Salinas, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

SILVA HARVESTING, INC., Employer, and . UNITED FARM WORKERS OF AMERICA, AFL-CIO, Petitioner, and INDEPENDENT UNION OF AGRICULTURAL WORKERS, Incumbent Union.	)	Case No. 83-RC-9-SAL 11 ALRB No. 12

DECISION AND ORDER
SETTING ASIDE ELECTION

In 1978, the Independent Union of Agricultural Workers (IUAW) was certified as the exclusive bargaining representative of the agricultural workers employed by Silva Harvesting, Inc. (Silva or Employer). On October 13, 1983, the United Farm workers of America, AFL-CIO (UFW), filed a rival union petition for certification, and an election was held on October 19, 1983. The Tally of Ballots showed the following results:

UFW.	76
IUAW	65
No Union	3
Unresolved Challenged Ballots. . . .	3
Total.	147

The Employer and the IUAW each timely filed objections to the election, two of which were set for hearing:

(1) Whether, because of inadequate lighting at the election site, voters were unable to properly mark their ballots, and

(2) Whether the employee eligibility list submitted by the Employer was deficient such that its utility was substantially impaired and, if so, whether the election should be set aside on this basis.

An investigative hearing was conducted on February 6, and 8, 1984 before Investigative Hearing Examiner (IHE) John Newman. The IHE found that the evidence supported the conclusion that the eligibility list was so deficient that its utility to the IUAW was impaired such that it affected the outcome of the election, and he recommended that the election be set aside.

The Board has considered the objections, the record, and the IHE's Decision and Recommendation in light of the exceptions and supporting briefs filed by the parties, and has decided to affirm the IHE's rulings, findings, and conclusions, and to dismiss the Petition for Certification.

Election Site Visibility

Several witnesses testified that conditions at the election site were dark and foggy.[1/] The only sources of light were two kerosene lamps, one on the ballot box table and one on the observer table; a yellow light about eight feet above

[1/] The election began at 4:30 a.m. and ran to 7:00 a.m. that morning was at 7:18.

the ground on a firehouse wall a foot away from the voting booths; and the headlights of a state car which was brought in and parked with the lights directed at the voting booths. A number of voters testified that they had difficulty seeing their ballots because of the fog and darkness. However, most stated that despite the difficulty they could see the ballot well enough to distinguish the symbols for the IUAW (clenched fist), UFW (black eagle) and No Union. On the basis of their demeanor, [2/] the IHE discredited the testimony of two voters who stated that it was so dark they did not know how they voted.

The IHE found that the 14-5 ballots were all marked in such a way that the intent of the voters was clear and unambiguous. None of the ballots showed random markings, smears or signs of erasure. He concluded that seeing the ballots was difficult but not impossible, and that the fog and darkness did not prevent the expression of voter free choice.

We affirm the IHE's findings and conclusions on the election site visibility issue, and decline to set aside the election on that basis.

Deficient Eligibility List

Martha Cano, president of the IUAW, testified that she received the employee eligibility list on the Saturday preceding the Wednesday, October 19th election. In reviewing the list, Cano discovered that many of the workers had only P.O.

[2/] The Board will not overrule an ALJ's credibility resolution based on demeanor unless the clear preponderance of the evidence demonstrates the resolution was in error.(Kitayama Brothers (1983) 9 ALRB No. 23.)

boxes listed instead of street addresses. (In fact, of the 198 names listed, 115 had only P.O. box addresses.) Cano also noted that there were 22 names listed with the same address of 150 Encinal, Apt. 8. Testimony at the hearing revealed that most of the 22 employees used that address only for mailing purposes, and that only two adults and two children actually lived there. Cano also observed that of the employees in Silva's Piece Rate Crew No. 1, two of them were listed as residing at the 150 Encinal, Apt. 8 address, and about 15 of them had only P.O. boxes listed. This concerned her because she knew the crew was not currently working and thus could not be contacted in the fields.

Cano tried unsuccessfully to contact Acting Regional Director Shirley Trevino prior to the October 17 pre-election conference to tell her the list was inadequate. She also tried unsuccessfully to notify the Employer about the problem.

Cano drove to the 150 Encinal address and spoke to the woman who lived there with her husband and two children. On Sunday, Cano drove to Soledad and Gonzales looking for several workers but could not find them because of incorrect or incomplete addresses. She testified that she was able to contact some employees at their worksites, but generally was able to address them only in groups, not individually. She claimed that at one worksite she was unable to speak to any workers because UFW organizers followed her around and started talking whenever she did, thus preventing her from campaigning.

The problem of the inadequate eligibility list was

raised at the pre-election conference. Shirley Trevino's response to questions about the list was that it was too late to deal with the P.O. box issue, and they should go on to other matters. Trevino admitted that on October 14, when the Employer received the petition, the Employer's attorney told her the eligibility list had many P.O. boxes, and he asked her if she wanted him to try to obtain street addresses, but she did not ask him to do that.

Labor Code section 1157.3[3/] requires employers to maintain accurate and current payroll lists of the names and addresses of all their agricultural employees. Board regulations require that a complete and accurate eligibility list of names and current street addresses of employees be provided to the Regional Director within -48 hours after the filing of an election petition (8 Cal. Admin. Code, section 20310) and that the Regional Director provide copies of the list to the other parties upon determining that an adequate showing of interest exists (8 Cal. Admin. Code, section 20313).

In Yoder Brothers (1976) 2 ALRB No. 4 (Yoder), this Board adopted the National Labor Relations Board's (NLRB or national board) "Excelsior Rule," which provides that an employer's failure to furnish a complete, accurate employee eligibility list is grounds for overturning an election. (Excelsior Underwear, Inc. (1966) 156 NLRB 1235 [51 LRRM 1217].) However, we noted in Yoder that the rule is not mechanically

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[3/] All section references herein are to the California Labor Code unless otherwise specified.

applied, and an election will not be set aside for an insubstantial failure to comply in the absence of gross negligence or bad faith on the part of the employer. (The Lobster House (1970) 186 NLRB 148 [75 LRRM 1309].)

In cases involving defective eligibility lists, this Board has applied an outcome-determinative standard, under which an election will be set aside only if the deficiencies in the list tended to interfere with the employees' free choice to the extent that the outcome of the election could have been affected. Thus, in Patterson Farms, Inc. (1982) 8 ALRB No. 57 (Patterson) where Patterson Farms Employees Association filed a rival union petition and the incumbent UFW received the defective[4/] eligibility list only 24 hours prior to the election, we held that the UFW had the burden of proving that objectionable pre-election conduct occurred which prejudiced the UFW and tended TO affect employees' free choice or the outcome of the election. (Id., at p. 5.) The evidence in Patterson established that the UFW knew where most of the workers lived who used P.O. box addresses. We found that the employer had failed to exercise due diligence in preparing the payroll list, but that there was no bad faith and no actual prejudice to the UFW. Therefore, we determined that the UFW had not met its burden of proof, and we upheld the results of the election. (Id., at p. 6.)

In Betteravia Farms (1983) 9 ALRB No. 46 (Betteravia)

[4/] Of the 122 names on the eligibility list, 41 had P 0 box addresses. (Patterson Farms, Inc. supra, 8 ALRB No. 57, IHED at p. 21.)

a petition for decertification of the incumbent union, IUAW, was filed, and the UFW intervened. The employer's eligibility list had only P.O. box addresses for 67 of the 307 eligible voters, and an additional four employees had non-local or incomplete addresses. The employer contended that the IUAW's failure to utilize all means at its disposal to locate employees at their homes proved that the lack of street addresses was unimportant to the union. However, the IHE (whose findings and conclusions were adopted by the Board) concluded that the union had no obligation, either under statute or case law, to maximize its campaigning or to remedy deficiencies in the list; rather, the duty of due diligence in compiling and correcting the list is imposed solely on the employer.

The IHE in Betteravia also found that almost one quarter of the work force was unreachable by the IUAW because of the defective list, that many of the replacement workers whom the union was able to contact were unfamiliar with the election issues, and that a shift of 17 votes from No Union to the IUAW would have resulted in a runoff election. Thus, she concluded (and the Board affirmed) that the outcome of the election was affected by the deficiencies in the list and the election should be set aside on that ground alone.

In Sonfarel, Inc. (1971) 188 NLRB 969 [76 LRRM 1497] the NLRB held that it would presume an employer's failure to supply a substantially complete voter eligibility list had a prejudicial effect upon the election. The NLRB concluded that to look beyond the question of substantial completeness of the

list, and into the further question of whether employees were actually informed about the election, "would spawn an administrative monstrosity." (Id., 76 LRRM at 1498.)

While we agree with the NLRB that an election should be set aside where an employer's refusal or failure to supply a substantially complete voter eligibility list had a prejudicial effect upon the election, we decline to follow the NLRB's presumption because we do not believe it constitutes applicable precedent for this Board. Rather, we believe that the outcome-determinative test is the correct test to apply in determining whether to set aside an agricultural election on the basis of a defective eligibility list, especially in the case of rival union elections. One reason we do not believe it appropriate to apply the NLRB's presumption that a substantially deficient eligibility list has a prejudicial effect on an election is the statutory requirement that we shall certify an election unless we determine that there are sufficient grounds to refuse to do so. (Labor Code section 1156.3(c).) Further, a decision to set aside a farm workers' election may mean a serious delay in the employees' expression of free choice, since generally another election cannot be run until the next peak season, which may not occur until the following year; moreover, because of the likelihood of high turnover, the composition of the bargaining unit may be substantially changed from that upon which the showing of interest was based.

Applying the outcome-determinative standard to the facts at hand, we conclude that the election herein should be

set aside on the grounds that the inadequate eligibility list did tend to affect the results of the election. The Employer's list was grossly inaccurate and incomplete, the IUAW itself did not have a significant number of employee home addresses in its files, and the IUAW's staff was forced to waste valuable time looking for employees whose addresses were incorrect. Further, the results of the election were close, so that a switch of merely six votes would have changed the outcome. We conclude, therefore, that the defective list caused actual prejudice to the IUAW.

We set aside this election most reluctantly, not only because of the difficulties inherent in re-running an agricultural election, but also because the result appears to penalize the petitioning union, the UFW, which has not been a party to any misconduct at all. However, the issue is not (as the UFW claims) whether the IUAW was any more prejudiced than the UFW by the defective eligibility list. Rather, the issue is whether the defective list tended to affect the outcome of the election -- and we find that it clearly did.

We are also mindful of the danger of setting aside rival union elections because of the possibility that an employer might deliberately submit a deficient eligibility list so that a favored incumbent union could seek to have the election set aside if the rival union won a majority (the incumbent union thus retaining its certification). We express no opinion as to whether the rationale of this case would extend to such a

situation.[5/] Here, there is no evidence that the Employer deliberately prepared an inadequate list or otherwise exhibited any favoritism toward the incumbent union. In fact, Silva's attorney offered to try to correct the list when he submitted it to the Regional Director, but she refused the offer.

We will order that the election herein be set aside. We will also order that upon a Notice of Intention to Take Access being filed with the Regional Director within'12 months following the date of our Order, the Employer shall forthwith furnish to the Regional Director a complete and accurate list of the names and street addresses of all its agricultural employees. The Regional Director shall then provide copies of the list to both the union filing the Notice of Intention to Take Access and the incumbent union so that they may ascertain the accuracy and completeness of the list. We will issue the above described Order so that if a petition for representation is again filed, the same problem of a defective eligibility list being submitted will not recur. We deem our authority to issue such an Order to be contained in Labor Code section 1157.3, which provides: "Employers shall maintain accurate and current payroll lists

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[5/] See, e.g., Nathan's Famous of Yonkers, Inc. (1970) 186 NLRB 131 [75 LRRM 1321] in which three unions competed for the same unit, and the -employer attempted to defeat Local *SO,* the eventual winner, by committing unfair labor practices such as promising and granting benefits in order to induce employees to support the favored union and threatening employees with reprisals if Local 50 won. Both of the other unions objected because no Excelsior list had been provided. In that unusual situation, the NLRB refused to apply the Excelsior rule, because setting aside the election would merely have given the company another chance to commit unfair labor practices in its effort to defeat its employees' free choice.

containing the names and addresses of all their employees, and shall make such lists available to the board upon request." (Emphasis added.)

ORDER

By authority of Labor Code sections 1156.3 and 1157.3, the Agricultural Labor Relations Board hereby orders:

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

2. That upon a Notice of Intention to Take Access being filed with the Regional Director within 12 months following the date of this Order, Employer Silva Harvesting, Inc., its officers, agents, successors, and assigns shall forthwith furnish to the Regional Director a complete and accurate list of the names and current street addresses of all its agricultural employees. The Regional Director shall then provide copies of the list to the union which has filed the Notice of Intention to Take Access and to the incumbent union, so that they may ascertain the accuracy and completeness of the list. Dated: April 25, 1985

JYRL JAMES-MASSENGALE, Chairperson[6/]

JOHN P. McCARTHY, Member

JORGE CARRILLO, Member

[6/] The signatures of Board members in all Board Decisions appear with the signature of the chairperson first (if participating), followed by the signatures of the participating Board members in order of their seniority.

MEMBER WALDIE, Dissenting:

In this case, the majority sets aside a rival union election solely on the basis of a deficient employee list. There is no evidence that the Employer compiled the list negligently or in bad faith; indeed, upon his submission of the list to the Regional Director, he acknowledged the deficiencies and offered to make attempts to obtain street addresses; no one suggested he needed to do so. The incumbent union (IUAW) raised no objection when it timely received the list; not until the preelection conference, three days after it had received the list and two days before the election, did it raise the issue.

In finding that the IUAW was prejudiced by the deficiencies in the list, the majority appears to rely on the IHE's observation that "the IUAW has a very limited staff" and so makes the determination of prejudice in rival union elections vary with the strength or size of the union alleging prejudice. I cannot agree. That the majority does utilize just such *a* sliding scale is evident

given this Board's previous - and contrary - determination in Patterson Farms (1982) 8 ALRB No. 57. There, the incumbent union (UFW) was denied status as a party by the Regional Director until 24 hours before the election and was not provided the list until that late time. In addition, there was substantial evidence that the employer compiled the list in bad faith, knowing that those employees he designated with post office addresses actually lived on his own property. Nonetheless, the Board refused to set aside the election, adopting instead the ALJ's determination that

> ...the UFW did not establish actual prejudice arising from their use of the list. Their organizational efforts mainly were discouraged by the lateness of the hour and day. (ALJ slip opinion at 75.)

I dissented in that opinion, stating that the denial of status to the union combined with the bad faith of the employer in compiling the list warranted setting aside the election. In Betteravia Farms (1983) 9 ALRB No. 4-6, I joined the majority in setting aside a rival union election because of the "cumulative effect of the deficiencies in the eligibility list and the preelection violence." (Slip opinion, pg. 3, emphasis added.)

The majority's opinion here leads me to conclude that it is overruling this Board's analysis in Patterson Farms, supra, and adopting an approach for rival union elections wherein it will apply different standards of prejudice to competing unions, setting aside an election when the losing union can show it was less equipped to organize than the prevailing union. The majority's ill-conceived standard is compounded by its mistaken characterization of this election as being a "close" election.

The Tally of Ballots shows that 97 percent of the

farmworkers who voted in this rival union election voted for union representation; only 3 (three) farmworkers -- 2 percent of the vote count — voted for "no union." This extremely high support for unionization is persuasive evidence that farmworkers and union organizers were communicating. Since a primary purpose of the employee list is to facilitate communication between farmworkers and union organizers (Harry Carian v. ALRB, 36 Cal.3d 654 (1984), I must conclude the deficient list had no significant impact on that communication and therefore did not affect the outcome of the election.

I realize, of course, that the close margin the majority refers to is that between the two competing unions. But I would submit that, in the absence of a sizeable "no union" vote, a close margin between competing unions argues against setting aside the election because of *a* deficient list since it must be presumed that the sizeable support enjoyed by both unions reflects their ability to communicate with the workers. A sizeable "no union" vote would change my conclusion, for such a showing would lend credence to the evidence offered that the deficient list hindered communication between organizers and workers. While the majority might certainly argue with me whether every worker who is contacted at home by are organizer would be persuaded to vote for a union, surely the majority does not seriously contend that a deficient list played an "outcome determinative" role when 97 percent of the voters

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selected union representation and their votes were closely divided between the two unions.

I would uphold the results of the election.

Dated: April 25, 1985

JEROME R. WALDIE, Member

MEMBER HENNING, Dissenting:

In this rival union election, the incumbent union was defeated and now argues we should set aside the election because the employer failed to exercise due diligence in maintaining the current street addresses of its employees. In the circumstances of this case, the deficient list was, in my view, insufficient to overcome the presumption of correctness afforded to our elections and I accordingly dissent from the majority's decision to set this election aside.

In Yoder Bros. (1976) 2 ALRB No. 4, we announced a broad rule adopting the National Labor Relations Board's (NLRB) so-called Excelsior rule. (Excelsior Underwear, Inc. (1966) 156 NLRB 1236 [51 LRRM 1217].) We stated:

> We reaffirm that it is the employer's obligation to supply an accurate, up-dated list of names and addresses of workers in accordance with the applicable statutory provisions and regulations. The burden of explaining defects or discrepancies in the list is consequently upon the employer. Where it appears that the employer has failed to exercise due diligence in obtaining and

> supplying the necessary information, and the defects or discrepancies are such as to substantially impair the utility of the list in its informational function, the employer's conduct will be considered as grounds for setting the election aside. Where the list is deficient due to the gross negligence or bad faith of the employer, an election may be set aside upon a lesser showing of actual prejudice by a union. (Id. at pp. 15-16.)

However, in Yoder, we carefully tempered application of this new rule and did not set the election aside despite deficiencies in the list. Because there was no showing of gross negligence by the employer nor substantial impairment of the utility of the list to the certified union, we found the election to fairly represent the wishes of the bargaining unit employees. (See also, Ranch No. 1 (1979) 5 ALRB No. 3; Paul W. Bertuccio (1979) 5 ALRB No. 5.)

Similarly, in Tenneco West, Inc. (1977) 3 ALRB No. 92, we found that the employer failed to provide an adequate list and refused to provide the names and addresses of a labor contractor. Again, we did not set aside the election, notwithstanding the inadequacies of the list thereby avoiding an overly technical application of the NLRB rule. (See also, Tenneco West, Inc. (1978) 4 ALRB No. 16.)

In Point Sal Growers & Packers (1978) 4. ALRB No. 105, we found that the employer had been negligent in the maintenance of the employee list. (In fact, we later concluded that the employer's negligence was an unfair labor practice, see Point Sal Growers & Packers (1979) 5 ALRB No. 7.) However, we did not set aside the election because the union seeking to set aside the election (the UFW there) could not show that the inadequate

list had a substantial impact on the election. The UFW intervened in the election only two days before the election and the employer made good faith efforts to correct the list. Similarly, in Jack T. Baillie Co, Inc. (1979) 5 ALRB No. 72, the employer's unfair labor practice in maintaining a deficient list did not affect the outcome of the election[1/] because the list was susbstantially repaired three days before the election.

In Patterson Farms, Inc. (1982) 8 ALRB No. 57, the incumbent union (again, the UFW) was given only twenty-four hours to make use of a deficient employee list. We determined that while the employer had been negligent in maintaining the list, the UFW had failed to establish that it suffered any prejudice because of differences in the list. Again, the election was certified.

Finally, and most recently, in Betteravia Farms (1983) 9 ALRB Mo. 46, we adopted an IHE report that held (in the alternative) that the cumulative effect of preelection violence (including threatening conduct of employer representatives with rifles during the volatile strike in progress), coupled with the deficient list, containing inadequate addresses for recently hired replacement workers, was sufficient to set aside the election.[2/]

[1/] A strong dissent was filed in this case by Board Member Ruiz. He stated that the majority in Baillie was creating an "administrative monstrosity" by requiring a showing that a defective list also had a substantial impact on the ability of organizing unions to communicate with the workforce. The position advocated by Member Ruiz is apparently adopted by the majority herein.

[2/] In Betteravia, as the majority correctly discusses, the IHE

(Fn. 2 cont. on p. 19.)

I have set forth the above precedent at some length to make the point that the strict liability rule proposed by the majority in this case is contrary to our previous guidelines. While the employer's negligence here is more than likely an unfair labor practice, I do not believe that the conduct was sufficient to set the election aside notwithstanding the majority's conclusory finding of prejudice to the incumbent union. Clearly, there is no gross negligence by the employer who offered to remedy the inadequacies of the list, (see e.g., Point Sal Growers & Packers, supra, 4 ALRB No. 105; Jack T. Baillie Co., Inc., supra, 5 ALRB No. 72.), nor was the incumbent union deprived of either its post-certification access rights to the employees (see, O.P. Murphy (1978) 4 ALRB No. 106) or otherwise able to establish that the deficient list caused it significant prejudice.[3/] No other factors are present in this case that question the ability of

(Fn. 2 cont.)

found a deficient employee list provided to an incumbent union faced with a decertification election to have been sufficient, in and of itself, to set aside an election. As one Board Member involved in the Betteravia Decision, my review focussed on the cumulative effect of all the facts, or the alternative holding of the IHE. I do not believe the Board intended to adopt such a strict interpretation of the Yoder rule in Betteravia as is here announced. A deficient employee list must be accompanied by a showing of employer bad faith and actual prejudice to the employees' right to receive information in order to constitute grounds to set aside an election. (Patterson Farms, supra, 8 ALRB No. 57.)

[3/] I concur with Member Waldie in objecting to the majority's reliance on the organizational ability of the IUAW as a factor in determining whether the election should be certified. Such a misplaced reliance is particularly incongruous where it is the certified union whose small organizational staff establishes the prejudice. A certified union has significant protection

(Fn. 3 cont. on p. 20.)

the employees to freely express their choice of representative and the Board should not lightly deprive them of that right. In my opinion, the majority's overly technical application of the Yoder rule in this case has disenfranchised the voters here and unnecessarily created significant burdens in the operation of future elections.

Dated: April 25, 1985

PATRICK W. HENNING, Member

(Fn. 3 cont.)

under the ALRA. For example, the Act provides that for the year following an election, an election bar is erected adequately protecting the fledgling union's status as representative from rival union or decertification petitions. (§1156.5.) Later, should collective bargaining prove successful the Act offers the protection of a contract bar to the incumbent union. (See, §1156.7(b).) Further, the incumbent union has all the post-certification access rights that are not available to the rival unions.

CASE SUMMARY

SILVA HARVESTING, INC.

11 ALRB No. 12
Case No. 83-RC-9-SAL

IHE Decision

In 1978 the IUAW was certified as representative of the Employer's agricultural employees. In October 1983 the UFW filed a rival union petition for certification and, in the subsequent election, the UFW received a majority of the votes.

The Employer and the IUAW filed election objections, two of which were set for hearing: (1) Whether the employee eligibility list submitted by the Employer was deficient such that it tended to affect the outcome of the election, and (2) whether because of inadequate lighting at the election site voters were unable to mark their ballots properly.

The IHE found that poor lighting at the election site made it difficult, but not impossible, for the voters to express their free choice. He found that all of the ballots were marked in such a way that the intent of the voters was clear and unambiguous, and he concluded that the election should not be set aside on the basis of poor visibility.

Regarding the eligibility list issue, the IHE found that the list submitted by the Employer contained accurate street addresses for only 53 of the 198 named employees (115 of the names had only P.O. box addresses, 8 had no addresses, and 22 were listed at one address where only two adults and two children actually lived). The IHE concluded that the list did not even come close to being adequate. Because of the closeness of the election results, and because the IUAW could have conducted a much more effective campaign if it had been able to plan home visits to employees on the basis of a complete and reliable list, the IHE concluded that the deficiencies in the list so impaired its utility to the IUAW that it tended to affect the outcome of the election. Therefore, he recommended that the election results be set aside.

Board Decision

The Board affirmed the IHE's rulings, findings, and conclusions, and dismissed the Petition for Certification. The Board held that the correct test to apply in determining whether to set aside an agricultural election on the basis of a deficient eligibility list is an outcome-determinative test, under which an election will be set aside only if the deficiencies in the list tended to interfere with employees' free choice to the extent that the outcome of the election could have been affected. Applying that test, the Board found that the eligibility list submitted by the Employer was grossly inaccurate and incomplete,

that the defective list caused actual prejudice to the IUAW, and that the inadequate list tended to affect the results of the election. Therefore, the Board ordered that the election be set aside.

The Board also ordered that upon a Notice of Intention to Take Access being filed within 12 months following the Board's Order, the Employer shall furnish to the Regional Director a complete and accurate list of the names and current street addresses of all its agricultural employees, and that the Regional Director shall then provide copies of the list to both unions so that they may ascertain the accuracy and completeness of the list.

Dissents

Member Waldie dissented, finding the 97 percent vote in favor of unionization, closely divided between the competing unions, demonstrated substantial communication between union organizers and workers and, therefore, the defective list did not have an outcome-determinative affect upon the election. In the presence of such overwhelming voter expression for unionization, Member Waldie would not overturn the results of a hotly contested rival union election solely on the basis of a defective list, in the absence of any bad faith or negligence by the employer in compiling the list. Given these factors, Member Waldie does not find it appropriate for the majority to overturn a rival union election merely because one union was less equipped to organize than was the other.

Member Henning dissented and would have certified the results of this election. He would have found the maintenance of a deficient payroll list in and of itself was not enough to set aside the election, especially when the party complaining of the list failed to seek its correction in a timely fashion and was otherwise unable to demonstrate that the deficient list caused it significant prejudice. Member Henning would require an affirmative demonstration that the defective list had a substantial impact in the ability of incumbent unions to communicate with the members of their bargaining unit.

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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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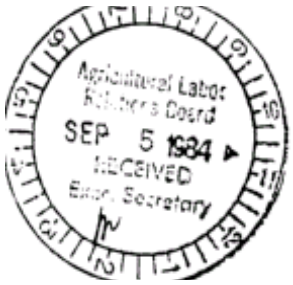

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of:

Case No. 83-RC-9-SAL

SILVA HARVESTING, INC.

Employer,

and

UNITED FARM WORKERS OF
AMERICA, AFL-CIO,

Petitioner,

and

INDEPENDENT UNION OF
AGRICULTURAL WORKERS,

Incumbent Union.

Terrence R. O'Connor, Esq.
Grower-Shipper Vegetable Association
for the Employer.

Martha Cano
for the Independent Union
of Agricultural Workers.

Chris A. Schneider
for the United Farm Workers
of America, AFL-CIO.

Christine Bleuler, Esq.
for the Agricultural Labor
Relations Board.

DECISION

STATEMENT OF THE CASE

JOHN NEWMAN, Investigative Hearing Examiner: This case was heard by me in Salinas, California on February 6.

through 8, 1984.. The Independent Union of Agricultural Workers (IUAW) and the United Farm Workers of America, AFL-CIO (UFW) participated fully in the hearing; Silva Harvesting (the Employer) and Lupe Martinez, Regional Director of the Agricultural Labor Relations Board's (ALRB or Board) Salinas region also participated, but on a limited basis which will be explained below. Post-hearing briefs were submitted by each of the above-named parties.[1/]

In 1978, the IUAW became the certified bargaining representative of the Employer's agricultural workers. On October 13, 1983, a petition for certification/rival union petition was filed by the UFW pursuant to section 1156.7 of the Agricultural Labor Relations Act (ALRA or Act.)[2/] The Board conducted an election on October 19, pursuant to Labor Code section 1156.3(a).

[1/] The UFW filed a motion to strike the IUAW's post-hearing brief because it was filed three days after the deadline all parties and I agreed to at the end of the hearing, due to a fire which destroyed the first typed version. As no prejudice has been shown likely to result to any party from the late filing, and the length of time by which the IUAW missed the deadline was not so great, under the circumstances here present, as to indicate disregard for the Beard's procedures, the UFW's motion is hereby denied.

The UFW also filed a motion to strike notes taken by an IUAW staff member at a pre-election conference, which the IUAW submitted as an attachment to its post-hearing brief more than one month after the date it had agreed to submit them. The UFW claims it was prejudiced in preparing its post-hearing brief by not having access to those notes. Based on the lateness of the IUAW's submission and the prejudice such lateness is alleged to have caused, and could have been expected to cause, the UFW's motion to strike said notes is hereby granted.

[2/] All dates hereafter refer to 1983 unless otherwise specified and all statutory citations are to the ALRA unless otherwise specified.

Immediately following the election, Regional Director Martinez ordered the ballots impounded. The tally of ballots shows the following results:

UFW	76
IUAW	65
No Union	3
Challenges	3
Total	147

The Employer and the IUAW each timely filed objections to the election. By Order dated December 20, 1983, the Executive Secretary dismissed certain objections to the election but set for hearing the following objection:

> Whether the employee eligibility list submitted by the employer was deficient such that its utility was substantially impaired and, if so, whether the election should be set aside on this basis.

On January 27, 1984, in an Order granting in part the Employer's and the IUAW's Requests for Review of Dismissal of Objections, the Executive Secretary set for hearing the following objection:

> Whether because of inadequate lighting at the election site voters were unable to properly mark their ballots.

JURISDICTION

None of the parties to the proceeding has challenged the Board's jurisdiction. Accordingly, I find that Silva Harvesting is an agricultural employer within the meaning of section ll40.4(c') and that the IUAW and the UFW are each labor organizations within the meaning of section 1140.4(f).

PRELIMINARY LEGAL ISSUES

Three legal issues raised during the course of the hearing

must be addressed before I discuss the findings I have made and conclusions I have come to on the basis of the evidence presented at the hearing. The legal issues are the following:

1. May an employer participate in an election objections hearing when the parties to the election were an incumbent union and a rival union, one of which is certain to serve as the employee's certified representative whether or not the election results are upheld?
2. What standard should be applied to an objection by a union that the list of employees submitted by the employer to the Regional Director pursuant to Title 8, California Administrative Code, section 20310(a)(2) was materially deficient?
3. What right, if any, does an ALRB Regional Director have to participate in election objection hearings?

The first issue concerns the right of an employer to participate in a hearing on election objections when one of two unions is certain to serve as the employees' certified representative. The UFW at the start of the hearing moved to exclude the Employer from participating, arguing that the Employer had no legally cognizable interest in the outcome. The alleged lack of such an interest results from the unusual circumstances here, whereby the UFW will be certified as the employees' representative if the election results are upheld, but, if the election is overturned, the incumbent IUAW will remain the employees' certified representative.

The UFW argued that the usual interest of an employer in avoiding unionization of its workforce does not arise here,

because the certification of one or the other labor organization is assured. The UFW further contended that by participating in the hearing in opposition to upholding the election results, the Employer would confer on the IUAW, which also argued against upholding the election results, *a.* benefit of considerable value, and that confering such a benefit would constitute a violation of ALRA section 1155.4, which provides, in relevant part, that "it shall be unlawful for any agricultural employer... to pay, lend or deliver any thing of value to.... [a]ny representative of his agricultural employees....". (Similarly, ALRA section 1155.5 provides that "It shall be unlawful for any person to request, demand, receive or accept, or agree to receive or accept, any payment, loan or delivery of any money or any other thing of value prohibited by section 1155.A.")

The UFW pointed out that although the IUAW was represented at the hearing by its President, Ms. Martha Cano, it was not represented by an attorney, while the Employer was represented by a member of the Bar, Terrence R. O'Connor. The UFW argued in its Motion that:

> The presence of a company lawyer conducting examination and presenting evidence in furtherance of an objection that is the same as the IUAW's objection amounts to the company lawyer litigating the IUAW's case. In this manner the company will have delivered and the IUAW will have accepted, things of value in contravention of the express prohibition of the [ALRA].

The Employer's position on this issue is that an employer has an interest in whether or not its employees are represented by a union and that, as a corollary, an employer has an interest in determining that the election accurately represents the freely expressed desires of the employees. An

employer, then, has *a* right to argue to the Board that a particular union ±*s* not the freely chosen representative of its employees. The Employer also points out that the nature of election objection hearings is investigative rather than adversarial, and that the more parties there are participating in the hearing, the greater the likelihood that all relevant issues will be explored and a complete evidentiary record produced.

I denied the UFW's Motion on three grounds, two of which are technical in nature. I found that the relief sought by the UFW, exclusion of the Employer from the hearing, was beyond the authority vested in an Investigative Hearing Examiner (IKE) by the Board's regulations[3/] governing the conduct of such hearings. The Executive Secretary having included the Employer as a party, it was not for me as an IHE to exclude it.

Second, I found the UFW's Motion untimely. The Motion should have been made to the Executive Secretary well in advance of the commencement of the hearing, not at the beginning of that proceeding.

The third ground for my ruling was that the UFW's Motion was at odds with the scheme for representation proceedings established in the Act, by the Board's regulations and by the settled practice of the Board, which has been reviewed and upheld

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[3/] Title 8, California Administrative Code, section 20365 and 203~0 set forth the duties and responsibilities of Investigative Hearing Examiners. They contain no suggestion that an IHE may exclude as a party to representation proceedings any person or entity designated as a party by the Executive Secretary.

by the courts, most notably in J. R. Norton Company v. Agricultural Labor Relations Bd. (1979) 26 Cal.3d 1. That scheme contemplates full participation by employers. (See Cattle Valley Farms (1982) 8 ALRB No. 24.) Their participation helps to assure not only that all issues arising from representation elections will be fully explored but also that the bargaining obligations which certification of labor organizations imposes on employers will be accepted by them with a sense that their rights and their legal arguments have been taken seriously in the representation certification process.

The definition of "party" in the Board's regulations includes, "any person named or admitted as a party...in any Board proceeding, including without limitation...any person named as... employer." (Title 8 Cal Admin. Code section 20130). This section is identical in all pertinent parts to section 102.8 of the National Labor Relations Board's (NLRB) regulations. (Title 29, Code of Federal Regulations section 102.8.) The NLRB has consistently permitted employers to participate in represenation hearings.

Finally, election objections hearings are indeed evidentiary rather than adversarial in nature; their purpose is to develop a full and accurate record on the objections at issue. (NLRB v Botany Worsted Mills (3rd Cir. 1943) 133 F.2d 876 [11 LRRM 780]). Participation by employers is conducive to this goal. Such benefit(s) as a union might derive from that participation are incidental and are outweighed by the desirability of producing complete evidentiary records in election objection hearings. The prohibitions contained in section 1155.4

and 1155.5 against benefits to a representative of employees from an employer do not contemplate or include the indirect benefits one of the completing unions might derive from employer participation in such a hearing.

For all of the above reasons, I conclude that an employer has a right to participate in an election objections hearing even when a union is certain to serve thereafter as the employees' representative.

The second legal issue to be discussed here concerns the standard to be applied when a labor organization objects to an election on the ground that the list of eligible employees submitted by an employer pursuant to Title 8, California Administrative Code, section 20310(a)(2), was materially deficient. This issue arises from the language of the first objection set for hearing in the Executive Secretary's Order of December 20, 1983, i.e.:

> Whether the employee eligibility list submitted by the employer was deficient such that its utility was substantially impaired and, if so, whether the election should be set aside on this basis.

The phrasing of the objection requires consideration of (1) whether the list was deficient; (2) if so, whether such deficiencies impaired the list's validity; and (3) if so, whether that impairment affected the outcome of the election so that those results should not be upheld. The last part of this objection, "...and, if so, whether the election should be set aside on this basis," suggests that a deficient list, the utility of which was impaired, might not by itself constitute sufficient grounds for setting an election aside.

Labor Code section 1157.3 imposes a duty on agricultural employers to "maintain accurate and current payroll lists containing the names and addresses of all their employees." Section 20310(2) of the Board's regulations provides that an employer's written response to an election petition shall contain a complete and accurate list of the full names and current street addresses of its employees. This employee eligibility list must be provided to the Regional Director within 48 hours after the filing of an election petition. (Regulation section 20310(d}.) The Regional Director must then provide copies of the list to all parties to the election. (Regulation section 20313.) The purpose of the latter requirement is to allow parties to an election to communicate with eligible voters at their hones. (Yoder Brothers, Inc. (1976) 2 ALRB No. 4.)

In Yoder Brothers, one of its earlier cases, the ALRB explicitly adopted the National Labor Relations Board's (MLRE) "Excelsior Rule" which, simply stated, provides that an employer's failure to provide a complete, accurate employee eligiblity list shall be grounds for setting aside the election. (Excelsior Underwear, Inc. (1966) 156 NLRB 1236 [61 LRRM 1217].) The rule embodies a policy that employees should be fully informed of the issues in an election and that communication of opposing viewpoints can only be insured if all parties have access to the names and addresses of all the voters. Under the ALRA a union has only five days to use the eligibility list. Deficiencies in the list therefore are more likely to interfere with communication between a union and agricultural employees

than they would in the industrial setting regulated by the NLRB. (Jack T. Baillie Co., Inc. (1979) 5 ALRB No. 72.)

The NLRB has held that the Excelsior rule should be simple and easy to administer, and has considered even seemingly minor defects in the Excelsior list to be grounds for setting aside a representation election. In Centre Engineering, Inc. (1980) 235 NLRB No. 28, [105 LRRM 1637] the NLRB voided an election where the list was not alphabetically arranged and contained home addresses, but no ZIP codes for 95 percent of the employees. In Sonfarrel, Inc. (1971) 188 NLRB 969, [76 LRRM 14.97] the NLRB ruled that the inquiry into the substantial completeness of the list should be an objective inquiry, rather than an inquiry into the actual impact the deficiencies had on the efforts of the union to reach employees. In that case, the employer omitted five names from the eligibility list in an election where 52 ballots were cast. The union objected and the election was overturned. The employer attempted to establish that four of the five individuals omitted from the list received union literature and were fully aware of the meaning and the purpose of the election, but the Board rejected that evidence, stating:

> [T]he issues of a union's actual access to employees or the extent to which employees omitted from the Excelsior list are aware of the election issues and arguments, are not litigable matters in applying the Excelsior rule...To look beyond the question of the substantial completeness of the lists, however, and into the further question of whether employees were actually 'informed' about the election issues despite their omission from the list, would spawn an administrative monstrosity. Ibid, 188 NLRB at 970 [76 LRRM at 1498].

The ALRB has often cited Excelsior, but its approach to election objections based on inadequate eligibility lists has included factors which go beyond the scope of that case. In Valley Farms, Maple Farms and Rose J. Farms (1976) 2 ALRB No. 46, the Board stated:

> ...where an employer fails to exercise due diligence in obtaining and supplying an accurate, updated list of names and addresses of workers, and the defects or discrepancies are such as to substantially impair the utility of the list in its informational function, the employer's conduct will be considered as grounds for setting the election aside. 2 ALRB No. 42 at p. 4.

The employer's due diligence (or good faith) in preparing the list was also considered in Yoder Brothers, supra, 2 ALRB No. 4, where the Board seemed to suggest a balancing of that factor against actual prejudice suffered by the objecting union. "[W]here the list is deficient due to the gross negligence or bad faith of the employer, an election may be set aside upon a lesser showing of actual prejudice by a union." 2 ALRB No. 4 at p. 16. The Board in Yoder Brothers upheld election results despite an objection based on a list for some 160 eligible employees from which nine names were missing, six listed addresses did not exist, and in seven instances the union organizers could not locate the employees at the listed addresses. Similarly, in H.H. Maulhardt Packing Company (1980) 6 ALRB No. 42, election results were upheld despite an objection based on a list from which addresses for 19 of 138 eligible voters were missing. There, the IHE, whose findings, conclusions and recommendations were accepted by the Board, stated that:

> the evidence does not support a finding that the IUAW's ability to communicate with the voters was substantially impaired by the inadequacies of the list. The evidence does indicate that the IUAW organizers were unable to find some workers at the addresses given on the list but does not indicate the number of workers the IUAW could not find. 6 ALRB No. 42, IHE Decision at pp. 5-6.

In Jack T. Baillie Co. (1979) 5 ALRB No. 72, an outcome-determinative standard was articulated by the Board. There the Board found that the employer interfered with employee rights in violation of section 1153(a) by failing to produce complete and accurate address data. The Board upheld the election, however, emphasizing the unique facts presented by the case and stating:

> Despite Respondent's failure to submit a legally sufficient names-and-addresses list at the outset, the record as a whole establishes, and we have concluded... that a majority of the defects therein were subsequently corrected and therefore did not tend to affect the outcome of the election. 5 ALRB No. 72 at p. 9.

Apparently moving back in the direction of Excelsior, the Board in Betteravia Farms (1983) 9 ALRB No. 46, adopted the findings, conclusions and recommendations of the IHE, who had stated that there exists no obligation of due diligence on the union either to maximize its campaign efforts or to remedy deficiencies in the list.

> There is no such duty imposed either by statute or case law. On the contrary, the law imposes the duty...[of] compiling and correcting the list solely upon the Employer. 9 ALRB No. 46, IHE Decision p. 42.

The IHE explained that the Excelsior Rule reflects a presumption that an accurate list is crucial to providing employees informed

free choice in an election. Discussing this presumption, the IHE observed:

> It is unclear whether the [Excelsior] presumption is rebuttable. If so, the employer would have to show that the Union would not have made home visits even if it had current street addresses. The Employer cannot rebut the presumption by showing merely that the Union did not make *as* many home visits as it might have. I [reject] the Employer's contention, unsupported by case law, that the Union's failure to campaign among every employee's residence proves that street addresses were unimportant to the Union. 9 ALRB No. 46, IHE Decision at p. 41, fn. 37.

As the IHE correctly pointed out, if the Excelsior Rule is interpreted as a rebuttable presumption that an inadequate list defeats employee free choice, evidence and argument aimed at rebutting the presumption will likely be tinged with speculation. The focus of inquiry will shift from the actual defects observable in the list itself or ascertainable from testimony about the accuracy or inaccuracy of the information on the list, to the realm of "what-might-have-been-if-the-facts-had-been-other-than-they-were. " That is, the question the parties will have to address is "what would the objecting union have accomplished in its campaign with an adequate list that it failed to accomplish with the deficient list it was given?" In my view, the difficulty of making determinations about a deficient list's impact on election results in a fair and consistent manner from case to case is, for practical purposes, insurmountable, amounting to that "administrative monstrosity" against which the NLRB warned in Sonfarel, Inc., supra 188 NLRB at p. 970 [76 LRRM at p. 1498].

However, in view of the Board's past cases dealing with list objections, and the language of the list objection set for hearing in this matter, particularly its final clause, "whether the election should be set aside" on the basis of substantial impairment of the list's utility, at the hearing I allowed into the record evidence on the availability of employee addresses to the IUAW from sources other than the list, evidence on the efforts the IUAW made to contact employees during the pre-election period, and evidence on what, if anything, the IUAW did in the pre-election period to bring its concerns about the list's deficiencies to the attention of the ALRB Regional staff or the Employer. That evidence and the conclusions to be drawn from it will be discussed below.[4/]

The third preliminary legal issue concerns participation by the Regional Directors in election objections hearings. During the course of the hearing, the UFW called the Board agent in charge of the election as a witness. A staff attorney from the Board's regional office made a limited appearance at that time in order to represent the Board agent and to represent the Regional

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[4/] In contexts like the one presented by this case, where an incumbent union is challenged by a rival with a reputation for greater militancy, there is obviously a danger that an employer more favorably disposed to the incumbent union will deliberately provide a deficient list, in order both to impede the rival's campaign and to provide the incumbent - with material for an objection if it loses the election. That danger should be met, in my opinion, through the unfair labor practice procedures of the Board rather than through its election objection procedures. The unfair labor practice(s) that such conduct would constitute deserve(s) penalties severe enough to deter their commission. (I note that unfair labor practice charges are pending against the Employer herein for its failure to maintain an accurate list. The Employer's participation in the hearing did not extend to the list issue, but was limited to the issue of adequate light at the election site.)

Director's interests in developing a full evidentiary record as to the conduct of the Board agent. The parties did not dispute the Board agent's right to representation. However, counsel for the Employer stated that "the counsel for the Regional Director should not take an active leadership approach to establishing any of the evidence in this case." (Transcript Volume III, p. 46.) At the close of the hearing, I suggested the parties submit briefs on the issue of the right of a Regional Director and his representative or designee to participate in hearings of this sort. The purpose of this suggestion was to provide the Board with such guidance as the parties' briefs might offer in the event the Board should choose this case as a suitable opportunity for it to address the scope of a Regional Director's right to participate in such hearings. (This issue was discussed by Administrative Law Judge (ALJ) Beverly Axelrod in her Decision in George A. Lucas o Sons (1982) 8 ALRB No. 61. The Board there noted that no party filed an exception to the ALJ's granting a motion by the Regional Director to intervene, but the Board did not go on to approve, disapprove, or discuss the ALJ's treatment of the issue.)

The Board's regulatory scheme contemplates the participation of Regional Directors in representation hearings. ALRA section 1156.3 gives the Board the authority and responsibility to conduct secret ballot representation elections. The Board, pursuant to ALRA section Il42(b), has delegated this authority and responsibility, by regulation, to its Regional Directors. The Regional Directors are in charge of the election process, from the time of the filing of an election petition up to and beyond the

actual election itself. Regional Directors are directly responsible for all phases of the election process. This includes determining whether a question of representation exists and whether all the prerequisites for holding an election are satisfied, deciding upon the appropriate bargaining unit, and supervising an orderly election. (Tit. 8, Calif. Admin. Code, § 20300-20390.) Regional Directors are also responsible for conducting post-election investigations, such as challenged-ballot. investigations. (Tit. 8, Calif.Admin. Code, § 20363.) A Regional Director's duties in election matters extend even beyond certification; the Regional Director has the responsibility of investigating and determining unit clarification issues as well. (Tit. 8, Calif. Admin. Code, § 20385.)

An election objections hearing conducted pursuant *to* Title 8, California Administrative Code, section 20370, is but one phase of the election process. The hearing is not an adversarial proceeding, but is rather an investigative hearing designed to develop as complete a factual record as possible on the issues set for hearing. (NLRB v. Botany Worsted Mills, supra, 133 F.2d 875.) Regional Directors are charged with ensuring the integrity of the election process, and they have a concommitant responsibility to ensure that all the pertinent facts regarding the election process are developed whenever objections which require a hearing are filed challenging the integrity of the administration of that process.

The Act does not provide in detail for an election objections procedure, but merely states:

> Upon receipt of [an election objections petition], the Board, upon due notice, shall conduct a hearing to determine whether the election shall be certified. Labor Code section 1156.3.

The regulation setting forth the investigative hearing procedure provides:

> The parties shall have the right to participate in such investigative hearings as set forth in Labor Code sections 1151, 1151.2, and 1151.3. Title 8, California Administrative Code, section 20370(b).

The term "party" is defined in section 20130 of the Board's regulations. It lists specific entities as parties, but expressly provides that parties are not limited to that list:

> The term 'party' as used herein shall mean any person named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, in any Board proceeding, including, without limitation, any person filing a charge or petition under the Act, any person named as respondent, as employer, or a party to a contract in any proceeding under the Act, and any labor organization alleged to be dominated, assisted, or supported in violation of Labor Code section 1153(a) or (b); but nothing herein shall be construed to prevent the Board or its designated agent from limiting any party's participation in the proceedings to the extent of its interest only. Title 8, California Administrative Code, section 20130.

The regulations also contemplate the involvement of Regional Directors in election objections; the Regional Director, along with the parties, must be served with the objections petition. Section 20365(c) of the regulations requires an objecting party to file with the Executive Secretary, inter alia:

> ...a declaration of service upon all other parties, including the Regional Director, as provided in section 204-30, of the objections petition and any detailed statement of facts and law supporting declarations.... Title 8, California Administrative Code, section 20365(c). [Emphasis added.]

Participation by the Regional Director in representation

hearings in cases such as the present one is desirable for several reasons. First, litigation by the labor organization and employer involved in the election might not result in a full evidentiary record of all the issues set for hearing. The parties on the ballot are presumably interested primarily in the outcome of the election and can be expected to direct their efforts accordingly. By contrast, the interest of the Regional Director is not identifiable with either side in an election; rather, the Regional Director's interest is focused on protecting the integrity of the process of the election. The Regional Director might therefore present certain kinds of evidence which the other parties might overlook or disregard, but which could be relevant and necessary to a Board decision.

Second, because of his or her duty to oversee the entire election procedure, the Regional Director may have more knowledge of the facts in a particular election than the parties have. For example, the Regional Director might be in possession of facts which formed the basis for an exercise of Board agent discretion which is raised later as an election objection. The Regional Director might also possess more evidence underlying an investigation of a challenged ballot report, a peak employment issue, or a unit clarification report. Participation by the Regional Director in a hearing involving such issues can contribute to the development of a full and accurate evidentiary record.

Third, in cases where Board agent misconduct is alleged, the Regional Director, as the representative of the Board in

charge of supervising representation proceedings, has an interest in developing a complete record, since his or her responsibilities in this supervisorial role include investigating and correcting any misfeasance or malfeasance on the part of regional office personnel. The Regional Director should be allowed to present evidence in his or her possession relevant to the agent's conduct so that the Board can make its decision on a full set of facts.

The practice heretofore, in ALRB election objections hearings has been to allow a Regional Director to participate to the extent he or she desires.[5/] For example, in Saticoy Lemon Association, et al. (1983) 8 ALRB No. 94, the Regional Director requested and was allowed to appear in regard to an election objection involving Board agents' failure to notify the parties. In George A. Lucas & Sons (1982) 8 ALRB No. 61, the Regional Director made a formal motion to intervene as a full party prior to the hearing and thereupon litigated the case as a full party, introducing documentary evidence, calling witnesses, cross-examining witnesses, making objections, and filing briefs. The ALJ permitted this participation by the Regional Director over the objections of the employer. As mentioned above, the Board upheld the ALJ's decision in that case without commenting on her permitting the Regional Director to participate in the hearing.

[5/] The extent of this participation can of course be limited by the Investigative Hearing Examiner to the issues in which the Regional Director is found to have an interest. For instance, should the Regional Director's representative attempt to litigate an issue of party misconduct which is not related to the Regional Director's role in the election process, the Investigative Hearing Examiner has the power to limit this participation, under section 20370 of the Board's regulations.

Similarly, it is the practice of the NLRB under the National Labor Relations Act (NLRA) 29 U.S.C. section 150, et seq. to permit Regional Directors to participate in post-election objections proceedings. The NLRA does not establish a post-election objections procedure; instead, the NLRB has created the procedure by regulation. (Tit. 29, CFR, § 102.69.) Although that regulation does not expressly mention the participation of Regional Directors in such proceedings[6/], the NLRB's practice is to allow full participation by a representative of the Regional Director, which may include examination and cross-examination of witnesses, introduction of documentary evidence, and making objections. (NLRB Case Handling Manual, Part Two, Representation Proceedings, section 11424, 11424.4.)

For all of the above reasons, I conclude that a Regional Director is entitled under the regulations of the ALRB to full party status in cases where the actions of the Regional Director or his or her subordinate(s) are involved. This group of cases includes those involving Board agent conduct or the exercise of Board agent discretion. It also includes cases involving certain determinations made by regional office personnel after investigation, such as peak employment determinations, unit determinations, and challenged ballot and unit clarification reports. In all of these cases, the integrity of the election process and the Regional Director's role in that process are

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[6/] According to NLRB regulations, the Regional Director, rather than the Executive Secretary, actually has the duty to set the election objections hearing. (Tit. 29, CFR, §102.69(d).)

at issue. He or she should therefore have an opportunity to participate in developing the evidentiary record on which judgment will be based.

THE FACTS

A. The Employee Eligibility List

Based on past Board cases dealing with election list objections, it appears that a list's adequacy is to be evaluated on the contents of the list itself; its utility, on the role it played in the complaining union's campaign; and its impact on the results of the election, on the difference an adequate list would have been likely to make in that campaign. The list of employees submitted by the Employer to the Regional Director pursuant to Title 8, California Administrative Code, section 20310(a)(2), contained 198 names. Examination of the list reveals that for 115 of the names the only address is a Post Office Box. For 8 others there is no address. One address, 150 Encinal, Apartment 8, is given for 22 names. Testimony received at the hearing indicated that few if any of the twenty-two employees listed at this address have ever lived there; the address is used by most of the employees listed there for mailing purposes only.

Testimony was given at the hearing regarding the actual impact of the deficient list upon the IUAW's ability to communicate with employees. IUAW President Martha Cano, whom I found to be a credible witness, based on her straightforward manner, physical ease in giving testimony, steady voice and consistent eye contact with her interlocutors, including myself,

testified that the IUAW did not have current street addresses for more than 70 Silva Harvesting employees in its files. She testified further that for some 33 employees for whom the IUAW had only Post Office box addresses, it also had telephone numbers. This results in a total of 103 employees out of the 198 on the eligibility list whom the IUAW might have been able to reach independently. While the matter does not appear to be entirely clear in the record, it seems that, one street address at 150 Encinal which appeared for 22 employees in the Employer's list also appeared for 22 or 23 employees in the IUAW's records. As this was a mailing address rather than an actual residence for most, if not all, of the 22 (23) employees, the total number of employees whom the IUAW was theoretically able to reach on the basis of information in its own possession without relying on the Employer's list; should probably be reduced by that number, leaving a total of SO. The record leaves unclear which, if any of these 80 employees were also listed with accurate street addresses on the Employer's list. Absent that evidence, it is impossible to know the total number of employees for whom, through its own files and the Employer list, the IUAW had street addresses or current telephone numbers. If all the employees for whom the IUAW had accurate street addresses or telephone numbers also appeared with accurate street addresses on the Employer's list, the total was 80. If there was no overlapping, the total would be 133. (This figure is arrived at by subtracting from the 193 names on the Employer list 115 for whom the only address was a Post Office Box, 8 for whom no address was given, and 22 for

whom the 150 Encinal address, a mailing address, was given; this subtraction leaves 53, to which the IUAW's records for 80 employees with accurate individual street addresses or telephone numbers are added, totalling 133.) At most, then, it appears that the IUAW had access to addresses or telephone numbers for fewer than 68% of the eligible employees.

Martha Cano also testified about efforts she made to contact employees at their work sites and, to a limited extent, at their homes. Her efforts were not very successful in either domain. The IUAW has a very limited staff; the only person who joined Ms. Cano's organizing efforts was her husband, Benito (formerly Oscar) Gonzales, an employee of the IUAW. She made trips to the towns of Gonzalez and Soledad looking for employees listed at addresses there, but failed to find them. She was told that many employees used the address 150 Encinal, Apartment 8, for mail but did not live there.

Ms. Cano testified that the collective bargaining agreement between the IUAW and the Employer permits the taking of access to employees at the worksite any time when agricultural operations would not be interrupted thereby, that she was able to contact some groups of employees in the fields in the pre-election period, and that she could not remember whether she asked any of them for their home addresses and telephone numbers during those contacts in the fields.

Ms. Cano testified that she attempted to register a complaint with the Employer about deficiencies in the list but her telephone call was not returned by the person she believed

could help with the list problem. She testified further that at the pre-election conference she joined in a protest initiated by a UFW representative about the list's inadequacies.

B. Election Site Visibility

Conditions at the election site in the early morning hours of October 19, 1983, were dark and foggy. There were few sources of light. As the parties stipulated,

> ...there was a yellow light about eight feet above the ground over a door on the side of the firehouse. That light went off and on occasionally during the election. There were two kerosene lanterns which needed to be pumped up occasionally. One was on the ballot box table and one was on the observer table during the election. A state car was used to illuminate the...voting booth. There were no lanterns, flashlights, lamps, or other sources of light inside the voting booth. There were, however, the above-mentioned sources of light outside the voting booths. (Transcript Volume III, p. 1)

According to the testimony of several witnesses, the state car, headlight beams of which were directed toward the voting booth, was not put to this use during the entire election; rather, it was brought into use after several employees had voted and was taker, away for a 15 to 20 minute period during the voting so that Board agents could get themselves some coffee.

A declaration signed by 17 employees in the week following the election states:

> When the lady from the State held up the sample ballot to explain how to vote, she was standing far away from most of the people. There was not enough light to see the sample ballot. This was the only time the process was explained to most of us.

Several witnesses testified that they had difficulty seeing their ballots because of the fog and darkness. When pressed on the issue, most stated that, despite the difficulty, they could see the ballot well enough at least to make out the clenched fist, symbol of the IUAW, and the black eagle, symbol of the UFW. Mario Campos Tapia, for example, testified credibly (based on his forthright demeanor, including tone of voice and facial expressions) that in the voting booth, although he could not see very well, he could distinguish the eagle on the ballot from the clenched fist "a little". (Transcript Volume II, p. 146.) Another witness whose tone of voice, gestures, posture and facial expressions indicated truthfulness, and whom I therefore found credible, Mario Montes, testified as follows:

> Q. And when you were given the ballot, did you look at it?
>
> A. I did look at it, but like I mentioned before, there was not enough light, so I didn't even know where I was going to be voting.
>
> Q. You didn't say anything to the Board Agent about not being able to see the ballot, did you?
>
> A. I was going to tell her, but I thought well, maybe they would be upset if I asked such question.
>
> Q. So you did not say anything.
>
> A. Well, they were others there they were complaining and saying something about the lights, but I could see there, I could see a little bit in the papers, so I just went ahead and marked it. (Transcript Volume III, p. 105.)

I take Mr. Montes' final statement that he "could see a little bit in the papers" as a clarification and perhaps a correction of his earlier statement that he didn't know where he was going to be voting; I interpret his testimony as meaning that he was just barely able, with effort, to make out enough of the ballot to know where to mark it. Similarly, Juan Manuel Garcia, who served as an observer at the election, testified as follows:

> Q. And when you went in to vote, you were able to see the eagle on the ballot, weren't you?
>
> A. Yeah, you could see it, but very dim. 0.
>
> Q. Okay, and you could also see the fist.
>
> A. Yeah, I could see everything.
>
> (Transcript Volume II, p. 157.)

Mr. Garcia testified in a calm, direct manner. He spoke clearly, with a certain dignity; his voice was steady and had authority. In other respects, such as posture, bearing and facial expressions, his demeanor was that of a person speaking truthfully. I found him a credible witness.

By contrast, I found Fidel Zanchez not to be credible. His manner was evasive, his posture slumped, his eyes wandering and his voice muffled. Alone among the witnesses he testified that there were lights inside the voting booth, but that they flickered off and on. He also stated that he did not remember being near any building. (The record clearly establishes that the two voting booths were a few feet from the side of the firehouse in Soledad, and that there was a yellow light bulb attached to the firehouse wall a few feet above and apart from the booths, which light went

out and came back on intermittently.) Mr. Zanchez testified in part *as* follows:

> "...It was so dark, so I didn't even know how I was voting or how I voted." (Transcript Volume II, p. 125.)

I did not find Mr. Zanchez a credible witness, so I do not accord his testimony any weight.

The only other witness whose demeanor evoked distrust rather than belief was Nicolaus Araujo Gonzales. He behaved in a diffident manner, hesitating before giving answers, avoiding eye contact with those who were addressing him (the interpreter, the legal representatives and myself) and appearing to have difficulty in recollecting the events about which he was testifying. I did not find him a credible witness, and do not accord any weight to testimony he gave that he could not see his ballot.

The weight of the testimony indicates that, although there was too little light for voting to be easy, there was enough for it to be possible. The ballots themselves cause the evidence to preponderate strongly in favor of this conclusion, for, of the 14.3 ballots cast, the 14-5 available for examination[7/] are all marked in such a way that the intent of the voter is clear and unambiguous from the placement of an "X" mark on each ballot. The parties by stipulation agreed to the following facts regarding the marking of the ballots.

1. One hundred thirty-one ballots were marked by an "X" inside the small box beneath one of the logos.

[7/] Three challenged ballots are in sealed envelopes.

2. Six ballots were marked with an "X" through one of the logos.

3. Three ballots had a large "X" over an entire rectangle containing one of the logos.

4. Four ballots had a small "x" within one of the large rectangles.

5. One ballot was marked above the large rectangle containing the IUAW logo.

6. Three challenged ballots were not examined.

All that I would add to this description of the ballots is the fact that not one of the 14-5 bears random markings, smears or signs of erasure.

ANALYSIS AMD CONCLUSIONS

1. DEFICIENT LIST

a) Excelsior standard

The Board in several previous cases determined that a list of employees submitted by an employer was materially deficient. For example, in Mapes Produce Co. (1976) 2 ALRB No. 54 , the employee list contained the names of 355 employees, but some 255 were not reachable by use of the list because it contained only Post Office box addresses for many of them and out-of-town addresses for many others. The Board found this a materially deficient list and stated that the defects in the list were "more central" to its decision to set the election aside than was the failure of a Board agent to give the list to a union campaigning for the election until the day before the election. Similarly, in Salinas Lettuce Farmers Co-Op (1979) 5 ALRB No. 21, the list contained 236 names, but for 81 of them it contained no addresses. The Board set aside the

election on this basis. In Coachella Imperial Distributors (1979) 5 ALRB No. 73, some 20% to 26% of the addresses contained on the list were inaccurate, and the Board set the election aside.

By comparison with the lists found in the above cases to be so deficient that their utility was fatally impaired, the list in the present case, containing accurate street addresses for only some 63 of the 198 named employees (subtracting from 198 the 115 for whom only a Post Office box is given, the 8 for whom no address is given, and the 22 for whom the 150 Encinal address is given) does not even come close to adequacy.

Taking account of evidence outside the four corners of the list itself, the record indicates that the IUAW could have conducted a much more effective campaign if it had been able to plan home visits to employees on the basis of a complete and reliable list. Much of the time Ms. Cano testified to having spent looking for employees' residences was wasted. Had she been able to actually contact employees during the hours she devoted to that futile search for them, she could not only have discussed the election but also learned where their crews would be located when work resumed. This information would probably have led to more effective worksite access and less waste of time looking in vain for crews. Therefore, I find that the deficiencies of the list severely impaired its utility.

Finally, responding to the most troublesome aspect of this objection as set by the Executive Secretary, I would recommend that the election be set aside. I base this recommendation on the relatively close margin separating the UFW and IUAW vote totals,

76 to 65. Either a switch of six votes, or twelve more votes cast by eligible employees in favor of the IUAW, would have put the IUAW ahead. I find the evidence sufficient to support the view that with an adequate list the IUAW could have mounted a campaign effective enough to bring many more supporters to the polls and/or to cause six of those who voted for the UFW to vote for it. In other words, the evidence can support the conclusion that the list was so deficient that its utility to the IUAW was so impaired that it affected the outcome of the election. The election results, therefore, should not be upheld.

The above discussion is admittedly speculative, for there can be no certainty that even *a* complete and reliable list would have resulted in a truly effective IUAW campaign. Possibly the severe limits of that union's resources would have precluded its reaching a significant number of employees even with a perfect list. Or perhaps the issues in the campaign would have been resolved by most voters in the UFW's favor if all eligible employees had received communication from both unions. But if list objections are to be adjudicated on a basis other than the completeness and accuracy of the list itself, it is necessary to speculate about the difference an adequate list would have made to the objecting union's campaign. Fairness requires that the benefit of those doubts which must always attend such an exercise in speculative reasoning be given to the objecting party, which reasonably believed it was entitled to receive, and would be able to base its campaign on, an adequate list. If a deficient list provides a plausible explanation for an ineffective campaign, that list should be presumed to have been either the cause or a major contributing cause of the ineffectiveness.

B. Election site visibility

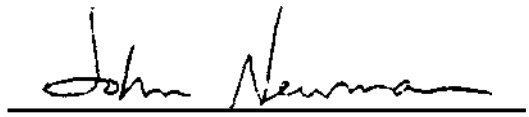
The evidence regarding conditions at the election site on the morning of October 19, 1983, establishes that darkness and fog reduced visibility to a minimum during much of the election, and that the Board agents conducting the election failed not only to provide satisfactory sources of lighting but also to give the employees adquate explanations of the voting procedure. The Board agents' performance does not seem to have met basic standards of professionalism.

Nonetheless, the testimony of the credible witnesses indicates that seeing the ballots, while difficult, was not impossible. Moreover, the clear markings on the ballots themselves in places appropriate for registering choice is strong evidence that they could be seen and in fact were seen.

Accordingly, I conclude that the fog and darkness were not so severe as to prevent the election from being a valid expression of free employee choice. The objection based on poor visibility at the election site should be dismissed.

DATED: September 5, 1984

Respectfully submitted,



JOHN NEWMAN
Investigative Hearing Examiner