

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

RANCHO PACKING,)	
)	
Employer,)	Case No. 83-RC-2-EC
)	
and)	
)	
UNITED FARM WORKERS)	
AMERICA, AFL-CIO,)	
)	
Petitioner.)	10 ALRB No. 38
)	

DECISION, DECISION ON CHALLENGED BALLOTS, AMENDED TALLY OF BALLOTS, AND CERTIFICATION OF REPRESENTATIVE

Following a Petition for Certification filed by the United Farm Workers of America, AFL-CIO (UFW or Union) on June 10, 1983, a representation election was conducted among all agricultural employees of Rancho Packing on June 17, 1983. An Amended Tally of Ballots issued on July 5, 1983, reflecting agreement between the parties on the resolution of several unresolved challenged ballots. That Amended Tally of Ballots showed the following results:

UFW	87
No Union	64
Unresolved Challenged Ballots	31
Void Ballots	6
Total Ballots	182

The El Centro Regional Director issued a Challenged Ballot Report on July 14, 1983, in which he recommended that the challenges to twenty-one employees who were challenged for

not being on the eligibility list be sustained. The ten remaining challenged ballots remained unresolved. The Employer filed exceptions to the Challenged Ballot Report.

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

1. Whether the Board agents failed to request identification of prospective voters;
2. Whether an eligible prospective voter was denied an opportunity to vote because his name did not appear on a revised eligibility list;
3. Whether the Board agents improperly voided two ballots ; .
4. Whether the Board agents lost five challenged ballots or allowed the ballots of challenged voters to be commingled with ballots of unchallenged voters;
5. Whether Board agents improperly assisted the Petitioner in its organizing efforts on June 16, 1983;
6. Whether the Board agents failed to list the names of voters on the challenged ballots of seven voters;
7. Whether the Regional Director erred in sustaining the challenges to three voters whose names appear on the eligibility list.

The Employer's objections to the Regional Director's Challenged Ballot Report were consolidated for hearing with the election objections.

A hearing was conducted before Investigative Hearing Examiner (IHE) Kevin S. Robinson who thereafter issued the attached Decision recommending that the Agricultural Labor Relations Board (ALRB or Board) dismiss the Employer's objections and certify the UFW as the exclusive collective bargaining representative of Rancho Packing's agricultural employees. The Employer timely filed exceptions to the IHE's Decision and a

supporting brief. The UFW filed a reply brief.

Pursuant to the provision 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 reply brief, and has decided to affirm the IHE's rulings, findings, and conclusions, as modified herein and to certify the UFW as the collective bargaining representative of Rancho Packing's agricultural employees.

We acknowledge at the outset that this election was flawed by the actions of Board agents who failed to follow established Board procedures regarding the processing of elections. While we condemn these careless actions, under the circumstances of the instant case, we find that they were insufficient to create a situation where the outcome of the election does not accurately reflect the free and uncoerced choice of Rancho Packing's employees.

Board Agent's Failure to Request Identification from Voters

Employer witness Alfred Guzman Juarez testified that the Board agent at the eligibility table did not ask prospective voters for identification. In addition, he testified that about one hundred people voted without showing identification. Board agent Antonio Barbosa testified that he was the agent in charge of the eligibility table. Barbosa confirmed that he did not request identification from each and every prospective voter. However, Barbosa further testified that the company and union

observers both acknowledged knowing prospective voters as they presented themselves at the eligibility table through verbal communication or through non-verbal gestures. Barbosa also testified that he requested identification of prospective voters when there was a question in his mind as to their identity. Barbosa's testimony was uncontroverted.

Section 20355(c) of the Board's regulations, Title 8, California Administrative Code, section 20355(c), provides that prospective voters must present identification in order to vote. This requirement was admittedly not met. However, Barbosa's unrefuted testimony indicates that the observers acknowledged knowing most of the voters. In addition, the Employer has presented no evidence that ineligible voters were allowed to cast ballots. In Toste Farms, Inc. (1975) 1 ALRB No. 16, the Board noted that the observers' recognition of a prospective voter may constitute sufficient identification. In William Pal Porto & Sons (1975) 1 ALRB No. 19, an employer's election objection based on the Board agents' failure to request proper identification was dismissed as there was neither any evidence nor allegation that ineligible voters were allowed to vote. We find this authority dispositive herein.

The ALRB will continue to require that Board agents adhere to the provisions of our regulations. However, we conclude that that flaw in the processing of the instant election is not sufficient to invalidate the employees' expression for union representation.

We reject any inference in the IHE's Decision that

the failure of company observer Alfred Juarez Guzman to challenge voters for lack of identification somehow contributed to the faulty processing of this election. While we agree that election observers should perform their functions as observers in a serious and thorough manner, the responsibility for conducting elections is vested exclusively with this Board and it is this Board which must assure that elections are conducted in a fair and equitable manner.

Alleged Improper Assistance by Board Agents

We affirm the IHE's factual findings as to the events of June 16, 1983, as well as his conclusion that Board agents did not improperly assist the UFW in its organizing efforts on that date. However, we do not adopt his alternate analysis wherein he excluded the testimony of the two Board agents and assumed that the Board agents' visit to the Prickett crew overlapped with that of the UFW's representatives. This analysis completely ignores the testimony of UFW representatives Esteben Jamarillo and Gilberto Rodriguez, whose testimony the IHE previously found credible. While, as pointed out by the IHE, this Board hesitates to rely solely or predominantly on the credibility of its own agents (see Mike Yurosek (1978) 4 ALRB No. 54), in the instant case there is no reason to disregard the testimony of Petitioner's witnesses. We find that even without relying on the testimony of Board agents Enrique Gastelum and John Hernandez, the Employer has failed to establish that Board agents assisted the UFW in its organizing efforts.

Based on our resolution herein of the challenged ballots

and our dismissal of the Employer's election objections, we certify the following amended Tally of Ballots:

UFW	87
No Union	65
Unresolved Challenges	3
Total Ballots	182
Void Ballots	12

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 1156, the said labor organization is the exclusive representative of all agricultural employees of Rancho Packing for purposes of collective bargaining as defined in section 1155.2(a) concerning employees' wages, hours, and working conditions.

Dated: August 10, 1984

JOHN P. MCCARTHY, Acting Chairman

JEROME R. WALDIE, Member

PATRICK W. HENNING, Member

CASE SUMMARY

Rancho Packing
UFW

10 ALRB No. 38
Case No. 83-RC-2-EC

IHE DECISION

The instant matter involved a consolidated election objections and challenged ballot case. The IHE concluded that Board agents did not improperly assist Petitioner in its organizing efforts, did not lose five challenged ballots or improperly commingle them, and did not deny an eligible prospective voter an opportunity to vote. In addition, the IHE concluded that the Regional Director properly sustained the challenge to three voters, and that Board agents improperly voided one ballot. Finally, the IHE found that Board agents failed to request identification of prospective voters and failed to list the names of seven voters on their challenged ballots. However even though he found that the election was flawed in these respects, the IHE concluded that the cumulative effect of the Board agents' errors was insufficient to warrant setting aside the election. He recommended that the United Farm Workers of America, AFL-CIO (UFW), be certified as the exclusive bargaining agent of the Employer's agricultural employees.

BOARD DECISION

The Board upheld the IHE's rulings, findings, and conclusions as modified. It acknowledged the carelessness of the Board agents in failing to follow established Board procedures embodied in its Regulations regarding the processing of elections. However, the Board upheld the IHE's conclusion that the flaws in the processing of the election were insufficient to set it aside. It rejected any inference in the IHE's Decision that the failure of the company observer to challenge voters for lack of identification contributed to the faulty processing of the election. The responsibility for conducting elections lies with the Board. In addition, the Board did not adopt the IHE's alternate analysis concerning the allegation that Board agents assisted Petitioner in its organizing efforts because this analysis ignored the credited testimony of Petitioner's witnesses.

Based on its dismissal of all the election objections and its determinations of the challenged ballots, the Board issued an Amended Tally of Ballots and certified the UFW as the exclusive bargaining representative of all of Rancho Packing's agricultural employees.

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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:

RANCHO PACKING,

Case No. 83-RC-2-EC

Employer ,

and

UNITED FARM WORKERS OF
AMERICA, AFL-CIO,

Petitioner

APPEARANCES:

William F. Macklin
Joanne L. Yeager
Ewing, Kirk & Johnson
El Centro, California
For the Employer

Clare M. McGinnis
Keene, California
For the Petitioner

Darrell Lepkowsky
El Centro, California
For the Intervenor

DECISION

STATEMENT OF THE CASE

KEVIN S. ROBINSON, Investigative Hearing Examiner: This case was heard before me on October 11, 12 and 13, 1983, in El Centro, California, pursuant to a Notice of Hearing issued by the Executive Secretary of the Agricultural Labor Relations Board (ALRB or Board).

A Petition for Certification was filed by the United Farm Workers of America, AFL-CIO (UFW or Petitioner) on June 10, 1983. (BX:1.)^{1/} The petition was filed in the El Centro Regional Office of the ALRB and sought to certify the UFW as the exclusive bargaining representative of all the agricultural employees of Rancho Packing (Employer) in the State of California. The petition was filed pursuant to section 1156.3^{2/} of the Agricultural Labor Relations Act (ALRA or Act).

A Notice and Direction of Election was issued by the El Centro Regional Director (RD) on June 15. (BX:3.) An election was held on June 17 at five locations (a city park in Calexico, California and four of the Employer's work sites). (BX:3.) The Tally of Ballots (BX:4) showed the following results:

UFW	75
No Union	[Blank]
Unresolved Challenges	59
Total Ballots	188

Six ballots were declared void. An amended Tally of Ballots (BX:5) issued on July 5, reflecting agreement between the parties on 28 of the unresolved challenges and correcting clerical inaccuracies in the earlier tally. This tally showed the following result:

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^{1/} Exhibits are noted herein as "BX" for Board exhibits, "PX" for Petitioner exhibits and "EX" for Employer exhibits. All dates are 1983 unless otherwise stated.

^{2/} All code section references are to the California Labor Code unless otherwise stated.

UFW	87
No Union	64
Unresolved Challenges	<u>31</u>
Total Ballots182
Void Ballots	6

On July 14, the El Centro RD issued his Report on challenged Ballots recommending that 21 of the unresolved challenges be sustained.

Pursuant to Title 8, California Administrative Code, section 20365 (hereafter referred to as the Board's regulations), the Deputy Executive Secretary dismissed three of the pending election objections filed by the Employer and set for consolidated investigative hearing the following election objections and the Employer's exceptions to the RD's challenged ballot report:

1. Whether the Board agents failed to request identification of prospective voters;

2. Whether an eligible prospective voter was denied an opportunity to vote because his name did not appear on a revised eligibility list;

3. Whether the Board agents improperly voided two ballots;

4. Whether the Board agents lost five challenged ballots or allowed the ballots of challenged voters to be commingled with ballots of unchallenged voters;

5. Whether Board agents improperly assisted the Petitioner in its organizing efforts on June 16, 1983;

6. Whether the Board agents failed to list the names of

voters on the challenged ballots of seven voters;

7. Whether the Regional Director erred in sustaining the challenges to three voters whose names appear on the eligibility list.

The General Counsel of the ALRB was, without objection, granted permission to intervene in this matter and all parties were given full opportunity to participate in the hearing, including the examination of witnesses and the filing of briefs. Upon the entire record, including my observation of the demeanor of the witnesses and after consideration of all the evidence and the parties' post-hearing briefs, I make the following findings of facts and conclusions of law.

I. WHETHER THE BOARD AGENTS FAILED TO REQUEST IDENTIFICATION OF PROSPECTIVE VOTERS.

A. Findings of Facts

Alfred Guzman Juarez acted as one of two election observers for the Employer. He was assigned to the eligibility table at three of the five election sites. (TR I:41.)^{3/} At one site (the fourth chronologically), all the voters cast challenged ballots and there was therefore no eligibility table in use. (TR III:124.) At the first site, a city park in Calexico, Juarez was read a set of instructions for election observers. (TR I:54; PX:3.) These instructions included notifying the observers of their obligation to assist Board agents in the identification of voters,

^{3/} References to the reporter's transcript are noted herein as "TR" followed by the volume number in Roman numerals and the page numbers in Arabic citation.

to identify voters themselves, to challenge voters in case of a dispute, and to report irregularities to a Board agent as soon as the observer becomes aware of the problem. (PX:3.) At the first site, all voters (there were only a few) exhibited identification to those located at the eligibility table before receiving their ballots and having their names checked off two eligibility lists. (TR I:42, 61.) At the second and fourth sites, Juarez acted as an observer at the ballot box and did not pay particular attention to the other aspects of the balloting. (TR I:59, 62.) However, at the third and fifth sites, Juarez noticed that prospective voters were not required to show identification before being checked off the eligibility list and receiving ballots. (TR I:4.3.) Juarez estimated that over 100 voters cast ballots without being properly identified. (TR I:43.) Juarez never pointed out the need for proper identification to any Board agent involved in the election nor did he challenge any voter for any reason, and, in particular, Juarez did not challenge any voter due to insufficient identification. (TR I:63-64.)

Board agent Jose Carlos supervised this election (TR III:32) and testified that every voter should have been required to show identification before being checked off the eligibility lists and receiving a ballot (TR III:48). Carlos stated that driver licenses, immigration documents (micas), company or union issued identification cards, social security cards or pay stubs would have been acceptable identification (TR III:47) to fulfill the requirements of Board policy (TR III:41). Board agent Enrique Gastelum (a Board agent also known as "Kiki") testified that he acted as a

"rover" in this election, specifically directing the prospective voters into lines in preparation for receiving their ballots. Gastelum informed the prospective voters to ready their identification for display to the Board agent and observers at the eligibility table so as to confirm their status as eligible voters. (TR II:88.)

Board agent Antonio Barbosa testified that he acted as the Board agent assigned to determine the eligibility of the voters (except for the fourth site where all the voters cast challenged ballots). (TR II:123.) Barbosa testified that he did not require prospective voters to show identification before receiving a ballot. (TR II:128.) If a voter had identification out, Barbosa checked it (TR II:127) and, if the voter's name appeared more than once on the eligibility lists, the people operating the eligibility table would specifically ask for identification (TR II:142-143). Barbosa testified that he was never informed by other Board agents that he should be requiring identification from prospective voters. (TR II:144.) Barbosa had previously conducted a Board election in exactly this manner (TR II:145) and no observer there complained as to the procedure being employed (TR II:130). Barbosa further testified that the parties had promised at the preelection conference to supply observers who were familiar with the employees at Rancho Packing (TR II:129) and that the observers frequently appeared to recognize co-workers as prospective voters (TR II:128, 139). Barbosa particularly noted that Juarez seemed to be very familiar with the prospective voters at the final voting site. (TR II : 130.)

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B. Credibility

Juarez testified in a straightforward and generally believable manner. My impression from the testimony given was that while Juarez' familial ties (among other reasons) had led him to conclude that unions and unionization would not be in the best interest of pieceworkers, or agricultural workers in general, he was not particularly interested in or concerned with the Rancho Packing election one way or the other. While this "impartiality" supports his credibility, his casualness toward his responsibilities detracts from it. Had Juarez shown more of an interest in the election process, by attempting to challenge voters with whom he was unfamiliar or seeking to fulfill his obligation as an observer more seriously by identifying voters or assisting in their identification (for example), the failure of Barbosa to conduct this election in accordance with Board policy possibly could have been rectified promptly. Juarez estimated that over 100 of the voters in this election received ballots without having been identified. (TR I:4.3.) This testimony means that over 100 voters must have cast their ballots at the third and fifth voting sites, since Juarez testified that at the first site all voters showed identification, and he was not located at the eligibility table at the second and fourth sites, nor was he paying attention to the identification process at those sites. (TR I:62.) This estimate must be inflated since, of the 129 voters who cast unchallenged ballots in this matter, Juarez would have less than thirty voting at the second and fourth sites, while at the same time, Juarez testified that every voting site was crowded. (TR I:69; see also TR II:80; TR III:147.)

A further factor to consider in determining the impact Barbosa's failure to consistently request identification had on this election is that one of the two sites where Juarez noticed that identification was not being required was the site where Juarez was normally employed by Rancho Packing. (TR I:39; BX:2.) The Employer is therefore objecting to a Board agent's failure to identify persons who were largely co-workers of the complaining witness. Juarez was particularly well-suited to observe voter fraud, if any, at this final voting site and rather than complaining of it at the time, so as to allow remedial action or preservation of the contested ballots, the Employer, through Juarez, their chosen observer, seeks now to disenfranchise those voters.

The testimony of Board agent Barbosa demonstrates that significant problems did occur during the conduct of this election. While Barbosa testified in an unduly hostile and self-serving manner, this was due, I am sure, to the fact that he had made certain errors in the conduct of this election to which he must now publicly admit. He did, however, frankly admit the errors committed.

Barbosa testified that he read the instructions to the observers at the first voting site (TR II:125), and Juarez corroborated that the instructions were read to him at that time (TR I:41). Barbosa did not require voters to show identification (TR II:139) and Juarez noted that some number of voters passed through without showing identification (TR I:43). All of the voting sites, except the first, were crowded with long lines of persons waiting to vote (TR I:69; TR II:14.7) and at the second site, efforts

were made to speed up the balloting process (TR II:80; TR II:147).

However, at the same time, Jose Carlos, who I found to have been highly credible, testifying in a straightforward, complete manner, making every effort to candidly and completely answer the questions put to him, stated unequivocally that Board policy requires that prospective voters be identified as eligible to vote (TR III:41) and that every voter is required to show some sort of identification (TR II:48). To effectuate this policy, Board agents acting as rovers organize voters into lines ready to vote and explain the need to have identification ready for display. One such rover, Enrique Gastelum, testified credibly that he followed that practice for this election. (TR II:88.)

Barbosa denied he was informed of the Board's policy requiring identification of prospective voters (TR II:144) and this is unfortunate. However, this ignorance does not negate the existence of and need for the practice of requiring identification.

C. Analysis

In the analysis of this objection, two competing policies are at odds. First, section 20355(c)^{4/} of the Board's regulations

^{4/}Section 20355(c) of the Board's regulations provides:

Prospective voters, including those whose names appear on the eligibility list, must present identification in order to vote. Identification may be in the form of an employer-provided identification card, a payroll check stub of that employer, driver's license, "green card", social security card, or any other identification which the Board agent, in his or her discretion, deems adequate. The Board agent will challenge any prospective voter who fails to supply identification as required above, or any prospective voter concerning whom the Board agent concludes there is a substantial question of identity.

requires, in unequivocal terms, that prospective voters show identification in order to vote, and Barbosa, by his own admission, failed to follow this directive. On the other hand, section 20344(b)^{5/} of the Board's regulations holds that failure to challenge a prospective voter's eligibility prior to receipt of a ballot will result in a waiver of the right to challenge, and Juarez, by his own admission, failed to challenge any prospective voter, notwithstanding his awareness of his responsibilities as an observer and his awareness of the failure of Barbosa to confirm the identity of the voters. Therefore, this matter presents for analysis a serious flaw in the conduct of the election with no method of determining the impact the flaw may have had upon the election.

The Board has previously explained its policy of requiring identification and the discretion of agents in effectuating that policy. In Toste Farms, Inc. (1975) 1 ALRB No. 16, the Board discussed the discretion given its agents in establishing the identity of the prospective voters, noting that simple recognition by an observer may be sufficient. In R. T. Englund Company (1976) 2 ALRB No. 23, the observer denied knowledge of the prospective voters and sought to have an eligibility list with signature exemplars used to determine identification. The Board affirmed its

^{5/} Section 20355(b) of the Board's regulations provides:

Failure to challenge the eligibility of a person to vote prior to his receiving a ballot shall constitute a waiver of the right to challenge that person's vote and any post-election objection raising the issue of the eligibility to vote of a person whose ballot was not challenged at the election shall be dismissed.

agent's use of payroll stubs and union supplied identification cards instead.

Generally, the issue has been raised by the prospective voter casting a challenged ballot due to insufficient identification. For example, in Sam Andrews' Sons (1976) 2 ALRB No. 28, two voters cast challenged ballots for neither had identification. One challenge was subsequently sustained due to discrepancies in that person's signature samples. (See also Valdora Produce Company(1977) 3 ALRB No. 8; Tex-Cal Land Management, Inc. (1977) 3 ALRB No. 11; Tennaco West, Inc. (1977) 3 ALRB No. 92; D'Arrigo Brothers(1978) 4 ALRB No. 92; Karahadian Ranches, Inc. (1979) 5 ALRB No. 19; E & J Gallo (1979) 5 ALRB No. 57 at pp. 37-38; Tony Lamanto (1982) 8 ALRB No. 44; and J. Oberti (1983) 9 ALRB No. 7.)

In a situation somewhat analogous, the Board condemned the action of a Board agent who denied two prospective voters, who had been challenged in their right to vote due to insufficient identification, the ability to cast challenged ballots so as to preserve the issue for appeal. (Bud Antle (1977) 3 ALRB No. 7.) Similarly, in Lawrence Vineyards Farming Corp. (1977) 3 ALRB No. 9, the Board directed that only the challenged ballots cast by economic strikers who subsequently confirmed their identification to the RD during his challenged ballot investigation could be counted, for Board agents failed to request identification at the time the challenged ballots were cast.

The Board has also addressed generalized charges that persons voted without proper identification, albeit never previously have such charges been accompanied by Board agent testimony that no

identification was needed.^{6/} In William Pal Porto & Sons (1975) 1 ALRB No. 19, for example, the Board stated, in response to such 'a generalized allegation and where most voters had shown union supplied identification or been recognized by the union observer,

^{6/} It should be noted, however, that the National Labor Relations Board's (NLRB) election procedures do not provide for a procedure substantially different than that utilized by Barbosa and the other Board agents in the present instance. The NLRB's case handling manual provides, in part:

Procedure at Checking Table: At the checking table are a set of observers, who sit behind the table, and a Board agent, who sits at its far end. Before them is the part of the voting list applicable to that table.

Observers should not be permitted to make lists of those who have or who have not voted. The official eligibility list is the only record made showing whether a person named thereon has voted. The observers' attention should be directed to the important task of checking that list and they should not be distracted by keeping other records.

The approaching voters, who should by that time have formed a line, should be asked to call out their names, last names first, as they reach the table. (They may also be asked for other identifying information, as appropriate and as formerly agreed upon.) The voter should give this information; it should not be given by an observer, subject to assent by the voter. Once a voter's name has been located on the eligibility list, all observers are satisfied as to his identity, and no one questions his voting status, each observer at the checking table should make a mark beside the name. One party marks before the name and the other after the name both using a straight line.

Once a voter has been identified and checked off, the observers—or one of them designated by the others--- should indicate this to the Board agent ("O.K.!"), who will then hand one ballot—repeat, one ballot----to the voter. The agent must look at each ballot to make sure that the mimeographed material has been inserted on the form. (National Labor Relations Board, Case Handling Manual (Part Two) Representation Proceedings, § 13222.1 (Oct. 1975), emphasis in original.)

that: "The [Employer's] observer did not state that any unchallenged voter had been improperly allowed to vote in this election. As there is neither evidence nor allegation that anybody was allowed to vote who was ineligible, the objection is overruled." (Accord Robert J. Lindeleaf (1982) 8 ALRB No. 22.)

Fundamentally then, the question presented is whether the Employer has preserved this issue for resolution as a post-election objection. That is, has the Employer presented evidence that this election should be set aside as a result of deviations from accepted election procedures by a Board agent because those deviations interfered with the employees' free choice or otherwise tended to affect the outcome of the election? (Harden Farms (1976) 2 ALRB No. 30 at p. 12; see also Kawano Farms (1977) 3 ALRB No. 25; Driscoll Ranch (1982) 8 ALRB No. 9.)

In concluding that Barbosa's failure to adequately identify voters should not invalidate Rancho Packing employees' choice of a bargaining representative, I note that the Employer failed to present evidence that Barbosa's failure to adequately identify prospective voters affected the outcome of the election. (See, e.g., TMY Farms (1976) 2 ALRB No. 58.) This lack of evidence is directly a result of the Employer's observer's failure to perform the office of observer. The primary duty to challenge lies with the Employer and the Union, not with the Board. (NLRB v. Paper Art Company, Inc. (7th Cir. 1970) 430 F.2d 82 [74 LRRM 2745].) Further, it is a sound policy to make full use of observers to aid Board agents in the effective processing of voters during elections conducted by the Board. In the present instance, where every site,

save the first, was crowded with people waiting to vote, pressure to rapidly process voters so as to avoid both a long disruption of the Employer's operations and the employees' workday is particularly desirable. The quasi-official status granted observers designated to guard the ballot box, check off voters, identify voters and insist upon challenges to preserve issues for subsequent resolution, is an important part of the election procedure, necessary to assure a fair and equitable election process. (Newport News Shipbuilding & Dry Dock Company (1978) 239 NLRB 82 [99 LRRM 1518, 1524-1525], enforced and remanded on other grounds Newport News Shipbuilding & Dry Dock Company v. NLRB (4th Cir. 1979) 594 F.2d 8 [100 LRRM 2798].)

Accordingly, I recommend that this objection be dismissed.

II. WHETHER AN ELIGIBLE PROSPECTIVE VOTER WAS DENIED AN OPPORTUNITY TO VOTE BECAUSE HIS NAME DID NOT APPEAR ON A REVISED ELIGIBILITY LIST.

A. Findings of Facts

Juarez testified that at the site located on Highway 111, his grandfather, Eli jo Guzman, came to him and asked Juarez if *he* was supposed to vote. Juarez was then located at the ballot box observing the depositing of the ballots. (TR I:60.) Juarez informed his grandfather that he was probably entitled to vote. Juarez and his grandfather were then approached by a Board agent Juarez knew only as "Kiki". This Board agent, according to Juarez, told Guzman he was a foreman and hence ineligible to vote. Guzman, who did not testify in this matter, reportedly said "fine" and left angrily. (TR I:60-61.)

Board agent Enrique Gastelum (also known as Kiki--

TR II:83) testified that a group of workers pointed out Juarez' grandfather and identified him as a foreman. Gastelum then approached Guzman and asked if he was a foreman. Guzman stated to Gastelum that he was a foreman and Gastelum explained that foremen were not entitled to be present when employees are voting. (TR II:89-90.)

Juarez also testified that a Board agent instructed persons gathered to vote at one site that crew leaders and foremen are not entitled to vote and that several persons left the voting area following this announcement. (TR I:51-52.) Gastelum denied ever instructing that crew leaders were not entitled to remain in the voting area or entitled to vote, limiting his comments to foremen. (TR II:109-110.)

B. Credibility

As previously stated in this Decision, Juarez' testimony (while straightforward and direct) demonstrated a somewhat casual attitude toward his responsibilities as an observer and toward the events of the election. Here, for example, he was unable to remember what Kiki told his grandfather when he, Juarez, was standing right next to Kiki (TR II:60), but when he was sitting at the eligibility table, a distance from the instructions being given prospective voters (and apparently not paying attention--TR I:62), he recalled an unidentified Board agent instructing crew leaders to leave the area (TR I:51).

Gastelum's testimony, on the other hand, was given in a serious and conscientious manner. His account of the incident regarding Juarez' grandfather is not substantially different from

Juarez' somewhat selective recollection of the event. To the extent the two accounts differ, I credit Gastelum.

C. Analysis

The burden of proof here is on the Employer to come forward with specific evidence showing that some improper action occurred and that this conduct interfered with employee free choice to such an extent that the conduct affected the results of the election. (TMY Farms, supra, 2 ALRB No. 58 at p. 9; Don Moorhead Harvesting Company, Inc. (1983) 9 ALRB No. 58.)

Here, two specific acts of interference are charged. The first act is Gastelum's exclusion of Guzman from the voting area. As Guzman did not testify and as no evidence was introduced that would demonstrate that Guzman was an eligible voter,^{7/} I find that the Employer has failed to carry its burden on this issue. (Tomooka Brothers (1976) 2 ALRB No. 52.) The second act is the purported statement by a Board agent that crew leaders must leave the voting area, is likewise insufficient to show that eligible voters were turned away or that any person was denied the right to vote. (TMY Farms, supra, 2 ALRB No. 58; NLRB v. Neuhoff Brothers Packers, Inc. (5th Cir. 1966) 362 F. 2d 611 [62 LRRM 2380], enforcing 154 NLRB 438 [59 LRRM 1761].) I therefore recommend dismissal of this objection. III. WHETHER THE BOARD AGENTS IMPROPERLY VOIDED TWO BALLOTS.

A. Findings of Facts

^{7/} Juarez testified that he worked for his grandfather every summer, the inference then being that Guzman was a supervisor of some sort, or at least an individual with some power to hire, and hence ineligible to vote. (TR I:3; Dave Walsh Company (1978) 4. ALRB No. 84; § 20352(b)(1) of the Board's Regs.)

Ronald E. Hull attended the counting of the ballots on behalf of the Employer in this matter. (TR II:10.) Rancho Packing is a member of the Imperial Valley Vegetable Growers Association and Hull is the manager of that association. Hull is also the mayor of the town of El Centro. (TR II:10.) According to Hull, Jose Carlos presided over the ballot count and voided a handful of ballots. The voided ballots were not shown to the parties. Hull testified that Carlos stated that the voter's intent was impossible to determine and/or someone had written their name or other identifying marks on the ballots. (TR II:12.) Hull remembered distinctly that some of the voided ballots were not shown to the parties and members of the public observing the ballot count, but could not recall if any voided ballots had been displayed by Carlos. (TR II:14.)

William Macklin also attended the ballot count on behalf of the Employer. Macklin was one of the Employer's attorneys of record in this matter. He testified that some of the ballots were voided purportedly because the voter's intent was unclear due to marks in both boxes on the ballot, but that two ballots were voided by Carlos without comment and were not shown to those attending the ballot count. (TR II:29-30.) Macklin amended this testimony on cross-examination to reflect that Carlos voided the two ballots because the ballots had extraneous writing. (TR II:33.)

Jose Carlos was subpoenaed by the Petitioner to testify in this matter. (TR III:37.) Carlos is the Regional Field Examiner for the El Centro Regional Office of the ALRB and supervised this election. (TR II:31.) He testified that he voided two ballots (subsequently identified as PX:16 and 17) during the counting of

the ballots without displaying them publicly as is the general practice. One ballot (PX:16) was voided and not displayed because the letter "M" appeared in the box designating "no union". Carlos felt the letter might have identified the person who cast this ballot to those attending the ballot count. (TR III:33.) Carlos also testified that this ballot did not clearly express the voter's intent because the box designating the UFW choice is also check-marked. (TR III:40.) The other ballot (PX:17) was voided and not displayed because of the perhaps distinctive writing on the left side or UFW side of the ballot (TR III:33). Carlos testified that the intent of this voter is clear (he or she intended to cast a vote for "no union") but Carlos determined not to display or tally the ballot to avoid exposing the voter's handwriting. (TR III:37-38.)

B. Analysis

While there appears to be little analysis on this issue by the ALRB (see, e.g., Lawrence Vineyards Farming (1977) 3 ALRB No. 9), the NLRB and reviewing courts have frequently discussed the voiding of ballots because the voter's intent is unclear or the identity of the voter may be exposed. Recently, due to the refusal of reviewing courts to enforce their decisions and the U. S. Supreme Court to grant certiorari, the NLRB reversed its long-standing policy of invalidating ballots marked in a manner radically different from the normal method of marking ballots. (Hydro Conduit Corporation (1982) 260 NLRB 1352 [109 LRRM 1320], revg. Columbus Nursing Home (1971) 188 NLRB 825 [76 LRRM 1417]). See also Wackenhut Corp. v. NLRB (11th Cir. 1982) 666 F.2d 464 [109 LRRM 2498]; Sioux Products, Inc. v. NLRB (7th Cir. 1983) 703 F.2d 1010 [112 LRRM

3219].) The NLRB's current policy seems to be that, absent evidence that the ballot was deliberately marked for identification, the national board will not disenfranchise the voter if the voter's intent is clear. (F. J. Stokes Corp. (1957) 117 NLRB 951, 954 [39 LRRM 1338]. Compare, e.g., Pride Made Product, Inc. (1977) 223 NLRB 182 [96 LRRM 14-59] with Anken Industries (1979) 242 NLRB 1371 [101 LRRM 1352].)

I find that the ballot identified as Petitioner's Exhibit 16 was properly voided by Carlos. There exists no reasonable method for determining the intent of the voter, who marked both boxes. (See Sadler Brothers Trucking & Leasing Co., Inc. (1976) 225 NLRB 194 [92 LRRM 1477].) However, under current NLRB practice (lacking explicit ALRB guidance, I turn to the NLRB for authority, see § 1148 of the Act), the ballot marked Petitioner's Exhibit 17 was improperly voided. The voter clearly intended to vote for "no union" and the markings emphasizing his or her choice "are not inherently such as to disclose the [voter's] identity." Therefore, it is a valid ballot and should be tallied as a vote for "no union". (F. J. Stokes, supra, 117 NLRB 951; Hydro Conduit Corp., supra, 260 NLRB 1352.)

IV. WHETHER BOARD AGENTS LOST FIVE CHALLENGED BALLOTS OR ALLOWED THE BALLOTS OF CHALLENGED VOTERS TO BE COMMINGLED WITH BALLOTS OF UNCHALLENGED VOTERS.

A. Findings of Facts

Ronald E. Hull testified that at the counting of the ballots in this matter, the following events occurred. Prior to the unsealing of the ballot, box, a list of voters who had cast challenged ballots was shown to the parties. (TR II:10.) This

list was prepared from declarations taken from the voters at the time of voting. (See, e.g., TR II:134.; TR III:37.) The ballot box, which had been sealed at the final voting site and the observers for both parties had initialed the seams (see TR II:35), was opened and the number of challenged ballot envelopes inside the ballot box did not equal the number of affidavits taken previously (TR II:10-11). Hull stated that Carlos appeared perplexed over the fact that there were only 58 or 59 ballots in challenged envelopes in the newly opened ballot box while there were names of 64. or 65 persons whose declarations had apparently been received at the various- voting sites. (TR II: 11 .)

William Macklin corroborated Hull's account, stating that the list of challenged voters derived from the declarations contained 64 names and was distributed to the parties prior to the unsealing of the ballot box. (TR II:28.) The ballot box was unsealed in the presence of the representatives of the parties and other observers and did not appear to have previously been opened in any manner. (TR II:35.)

Jose Carlos testified that the election kit for use in this election was not completely and adequately checked and therefore, five declarations taken from voters casting challenged ballots in a previous Board-supervised election had been left in the kit. (TR III:36.) Accordingly, when the list of names of challenged voters was prepared from the declarations prior to opening of the ballot box, five names were included on the list for which no ballots were received. (TR III:37.) A letter from the Board agents involved, dated July 6, 1983 (PX:6), was sent to

Macklin explaining the agreed upon resolution of some of the pending challenged ballots and including copies and an explanation of the inadvertently included declarations. All five attached declarations were dated February 19, 1983, and would have preceded this election by nearly four months. The letter (PX:6) represents a summary of the events that occurred at a meeting to resolve challenged ballots held on July 5, 1983, attended by representatives of the parties, and was received by representatives of the Employer (TR II:32; see also TR II:20, 22).

B. Analysis

No evidence was introduced showing that any challenged ballot was misplaced, lost or commingled with ballots of unchallenged voters. Further, all the evidence demonstrates that the ballot box was properly sealed at the close of the balloting and not otherwise tampered with until the box was unsealed and the ballots were removed for tallying. Therefore, the question presented is whether this admitted error, a deviation from the standard practice of conducting elections, should be a basis for setting aside this election. In Harden Farms, supra, 2 ALRB No. 30, where Board agents neglected to bring the proper forms to the voting site, the Board stated:

Deviations from procedures [for conducting ALRB elections] are not in themselves grounds for setting aside the secret ballot choice of a collective bargaining representative by employees without evidence that those deviations interfered with employees' free choice or otherwise affected the outcome of the election.

(Id. at p. 12 citing Polymers, Inc. (1969) 174. NLRB 282 [70 LRRM 1148]. See also Hashimoto Brothers Nursery (1976) 2 ALRB No. 31;

Kawano Farms (1977) 3 ALRB No. 25; Driscoll Ranch (1982) 8 ALRB No.

9 .)

I find the mistaken inclusion of the five affidavits from the Don Moorhead Harvesting Company, Inc. election (see 9 ALRB No. 58) did not interfere with employee free choice or otherwise affect the outcome of the election. Accordingly, I recommend dismissal of this objection, for there was no reasonable possibility that commingling or loss of challenged ballots occurred in this election. (Peoples Drug Store (1973) 202 NLRB 1145 [82 LRRM 1763].)

V. WHETHER BOARD AGENTS IMPROPERLY ASSISTED THE PETITIONER IN ITS ORGANIZING EFFORTS ON JUNE 16, 1983.

A. Findings of Facts

This issue presented the starkest differences between the various witnesses' factual accounts and is therefore the most difficult to resolve. Over the objection of the Petitioner at the hearing herein, I permitted certain limited testimony regarding the extension of time granted the Petitioner by Board regional personnel in the acquisition of a sufficient showing of interest to justify scheduling an election. This evidentiary ruling was based on my understanding of the Employer's contentions in this matter, viz., that because this extension of time included some portion of June 16, any apparent joint organizational activity by ALRB regional personnel and UFW representatives during June 16 would appear to be particularly inappropriate. However, because of my conclusion that the Employer has failed to show by a preponderance of the evidence that any improper conduct by ALRB regional agents occurred, it is not necessary to consider what effect, if any, the extension of time

granted the UFW to gather its showing of interest may have had on the employees of the Prickett crew.

Ken Oswald, a field supervisor for Rancho Packing, testified that on a day before the election in this case, he was walking through a cantaloupe field (named Magnolia 2) at about 10:30 a.m. in front of a cantaloupe harvesting machine owned by William Prickett when he saw two cars enter the field and park. Oswald watched four people approach the machine to speak to the harvesting crew. (TR I:6-7.) The cars were tan and white and were not marked with emblems identifying them as state vehicles. (TR I:14.) Oswald returned to where the crew was stopped to determine what was occurring. (The machine had just completed one pass through the field moving west and was in the process of turning to return in the other direction.) The four individuals identified themselves to Oswald as Esteban Jaramillo (Jaramillo was wearing a badge and produced papers from his wallet), Gilbert Rodriguez (he showed a driver's license or green card), Enrique Gastelum (he showed a driver's license), and Frank Hernandez (he showed a social security card). Gastelum stated, "I'm with the Union." (TR I:8-10.) Oswald testified that none of the individuals identified themselves as employees of the state. (TR I:10-11, 30-31.) The four individuals conducted a meeting for approximately twenty minutes over Oswald's protest (Jaramillo told Oswald that they could stop his crew anytime they wished—TR I:29) and Jaramillo circulated a white leaflet with a black eagle on it that may or may not have been similar to a document identified as Petitioner's Exhibit I (TR I:11-13, 22). Although Oswald testified that none of

these four persons identified themselves as ALRB representatives, a declaration of Ken Oswalt executed on June 22, 1983, states that Gastelum and Hernandez showed identification stating they were agents of the ALRB. (TR I:11; PX:2.) All four individuals left together. (TR I:12.) Oswalt was present in this field from 9:30 a.m. on, until 11 or 12 noon, when he left for his lunch break in conjunction with the crews' lunch break. (TR I:19.) His brother, Roger Oswalt may have arrived later, following the departure of the four visitors. (TR I:16, 30.)

William Prickett, the owner of the harvest machine, testified that three or four cars arrived together and six individuals visited his crew the day prior to the election in this case. (TR I:76-78.) Two individuals got out of the first car and identified themselves as ALRB agents and asked that the machine be stopped so a meeting with the employees could be held. (TR I:76, 83.) Prickett asked if they could wait until he got to the end of the field and they agreed. (TR I:85.) The meeting occurred at about 10:30 a.m. and lasted 15-20 minutes. (TR I:78-79.) Prickett was unaware that the other four individuals, who showed Ken Oswalt identification indicating they came from the UFW, were even present until he left the presence of the ALRB agents and Ken Oswalt began speaking to the four UFW agents. (TR I:77, 81, 94.) The four representing Petitioner returned between 12:30 and 1 p.m. that day and attempted to hold another organizing meeting with the crew but were dissuaded by Prickett who told them to wait until 2 p.m. when the crew completed its work day. (TR I:87.) However, the four essentially accomplished the purpose of this later meeting, for,

while one spoke with Prickett, the others conversed with the crew. (TR I:87.) At this time, Prickett was at the end of the field, and the four were unaccompanied by any Board agents. (TR I:89.) Prickett testified that his crew does not break for lunch but works straight through to 2 p.m. (TR I:79), that no other member of the Oswalt family, besides Ken Oswalt, was present that day (TR I:93) and that Prickett was unable to observe the nature of the leaflets being passed out (TR I:99).

Esteben Jaramillo is a full-time UFW volunteer and has been representative of the UFWs Callexico legal office since February 1983. (TR III:2, 19.) He testified that one or two days before the election in this case, he, with Gilberto Rodriguez, Jesus Villegas and Ramon Medina, arrived at the Magnolia cantaloupe field at approximately 11 a.m. (TR III:3.) The four were in two beige cars. (TR III:6.) They stopped at the south end of the field after turning off the main highway and Jarmillo noticed a state vehicle parked at the southwest corner of the field. The employees in the field were gathered around in what appeared to be a meeting of some sort. (TR III:3.) The UFW vehicles continued along the dirt side road to park behind some haystacks near an adjacent alfafa field where they waited for ten to twenty minutes until the state car left. (TR III:9-10.) Jaramillo recognized Board agent Gastelum, who was present in the field, because Gastelum was standing where others were sitting and by his distinctive features. (TR III:20.) After the state car left, the UFW cars crossed over a canal and returned along a parallel dirt road, parking just below the field. (TR III:10.) From this new vantage point, the representatives from

Petitioner watched the crew, which had returned to work. When the harvesting machine reached the end of the field, Jaramillo noted that the crew stopped working and began removing lunch sacks. (TR III:10-11.) The two UFW cars then returned and parked where the state car had previously been and the UFW representatives began passing out leaflets and speaking to the employees. (TR III:12.) Prickett returned from the east end of the field, telling his crew to return to work. (TR III:12.) Prickett and Rodriguez spoke and then Prickett spoke with Jaramillo. (TR III:26.) An individual asked Jaramillo for his identification and Jaramillo identified himself and requested identification in turn. (TR III:21-22.) This person told Jaramillo his name was Roger Oswalt and that the crew was not at lunch, rather they worked straight through to 2 p.m. Jaramillo noted this information down on a piece of paper and the time, 11:4-6 a.m. (TR III:16.) Ken Oswalt, who Jaramillo saw during the hearing in this matter, may or may not have been present also but did not speak with or identify himself to Jaramillo during this encounter in the cantaloupe field. (TR III:28.) The four UFW representatives left after three to five minutes in the field and did not return that day. (TR III:17, 25.)

Gilberto Rodriguez, the UFW office manager for the Imperial Valley, visited Rancho Packing operations four times prior to this election, twice to sites where the Prickett crew was working. (TR III:51.) On the first visit, which may have occurred two days before the election or on June 15 (TR III:62, 64), Rodriguez was accompanied by Ramon Medina (TR III:52). The second visit, on or about June 16, he was accompanied by Jaramillo, Medina

and Jesus Villegas. (TR III:51, 62.) Rodriguez' account of the events of June 16, corroborated Jaramillo's account. Rodriguez testified that they arrived in two beige 1974 Plymouths between 10 and 11 a.m., saw the state car and meeting in progress, so drove to the haystacks. (TR III:53.) Rodriguez could not identify any of the state representatives involved in this meeting but stated the state car was a dusty yellow color. (TR III:62-63.) Petitioner's representatives stayed at the haystacks for approximately twenty minutes listening to the radio and watching the meeting in progress in the cantaloupe field. When the state car left, the UFW representatives returned to their cars, drove on a short distance where they stopped, again near the field. (TR III:54-55, 63.) Here they observed the employees further, noting that the employees had returned to work, and Rodriguez changed a flat tire on his car. (TR III:55.) When the crew stopped and began eating, the four drove to the edge of the cantaloupe field and began speaking with the crew. (TR III:55.) Prickett spoke to Rodriguez, telling the employees to go back to work and threatening to take his machine to Arizona if the Union became involved. (TR III:55-56, 62.) Roger Oswalt, who had been present the entire time, also spoke to Rodriguez requesting identification. Rodriguez displayed a badge with his name on it and Prickett and Oswalt orally identified themselves. (TR III:55, 57, 59-60, 62, 66.) When the tractor driver, a one-armed gentleman being fed by his daughter, was ordered to return to work and the rest of the crew followed suit, the four UFW representatives left the field and drove away. (TR III:57, 63.) Rodriguez estimated that the time from his conversation with

Prickett to leaving as twenty minutes or less and estimated that they left after 11:40 a.m. (TR III:63.) Rodriguez, on his previous visits, had encountered neither Prickett nor Roger Oswald but learned from the crew and the license plates on their cars that some of the employees came from Arizona. (TR III:64, 67.) Rodriguez had met another Oswald (who he thought might be Ken Oswald), a gentleman described as over fifty years of age (and therefore not Ken Oswald), earlier when Rodriguez had delivered some papers to Rancho Packing representatives.

Board agent Enrique Gastelum testified that on June 16, one day prior to the election (TR II:116), he, accompanied by Board agent John Hernandez, visited the field being harvested by the Prickett cantaloupe machine. They arrived at approximately 10 a.m. in a brownish or tan Valiant with a State of California emblem in the back window. (TR II:85, 101-102.) Gastelum spoke with an individual who identified himself as Bill Prickett and requested that the crew be permitted to meet with the state representatives to receive information about the upcoming election. (TR II:85-86.) Prickett told them to wait until the machine, which was moving east toward the parked state car, reached the end of the field, a natural stopping place. (TR II:86.)

While this was occurring, a pickup truck drove up and parked near the state car and an individual came and spoke to Gastelum, protesting the visit. (TR II:86, 103.) Gastelum testified that this latter individual called them back as they were leaving and requested identification, which he noted on a piece of paper. (TR II:103-104.) Gastelum testified that this individual

identified himself as Ken Oswalt. (TR II:86, 118.) According to Gastelum, the Board agents were in the area approximately 25 minutes, three to ten minutes of which were spent actually conducting a meeting with the 30-32 employees present. (TR II:85-87, 103, 120.) Gastelum spoke with some of the crew in Spanish and Hernandez may have only conducted the English portion of the meeting. (TR II:107.) The meeting was held approximately 15 yards from the end of the rows. (TR II:105, 107.) Gastelum saw no union representatives, specifically did not see Jaramillo or Rodriguez, and testified that no especially unforeseen or extraordinary circumstances occurred. (TR II:87, 101-105, 108.) Gastelum had visited a machine crew (probably the same crew) once before accompanied by an unidentified Board agent one or two days earlier and had shown his identification to a tall, well-built man at that time. He did not see any union personnel during this earlier visit either. (TR II:116-118, 121.)

Board agent John Hernandez testified in conformity with Gastelum in every essential particular. He and Gastelum arrived one morning at a crew operating a melon harvesting machine owned by Bill Prickett. (TR II:152.) Gastelum spoke to Prickett and Gastelum and Hernandez spoke with the employees following a short delay while the machine moved to the edge of the field. (TR 153.) At this time, a pickup truck pulled up and an individual who identified himself as Mr. Oswalt demanded they explain themselves. Hernandez testified that although he and Gastelum displayed their credentials, had arrived in a brownish car with state emblems in the window, and had official documents from the ALRB for distribution,

Oswalt was not convinced as to their identity and purpose. (TR II:155, 159.) Hernandez explained in English to some of the employees about the upcoming election and then he and Gastelum drove away. (TR II:156.) They had arrived sometime before 10 a.m., left between 10:30 and 11 a.m. and Hernandez was not aware of the presence of any UFW cars or organizers. He specifically did not see Jaramillo or Rodriguez during their visit to the fields. (TR II:155-157, 165.) Hernandez testified that Oswalt did not give his first name, but Hernandez was able to identify him as Ken Oswalt due to Hernandez having attended El Centro High School with members of the Oswalt family. (TR II:165.)

B. Credibility

Board agents Gastelum and Hernandez impressed me as conscientious, professional state employees who attempted to honestly, completely and unequivocally explain the nature of their duties for the ALRB El Centro Regional Office and the actual events that occurred at the Magnolia 2 melon field on June 16. Hernandez displayed a faint touch of exasperation in his testimony under cross-examination, but otherwise explained, without hesitation, what he could remember of what, to him, had been a routine, relatively uneventful performance of his duties on June 16. Gastelum, as I have implied earlier in this Decision, also testified in a fully believable and conscientious fashion. Gastelum struck me as a particularly serious individual regarding the performance of his duties, a man who would, and did, attempt to fairly and completely accomplish the difficult and, at times, tense duties he performs for the ALRB. Further, neither Gastelum nor Hernandez, who testified

in substantial conformity with each other, gave the impression that they had memorized a script but both appeared to give each question a great deal of consideration, each reaching back in his memory to answer the questions to the best of his ability. In short, I found both Gastelum and Hernandez to be believable and credible witnesses, both of whom expressed a degree of understandable perplexity that what was a routine visit of less than an hour to prospective voters in an upcoming election, which visit had been previously cleared with representatives of the Employer, should be the subject of an election objection. (TR II:86, 161.)

The testimony of UFW representatives Jaramillo and Rodriguez corroborate, in the relevant aspects, the testimony of Gastelum and Hernandez. Neither UFW representative admits to being present in the company of Board agents Gastelum or Hernandez during the day of June 16 at the site of the Prickett melon harvesting crew. Jaramillo read into the record notes he had made of an encounter that day between himself and an individual who identified himself as Roger Oswalt.^{8/} As this event is purported to have occurred at a time when no Board agents were present, it is not directly probative to the issue under review. It does, however,

^{8/} In its post-hearing brief, the Petitioner refers to a declaration by Roger Oswalt that the Employer had attached to its Objections to Election pleading filed with the ALRB and served on Petitioner. This declaration is neither a public document of which I may appropriately take official notice (Cal. Evid. Code, §§ 451, 4.52; § 20365 (c) (2) (D) of Board's Regs.; Giumarra Vineyards Corp. (1977) 3 ALRB No. 21; Ukegawa Brothers (1982) 8 ALRB No. 90), nor was this declaration admitted into evidence at the hearing herein. Accordingly, I have not considered the portion of Petitioner's brief regarding the declaration of Roger Oswalt in my determination of the issues of this case.

undermine Jaramillo's account of the day's events to the extent that no other person save Rodriguez corroborated the presence of Roger Oswald. Jaramillo also stated that the presence of himself and the other representatives from petitioner in the field lasted only three to five minutes, a remarkably short time. Rodriguez stated more reasonably that the time was closer to twenty minutes. However, as a whole, neither Jaramillo nor Rodriguez (I realize both are interested witnesses in the outcome of this hearing) testified in an inherently incredible fashion, nor did they appear rehearsed or unbelievable in the general outlines of their testimony.

The testimony of Ken Oswald did, however, contradict the accounts of Gastelum and Hernandez, in nearly every particular. It would, perhaps, be possible to conclude that Oswald confused Board agents Gastelum and Hernandez with Petitioner's representatives Jesus Villegas and Ramon Medina, for Oswald only placed four persons at the field on June 16, whereas Jaramillo, Prickett and Rodriguez all place six visitors at the work site that day. (In fact, some sort of confusion such as the above must have occurred, engendered no doubt by the rapid sequence of visits that coincidentally occurred at that time.) In support of such a logical resolution of the conflicts in the testimony between Oswald and the testimony of Gastelum, Hernandez, Jaramillo, Prickett and Rodriguez, is the fact that Oswald testified several times that Gastelum and Hernandez never identified themselves as employees of the State of California. In fact, Oswald remembered Gastelum stating that he was from the Union. (TR I:8-11, 30-31.) However, Oswald executed a declaration on June 22, 1983, or six days after the June 16 events, in which he

stated that Gastelum and Hernandez identified themselves as agents from the ALRB. (PX:2.) Lastly, and significantly, Oswald tentatively identified the material distributed by Jaramillo as a document similar in appearance to the leaflet admitted into evidence as Petitioner's Exhibit 1.

Oswald testified with an appearance of frankness and sincerity but underlying his words was a decided emotional intensity and involvement in the issues at stake. He admitted to being upset and excited during the events of June 16, and that intensity was apparent in his description of the encounters that day.

William Prickett, on the other hand, testified with a much larger degree of affability and disinterest. He frankly admitted being upset over having his work shift interrupted, but once he had convinced himself of the inevitability of the disruption, appeared to have paid little attention to the meeting(s) that followed. He, unlike Oswald, places six visitors in the field that day and, in what I find to be an illuminating comment, stated that he was unaware of the presence of the four representatives from Petitioner until later in the day. While Prickett placed the six in the field at the same time, he also admitted that he may have left briefly after the disruption began, perhaps to get water, and therefore, to some small extent, corroborates the account of Jaramillo and Rodriguez.

C. Analysis

Based upon the above credibility resolutions, the demeanor of the witnesses, the internal consistency of their individual testimony and the corroboration and contradiction in the various

accounts, I conclude that the following events occurred on June 16. First, around ten in the morning, Board agents Gastelum and Hernandez interrupted Prickett's machine crew after accommodating Prickett as much as possible. They distributed announcements of the election and answered questions from employees. Shortly before they left, they identified themselves to Ken Oswalt as Board agents on official business. Almost immediately after leaving, two cars similar in color to the vehicle utilized by the Board agents arrived and four representatives from the UFW entered the field to organize support for Petitioner in the upcoming election. Prickett, aware of either an unauthorized lunch break or an overlong disruption, ordered the crew back to work. Oswalt (in all probability, Ken Oswalt) demanded identification of the new visitors shortly after they arrived. This entire sequence of events lasted from about 10 a.m. to nearly 12 noon. As such, I find the evidence does not support the objection, that is, Board agents did not assist Petitioner in its organizing efforts. Therefore, this objection should be dismissed.

However, the Board has, on a previous occasion, expressed some hesitation in relying solely or predominately on the credibility of its own agents. (See Mike Yurosek (1978) 4 ALRB No. 54 at p. 3 ["Unlike the IHE, we are not prepared to make a credibility resolution on this record. To do so would require us to judge the credibility of our own agent, a task which should be avoided where possible."].) So, for the purpose of an alternative analysis, I will assume that Board agents and Petitioner's representatives overlapped in their encounters with the Prickett crew as stated by

the testimony of Prickett. I do not credit Oswald's statement that Gastelum identified himself as coming from the Petitioner, for it is inconsistent with his own declaration and uncorroborated. Rather, I find that, excluding the testimony of Gastelum and Hernandez, and reading the remaining evidence in the light most favorable to the Employer, at most, the Board agents' visit coincided with that of Petitioner's representatives for a short period of time. Neither Oswald nor Prickett could identify the activity of the Board agents while in the field and no employee witness was called by either party. Therefore, insufficient evidence has been adduced to demonstrate Board agents aided Petitioner's organizing efforts. At most, an appearance of assistance could be inferred.

In Coachella Growers, Inc. (1976) 2 ALRB No. 17, the Board established that an appearance of bias by Board agents can result in the refusal to certify an election if that appearance tended to affect the outcome of the election and impair the balloting's validity as a measure of employee choice. In that case, Board agents, at the request of a union, attended a union-conducted meeting to explain the upcoming balloting process. Such actions by Board agents, while not endorsed, were not sufficient to require setting the election aside. (Id.) (Accord George Lucas & Sons (1982) 8 ALRB No. 61; Matsui Nursery, Inc. (1983) 9 ALRB No. 42.) In Bertuccio Farms (1978) 4- ALRB No. 91, the Board assumed, for the sake of argument, that a Board agent identified himself, in Spanish, as representing a union and this also was insufficient to set aside that election. (See also Don Moorhead Harvesting Co., supra,

9 ALRB No. 58.) However, in William Mosesian Corp. (1978) 4 ALRB No. 60, a Board agent told approximately twenty employees to remember to vote for the union. Such a statement by a Board agent created an appearance of bias that tended to affect the outcome of the election. (Id.)

Here, at most, the Employer has shown Board agents were present at the time of a union organizational meeting during normal working hours. Absent some showing that the Board agents aligned themselves with Petitioner, or allowed themselves to be used in a manner seriously affecting the neutrality of the Board's proceeding, which showing is not present on this record, I recommend that this objection be dismissed. (Monterey Mushroom, Inc. (1979) 5 ALRB No. 2; Isaacson-Carrio Mfg. Company (1972) 200 NLRB 788 [82 LRRM 1205]; Provincial House, Inc. v. NLRB (6th Cir. 1977) 568 F.2d 8 [97 LRRM 2307], revg. 222 NLRB 1300 [91 LRRM 1368].)

VI. WHETHER THE BOARD AGENTS FAILED TO LIST THE NAMES OF VOTERS ON THE CHALLENGED BALLOTS OF SEVEN VOTERS.

A. Findings of Facts

Scott A. Wilson, an attorney with the firm of Littler, Mendelson, Fastiff & Tichy, was associated by the Employer to represent it at a meeting held on or about July 5, to resolve challenged ballots. (TR II:16.) At this meeting, Jose Carlos discovered that several of the envelopes containing the challenged ballots omitted the name of the challenged voters, and were therefore impossible to resolve. (TR II:17, 23.)

El Centro Regional Director David Arizmendi testified that the failure -to place the name of the person seeking to vote

on the envelope containing the challenged ballot was an error.

(TR II:77.) Arizmendi determined that all seven ballots came from a particular crew, the Prickett crew. (TR II:77.)

Antonio Barbosa testified that he failed to place the name of the person seeking to vote on several challenged ballot envelopes at the fourth site. Barbosa mistakenly believed that since the entire Prickett crew was voting challenged ballots, it was not necessary to additionally identify the envelopes. (TR II:134.) Barbosa had never before filled out challenged ballot envelopes and declarations. (TR II:143.)

B. Analysis

The evidence, without contradiction, shows seven challenged ballots are impossible to resolve for the voter who cast the ballot was not required to sign the challenged ballot envelope. These ballots must, therefore, be declared void, for they are not outcome determinative. (George Lucas (1977) 3 ALRB No. 5; see also Hatamaka & Ota Company (1975) 1 ALRB No. 7; Lawrence Vineyards Farming Co., supra, 3 ALRB No. 9; Escapade Fashions, Inc. (1978) 238 NLRB 387; Tube Distributors Company, Inc. (1955) 113 NLRB 381 [36 LRRM 1306].) The subsidiary question, whether this deviation from standard election procedure affected the outcome of the election, must also be considered. However, since the number of affected ballots is insufficient to have an impact on the results of this election, the errors by the Board agent(s) in failing to properly identify the challenged ballot envelopes will not result in the deprivation of the employees' free choice of a collective bargaining representative. (Kawano Farms, Inc. (1977))

3 ALRB No. 25.)

VII. WHETHER THE REGIONAL DIRECTOR ERRED IN SUSTAINING THE •
CHALLENGES TO THREE VOTERS WHOSE NAMES APPEAR ON THE
ELIGIBILITY LIST.

A. Findings of Facts

Three members of the Prickett crew were ruled ineligible to vote by the RD in his challenged ballot report. (BX:7.) Arizmendi testified that he concluded that these three voters (Jose Manuel Gomez Gonzalez, Gene Lackey and Juan Lopez) did not work during the eligibility period, determined to be June 5-9, 1983. (TR II:52.) Using the Employer's payroll records (PX:11), Arizmendi determined that Lackey did not begin working during this week until June 10 (TR II:54), and that Gomez Gonzalez and Lopez were not on any payroll records (TR II:54-55; PX:9; PX:11). These three voters all filled out declarations stating they were employed in the Pickett crew (PX:10) and were challenged for that reason (TR II:77).

B. Analysis

Initially, only two of the three ballots described by Arizmendi are at issue here. Eugene Lackey's ballot was determined, by a process of elimination, to be one of the seven challenged ballots whose envelope did not contain the name of the voter. (TR II:61-63.) Even if Lackey were determined to be an eligible voter, it would be impossible to determine which of the seven unidentified envelopes contains his ballot. I have previously recommended in this Decision that these seven unidentified ballots be declared void.

The Employer's position regarding the ballots of Gomez Gonzalez and Lopez appears to be that, since they were originally

challenged along with all the members of the "Prickett crew," it was improper for the RD to extend his investigation beyond a general determination of the eligibility of the Prickett crew to an individual determination of voter eligibility.

The scope of a RD's investigation of challenged ballots may, quite properly, disclose alternative or different reasons of ineligibility and, if so, the results of the investigation may not be ignored. (Bandag, Inc. (1976) 225 NLRB 72 [92 LRRM 1512]; Firestone Textiles Company v. John C. Getreu (W.D.Ky. 1971) 324 F.Supp. 1395 [77 LRRM 2094].) For example, in a similar situation, a voter was challenged for not being on the list of eligible voters and the investigation disclosed the individual was a supervisor. The exception to the regional director's report on challenged ballots was dismissed for an investigation may disclose additional or different reasons for ineligibility. (Jack T. Baille Co., Inc. (1978) 4 ALRB NO. 47.)

Having concluded that it was proper for the RD to have extended his investigation of the eligibility of Gomez Gonzalez and Lopez beyond a general review of the Prickett crew's eligibility, it is incumbent upon the party excepting to the RD's conclusion to demonstrate the error in the RD's report. (§ 20363(b) of the Board's Regs.; Miranda Mushroom Farms (1980) 6 ALRB No. 22 at pp. 7-8; Mayfair Packing Company (1983) 9 ALRB No. 66 at p. 4.) No evidence contradicts the RD's conclusions and, therefore, I recommend dismissing this exception and sustaining the challenges to the ballots of Jose Manuel Gomez Gonzalez and Juan Lopez. I have previously recommended voiding the seven unidentified challenged

ballots, one of which is the ballot of Eugene Lackey.

VIII. CONCLUSION.

A final analysis is essential in this matter. That is, whether the conduct charged and found to have occurred, considered as a whole, inhibited a free and uncoerced choice by employees of Rancho Packing. (D'Arrigo Brothers (1977) 3 ALRB No. 37.)

I have concluded that the processing of this election was flawed in that a Board agent failed to properly request identifications from prospective voters and that several challenged ballots were left unmarked so those voters, if eligible, are disenfranchised. However, I do not believe that these deviations from procedures set forth for the proper conducting of representation elections, viewed cumulatively, are sufficient to have created a situation where the outcome of the election does not accurately reflect the free and uncoerced choice of the Rancho Packing employees. (Mike Yurosek (1978) 4 ALRB No. 54; Harden Farms, supra, 2 ALRB No. 30; Hemet Wholesale (1976) 2 ALRB No. 24.) The number of potentially disenfranchised voters (seven) is insufficient to have an impact on the election and no evidence was presented, nor preserved for resolution, that any ineligible voter was allowed to cast a ballot. I therefore find the cumulative effect of the errors by Board agents in the conduct of this election to be insufficient to warrant setting it aside. (William Pal Porto, supra, 1 ALRB No. 19,; Robert J. Lindeleaf (1982) 8 ALRB No. 22.)

Accordingly, I recommend the following actions be taken:

1. That the seven unidentified challenged ballots be declared void;

2. That one of the two previously voided ballots (PX:17) be tallied as a vote for "No Union," for the intent of the voter is clear;

3. That the Regional Director's determination that Jose Manuel Gomez Gonzalez and Juan Lopez were not employed during the eligibility period be sustained;

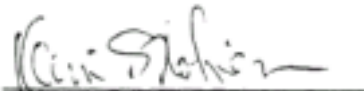
4. That a new tally be prepared and served upon the parties showing the following result:

UFW87
No Union	65
Unresolved challenges	3
Void Ballots	12

5. That the other objections by the Employer be dismissed and that the UFW be certified as the exclusive collective bargaining representative of all the agricultural employees of Rancho Packing Company in the State of California.

DATED: February 9, 1984

Respectfully submitted,



KEVIN S. ROBINSON
Investigative Hearing Examiner