Carpenteria, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

SANDYLAND NURSERY CO.,INC., Employer, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Petitioner.	)	Case No.85-RC-l-OX 12 ALRBNo.1

DECISION AND CERTIFICATION OF REPRESENTATIVE

Following a Petition for Certification filed by the United Farm Workers of America, AFL-CIO (UFW) on February 13, 1985, a representation election was conducted on February 20, 1985, among all agricultural employees of Sandyland Nursery Co., Inc. (Employer or Sandyland). The Tally of Ballots showed the following results:

UFW	80
No Union	14
Unresolved Challenged Ballots	11
Total	105

The Employer filed objections to the election. The following objection was set for hearing:

> Objection No. 8 to the extent that it is alleged therein that threats of bodily harm, rape and the burning of houses were made to and/or within hearing of employees, and whether such conduct tended to interfere with employee free choice and affected the results of the election. See Pleasant Valley Vegetable Co-op (1982) 8 ALRB No. 82. For that purpose, the Board desires to take evidence at hearing regarding whether and by whom such threats were made and, if so, to whom they

were directed as well as the extent to which they may have been heard directly or subsequently disseminated to bargaining unit employees prior to the election.

A hearing was conducted before Investigative Hearing Examiner (IHE) Marvin J. Brenner who thereafter issued the attached Decision recommending that the Agricultural Labor Relations Board (ALRB or Board) dismiss the Employer's objection and certify the UFW as the collective bargaining representative of the Employer's agricultural employees. The Employer timely filed exceptions to the IHE's Decision and a supporting brief.

The Board has considered the record and the IHE's Decision in light of the exceptions and brief and has decided to affirm his rulings, findings[1/] and conclusions and to certify the UFW as the collective bargaining representative of the agricultural employees of Sandyland.

The Employer's allegation that two pre-election threats were made in the presence[2/] of alleged supervisor Maria Espinoza was not refuted by the UFW. Espinoza testified that union supporter and supervisor Lupe Gil passed within 6 to 8 feet of her and stated: "Woe to him who goes and tells to the office, who tells tales at the office, because Jorge already had someone to explode the car, and that we would even burn the house down." Gil did not testify. Lilia Vasquez, one of Espinoza's crew members and the only other employee within hearing distance, testified

[1/] We need not determine whether Maria Espinoza was or was not a supervisor as it is not necessary to our conclusion herein.

[2/] The evidence does not clearly establish that these threats were directed at Espinoza, but only that she heard them.

that Gil's remark referred not to Espinoza but to another employee and came in response to Vasquez' inquiry as to the consequences of the other employee's defection from the union. Although Espinoza testified that she did not understand Gil's comment to refer to her, a third employee, Jessica Barber, testified that Espinoza did tell her about a threat to burn down her house but that Espinoza had stated that it was all right with her because she had insurance.

Regardless of the actual substance or intent of the statement, however, its isolated nature was established by the Employer's own witnesses. Both Vasquez and Barber testified that they had not discussed the comment with others -- Vasquez because she did not believe it to be important. Furthermore, Espinoza did not claim to have mentioned it to any other unit members.

Espinoza's allegation with respect to the second "threat" is more substantial. She testified that union supporter Fidel Bernal stated' to her two days before the election, "if you back off [from the union] I'm going to get men all drunk and they're going to undress you and they're going to do whatever they want." Espinoza's testimony relating to the dissemination of the threat, however, was contradicted both by her own and Jessica Barber's testimony. Her claim on redirect that she told everyone in her crew (a total of 6) that she had gone to an attorney to protect herself was contradicted by her previous testimony unequivocally denying that she had discussed Bernal's threat with anyone other than Vasquez and Barber. Her testimony that she discussed Bernal's threat with Vasquez and Barber was contradicted by both Vasquez

and Barber. Ultimately, however, with the prodding of counsel for the Employer, Barber testified to having heard Bernal make a similar threat, but outside the presence of Espinoza. Barber stated, however, that only she and Vasquez heard the remark and other employees were too far away to hear. Therefore, although Barber's testimony could be seen as corroborative of Espinoza's claim that Bernal actually made such a threat, it also supports our finding that the threat was isolated both in its exposure and in its impact.

We find that the threats were such that they could have a tendency to interfere with employee free choice. However, we also find that the threats were isolated and were not disseminated to more than one or two bargaining unit employees. Therefore, in light of the disparity in the tally of votes between the UFW and No Union, we conclude that the threats cannot be deemed to have affected the results of the election. (See Jack or Marion Radovich (1976) 2 ALRB No. 12, cited with approval in Triple E Produce Company v. ALRB (1985) 35 Cal. 3d 42, 51.)

CERTIFICATION OF REPRESENTATIVE

It is hereby certified that a majority of the valid votes has been cast for the United Farm Workers of America, AFL-CIO and that, pursuant to Labor Code section 1156, the said labor organization is the exclusive representative of all agricultural

employees of Sandyland Nursery Co., Inc., in the State of California for the purposes of collective bargaining as defined in section 1155.2(a) concerning employees' wages, hours and working conditions.

Dated: February 4, 1986

JYRL JAMES-MASSENGALE, Chairperson

JOHN P. McCARTHY, Member

JORGE CARRILLO, Member

PATRICK W. HENNING, Member

GREGORY L. GONOT, Member

CASE SUMMARY

Sandyland Nursery Co., Inc.
UFW

Case Nos. 85-RC-l-OX
12 ALRB No. 1

IHE DECISION

Following a representation election in which the United Farm Workers of America, AFL-CIO (Union) received a majority of the votes case, the Employer timely filed post-election objections, part of one of which was set for hearing. The objection alleged that threats of bodily harm, rape and the burning of houses were made to and/or within the hearing of employees and that they tended to interfere with employee free choice and affect the results of the election. At the close of the Employer's case, the Investigative Hearing Examiner (IHE) granted the Union's Motion for Directed Verdict, finding that the Employer had failed to make out a prima facie case that the conduct complained of tended to interfere with employee free choice. Thereafter, the IHE issued his Decision wherein he concluded that the threats were isolated and meaningless, especially since they were not made by Union agents and were directed to a supervisor.

BOARD DECISION

The Board affirmed the rulings, findings, and conclusions of the IHE with one exception. It declined to make a finding concerning Espinoza's supervisory status as such a finding was not necessary to its conclusion. In addition, it found that the threats were repeated to only two employees and were not disseminated among the other members of the bargaining unit. The Board therefore adopted the IHE's Order of Certification.

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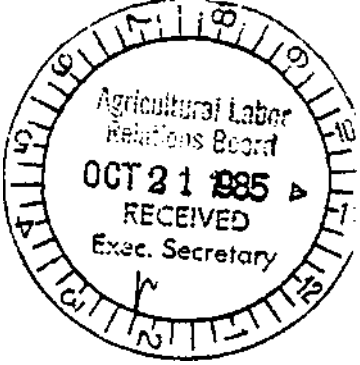
STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

Case No. 85-RC-l-OX



In the Matter of:)
)
SANDYLAND NURSERY CO., INC.,)
)
Employer,)
)
and)

UNITED FARM -WORKERS OF AMERICA, AFL-CIO,

Petitioner.

Appearances:

Scott A. Wilson
Littler, Mendelson, Fastiff & Tichy
701 B Street, Suite 300
San Diego, California 92101
for the Employer

Ned Dunphy
United Farm Workers
P.O. Box 30
Keene, California 93531
for Petitioner

Before: Marvin J. Brenner
Investigative Hearing Examiner

DECISION OF THE INVESTIGATIVE HEARING EXAMINER

MARVIN J. BRENNER, Investigative Hearing Examiner:

This case was heard by me on August 27, 1985. The facts giving rise to this proceeding are these. On February 13, 1985, the United Farm Workers of America, AFL-CIO (hereafter "UFW" or "Union") filed a Petition for Certification seeking an election by which it could become the exclusive bargaining representative of all of Sandyland Nursery's (hereafter "Employer" or "Company") agricultural employees. The Agricultural Labor Relations Board (hereafter "ALRB" or "Board") conducted such an election on February 20, 1985. The results were as follows:

United Farm Workers:	80 votes
No Union:	14 votes
Challenged Ballots:	11 votes

Thereafter, on February 26, 1985, the Employer filed 9 objections to the conduct of the election, but all such objections were dismissed as unmeritorious by the Executive Secretary of the ALRB on May 21, 1985. On appeal to the Board, the Executive Secretary's dismissal was upheld as to all objections except for a portion of Objection No. 8. As a result, the following issue was set for hearing:

> Objection No. 8 to the extent that it is alleged therein that threats of bodily harm, rape and the burning of houses were made to and/or within hearing of employees, and whether such conduct tended to interfere with employee free choice and affected the results of the election. See Pleasant Valley, Vegetable Co-op (1982) 8 ALRB No. 82. For that purpose, the Board desires to take evidence at hearing regarding whether and by whom such threats were made and, if so, to whom they were directed as well as the extent to which they may have been heard directly or subsequently

disseminated to bargaining unit employees prior to the election.

The Employer and Union were present throughout the entire hearing and participated fully. The Employer argued that I had no authority to make any findings of fact or conclusions of law in this case citing the recent appellate case of Lindeleaf v. Agricultural Labor Relations Board (1985) 169 Cal.App.3d 1190, 215 Cal.Rptr. 776 (incorrectly referred to throughout the Reporter's transcript as "Lindley") for support. The Lindeleaf case is no longer precedent as the Supreme Court granted review of the Court of Appeal decision on October 17, 1985. (See S.F. No. 24942.)

Upon the record[1] presented by the Employer and after careful consideration of the oral arguments made by the parties at the hearing, I make the following findings of fact and reach the following conclusions of law:

FINDINGS OF FACT

I. Jurisdiction

I find that the UFW is a labor organization within the meaning of section 1140(f) of the Act and that Sandyland Nursery Co., Inc., is an agricultural employer within the meaning of section 1140.4(c) of the Act.

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[1]As there was only one volume of the Reporter's transcript, references to it will be to the page number(s) only. Employer's exhibit is identified as "Co. 1".

II. The Business Operation

This company employs 90-100 people and operates a wholesale nursery dealing with potted plant material, primarily chrysanthemums, and some foliage. (p. 12.)

III. The Employer's Evidence

A. The Objectionable Conduct

The Employer's position is that one of its supervisors, Maria Espinoza[2], was threatened on two occasions prior to the election, once by a fellow supervisor and another time by a bargaining unit employee who was an active UFW supporter; and that these threats were so coercive and pervasive that they rendered the conduct of a fair election difficult or impossible.

1. Incident No. 1 - The threat to burn the house down

Espinoza testified that on a Tuesday Morning[3] while at work and in close proximity to bargaining unit employee, Lilia Vasquez, a fellow supervisor, Lupe Gil, walked by her on her way to work. According to Espinoza, as Gil passed by the area and within 6-8 feet of her, Gil made a statement in a normal voice, not directed to her or anyone

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[2]There is no dispute over Espinoza's supervisory position. (See testimony of Espinoza and her supervisor, Personnel Manager Maria Fragoso (pp. 39-41, 15, 26).)

[3]The evidence is confusing as to how close to the election it was that this incident took place. It is not certain if it occurred before or after the Petition for Certification was filed. (p. 43.)

in particular (Espinoza "didn't notice" to whom, if anyone, the statement was made), which was the following: "Woe to him who goes and tells to the office, who tells tales at the office, because Jorge already had someone to explode the car, and that we would even burn the house down." (pp. 45-46, 85-86, 91.) Gil then left. At the time Gil made her statement, according to Espinoza, there were 4 other workers around, but they were further away from her and spread apart, the closest one being over 19 feet away (pp. 88-89).

Espinoza had difficulty explaining what Gil's comment exactly meant to her. (p. 47.) The closest she could get to relating it to her personally was Espinoza's testimony that she wore a Union button after the Petition for Certification was filed but that she removed it two days later when her boss told her that she was a part of management. According to Espinoza, this upset some of the line employees because they felt that the removal signified that she was not backing the Union anymore. (pp. 51-52.) However, Espinoza could not testify that Gil was one of those who expressed such a feeling (pp. 53-54). In any event, Espinoza testified she was not scared by Gil's remark and told her fried Vasquez that she would not be afraid to tell the office. (pp. 90-91.)

Espinoza testified that she had known Gil 3-4 years since she (Gil) had started working for the Company and that they were friends who often spoke to one another at

work. (p. 90.) Espinoza regarded Gil as one of the leaders of the organizing drive. (p. 45.)

As mentioned, Espinoza was not sure Gil's remark was directed to her. But another one of the Employer's witnesses, Lilia Vasquez, was sure it was not. Vasquez made it clear that the remark wasn't even addressed to Espinoza but to some other employee, apparently not present at the scene.

> Q: (By counsel for Employer) . . . when Lupe Gil approached, did she say anything?
>
> A: Well, it wasn't her. It was I that asked a question, because it was before the voting. Because there's a worker whose name is Rogelio, and I was the one that started the conversation. And I said that we were all united, and that we knew that there was one that was chicken.
>
> Q: Okay, now who did you say that to?
>
> A: Lupe was coming at the time. And I said, "What's going to happen if Rogelio backs off?" And she said, "If Rogelio backs off we will burn his car -- and his house and his car." (p. 122)

Apparently, according to Vasquez, Espinoza thought Gil was talking about her house. (p. 122.) In any event, Vasquez testified that there were no other workers close enough to have heard this conversation as the closest was 30 yards away (p. 121, 128).

Vasquez also testified that she never discussed Gil's statement with any other employee because she didn't think it was important enough. (pp. 121, 123.) Vasquez further testified that Gil smiled when she made the statement. (p. 123.)

2. Incident No 2 - The threat of bodily harm and rape.

Espinoza also testified that Saturday, 48 days prior to the election, she was "sleeving" four inch pots, that there were some others from her crew in a group between 10-15 feet away,[4] and that she was close enough to hear them speak (pp. 55-56, 61). At that time, a Mr. Bernal, who was a member of another crew (the plant movers) and a man whom she had known at work, passed by and said in a "normal"[5] voice: "That Maria, she's not going to back out, right? . . . Well, I don't know. We'll see. It all depends. . . . If you back off, I'm going to get my men all drunk and they're going to undress you and they're going to do you whatever they want." (p. 58.) Espinoza said she responded to Bernal by telling him that she was not afraid; however, at the hearing she testified that she took his words seriously and was indeed scared. (pp. 58-59, 64, 97.)

Espinoza testified that she discussed Bernal's remark mainly with Jessica Barber but also with Lilia Vasquez, both of whom were friends of hers, members of her crew, and Union supporters (pp. 59-60, 93-94, 96).

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[4]Much later in her testimony she testified her crew was all spread out and that she couldn't tell how far one was from the other. (p. 93.)

[5]Her precise testimony was: "He speaks not laughing, not very serious. In a normal voice." (p. 58.)

According to Espinoza, she asked Barber if she knew what she (Espinoza) had been told and Barber replied: "Maria, I know. We all know. But if they ask me, I will be willing to say no." (p. 60.)

Espinoza also testified that she told Barber and Vasquez that Bernal's comments caused her to see an attorney "so that they would think that I had not just taken it and kept shut." However, at the hearing Espinoza testified that this was not the truth and that, in fact, she had not sought out anyone for legal advise.[6] (pp. 79-80.)

The Employer's next witness, Jessica Barber, could provide little corroboration for Espinoza's testimony. Barber denied every having had a conversation with Espinoza regarding Bernal's alleged remarks, could not recall if she came to work the day of the alleged Bernal remark, and could not remember seeking Bernal that day at all. (pp. 103-105, 108.) After cross-examining his own witness, counsel for the Employer got Barber to admit that in an interview with him the previous night, she had stated that she had heard Bernal tell Espinoza that he and his men were going to have their way with her but then she testified that he wasn't speaking to Espinoza when he uttered it. Next Barber testified that only she and Vasquez heard the remarks, then said some of the employees (less than 10) from different

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[6]Vasquez denied that Espinoza had ever said anything to her about seeking an attorney. (p. 123.)

crews, all of whom were Union supporters, were there talking about the Union when the statement was made but that no worker commented on the remark. And then, as a finale, Barber testified that Espinoza was not even present when Bernal made his statement. (pp. 109-113, 116.)

B. The Dissemination of the Gil and Bernal Remarks

Espinoza testified she was a supervisor over 6 others in the foliage department in February of 1985 and would send employees to Ranges 2, 3 and sometimes 4. (Co. 1.) (p. 39.) While there, there would be contact with employees from other crews as ". . . they were doing their work when we were going to fill the orders", and Espinoza testified that she observed members of her crew speaking to these others (p. 40). She also testified her crew ate lunch at a central location with workers from other crews. (p. 41.) However, Espinoza could not recall any specific times in the week preceding the election when people from her crew either worked with or worked in the vicinity of these workers from other crews. (p. 84.)

Personnel Manager Fragoso testified that it was the job of the 6 member foliage crew to receive customer orders from the shipping department and to then proceed to various locations throughout the nursery to pack the plants pursuant to those orders. As such, members of this crew could, according to Fragoso, come into contact with members of other crews, e.g. the disbudding crew (14 members), pot moving crew (6 members), the mum sleeving crew (6-10

members) or the mum planting crew (10 members). (pp. 14-16, 30-34.) With respect to these crews, Fragoso testified that the foliage crew would " . . . work around them. They'd have to pass them. They might greet them." (p. 34.) (Emphasis added.) Thus, Fragoso's testimony was that members of the foliage crew would more than likely run into members of the other crews, but she was unable to say exactly where the foliage crew was during the election week or that they were in fact, in each "range" of the nursery.[7] (See Co. 1.) There is then no direct evidence that the Gil or Bernal remarks were ever disseminated to other crews.[8]

C. The Union Connection

There is no evidence that either Bernal or Gil was a UFW organizer or that organizers were present when they made their remarks. (pp. 61-62.) And there is very little evidence that they were Union leaders. Neither Espinoza nor the Company's Personnel Manager, Fragoso, could

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[7]Fragoso also testified that sometimes some of the members of the foliage crew were loaned to other crews, but she was unable to confirm whether this happened during the election week. (pp. 14-15, 26-27.)

[8]Counsel for the Employer tried valiantly to show that Bernal's statement was heard by a great number of his fellow employees through a supposedly percipient witness, Jessica Barber. But Barber could not corroborate Espinoza's hearsay statement that she (Barker) had said that "(W)e all know" (p. 60), (referring to Bernal's statement), and Barber's entire testimony was so riddled by contradictions and non sequiturs as to be totally unworthy of belief. Moreover, "We all know" was never defined numerically so that even if it were to be believed, the evidence is lacking as to precisely how many workers Barber was referring to.

identify Bernal as a leader. Espinoza was specifically asked on direct examination about this and replied that he had no leadership role; ". . . (h)e just backed the union (p. 59). Fragoso testified that it was two other employees who had been calling regular meetings with the work force but that she had "heard through conversations with . . . managers . . . " that Bernal and Gil would have been among those taking an active role. (pp. 22-23.)

Both of the Employer's other witnesses, Lilia Vasquez and Jessica Barber, testified that the organizing effort was fairly spontaneous from within the entire work force and that no one in particular was considered a leader in the movement. Both were unaware of any committee of workers that was in charge of the organizing. (pp. 102-103, 119.)

IV. The Dismissal

At the close of all the Employer's evidence and upon motion by the UFW, I dismissed this matter because in my view the Employer had failed to make out a prima facie case that the conduct complained of tended to interfer with employee free choice and affected the results of the election.

ANALYSIS AND CONCLUSIONS OF LAW

It has been held that a legislatively created presumption exists in favor of certifying the results of an election. California Lettuce Co. (1979) 5 ALRB No. 24.

(See also, ALRA section 1156.3(c).) Generally speaking, the party objecting to certifying the results of an election has the burden of proving that specific misconduct occurred and that this misconduct tended to affect employee free choice to such an extent that it had an ultimate impact on the results of that election. Ibid; Bright's Nursery (1984) 10 ALRB No. 18; J. Oberti, Inc. (1984) 10 ALRB No. 50, IHED, p. 133. Where employees have participated in a free and fair election of a collective bargaining representative, they will not be deprived of their right to collective bargaining because of misconduct in which the Board cannot fairly conclude that the election results were affected. Ranch No. 1, Inc. (1979) 5 ALRB No. 1.

The Employer's only real argument in this case is that threats of bodily harm and burning were made in front of employees and that though these employees were few in number, the " -- threats very well could have permeated throughout the bargaining unit" as "it is reasonable to believe that there employees would circulate these threats among other employees --". See Employer's Request for Review, May 31, 1985, pp. 7-8. The Employer cites for authority the State Supreme Court's decision in Triple E Produce Corp. v. Agricultural Labor Relations Board, et al. (1983) 196 Cal. Rptr. 518. In that case, the Court approved of language found in United Broadcasting Company of New York (1980) 248 NLRB 403, 404 to the effect that ". . . . statements made during an election can reasonably

be expected to have been discussed, repeated, or disseminated among the employees, and therefore, the impact of such statements will carry beyond the person to whom they are directed".

Triple E is easily distinguishable from the matter at hand. In Triple E, it was union organizers who had made direct threats to unit employees that a failure to vote for the union would result in their losing their jobs. Here, there was no union staff involved in the misconduct nor was there any evidence of any "in-plant organizing committee" acting as agent for the UFW, the entire Union organizing campaign here appearing to be a fairly grass roots effort.[9] No UFW organizer or official made any statements or engaged in any conduct which would indicate to the Employer's employees that either Gil or Bernal were acting as agents for the UFW. So far as the employees were concerned, Gil and Bernal were seen as fellow employees (one a supervisor and the other a line employee) acting on their own and not as UFW organizers or organizing committee members. Nor was there any evidence that the UFW directed, authorized, knew of or ratified Gil's or Bernal's acts or conduct. As such, I find they were not acting as agents or representative of the UFW at any time during the election. See San Diego

9 Counsel for the Employer conceded that there was very little Union organizational activity and that Union representatives visited the company very few times. (p. 20.)

Nursery, (1979) 5 ALRB No. 43; Pleasant Valley Vegetable Co-Op. (1982) 8 ALRB No. 82.

The standard applied in assessing the impact of the conduct of a party or its agents on the free choice of voters differs from that applied to the conduct of a non-party. Misconduct by a party is considered more destructive. In Pleasant Valley Vegetable Co-Op., Id_. , (1982) 8 ALRB No. 82, the ALRB adopted the standard set forth by the Ninth Circuit in NLRB v. Aaron Brothers Corp. (9th Cir. 1977) 563 F.2d 409 [96 LRRM 3261] for all cases where it was alleged that the acts or conduct of voting-unit employees or other third parties before or during an election warranted setting aside the election. That standard was said to be the following:

> We adhere to the Board's policy that "activities of a union's employee adherents which are not attributable to the union itself are entitled to less weight in the variable equation which leads to a conclusion that an election must be set aside." N.L.R.B. v. Monroe Auto Equipment *Co.,* 470 F.2d 1329, 1332 (5th Cir. 1972). Furthermore this Court has recognized that the Board's policy "credits employees with the ability to give true weight to the possibly impulsive allegations of fellow employees induced by the heat of a campaign." N.L.R.B. v. Sauk Valley Mfg. Co., 486 F.2d 1127, 1131, n. 5 (9th Cir. 1973). So to warrant overturning an election, employee conduct must be "coercive and disruptive conduct or other action [which] is so aggravated that a free expression of choice of representation is impossible." (Emphasis added.) Monroe Auto Equipment, 470 F.2d at 1332, quoting Bush Hog, Inc. v. N.L.R.B. 420 F.2d 1266, 1269 (5th Cir. 1979).

The Employer argues that even if Gil and Bernal were not Union agents or representatives, the statements

they made were coercive, were disseminated widely and were known by all.

In Triple E one worker had testified that as a result of the union representatives' threats, "all" the workers were afraid of losing their jobs; another had testified that many were afraid to vote. Five workers testified in all, and there was evidence that organizers had spoken to other eligible voters besides those testifying and that others had discussed the threats. In addition, it was reasonable to infer from the organizers' statements that the union could implement its threat. Thus, Triple E involved the question of "-- serious threats to employees in the exercise of their vote." (Emphasis in original). Because the threats were pervasive in nature (the statements were made to arriving workers on and about the day of the election and were discussed in the field), tied job loss to the act of voting, and would have been taken seriously, the Court said an impermissible atmosphere of fear and coercion surrounded the balloting which rendered the election invalid.

None of these kinds of things were involved in the present case. Aside from the minuscule number of persons who may have heard or heard about both Gil's and Bernal's remarks to supervisor Espinoza (estimated to be at most 5 in the Gil incident, who were at the scene, and 2 in the Bernal matter, Barber & Vasquez, who were supposedly informed of the remark by Espinoza), there was no direct evidence that

the threats were disseminated to members of other crews. In fact, the Employer failed in its burden of proof to show (as had been done in Triple E) that in the week preceding the election, workers who had heard Gil's or Bernal's statements or had heard about them actually passed them on at any time to workers employed in other crews. This is a significant factor. See Triple E Produce Corp., supra, (1983) 196 Cal. Rptr. 518; Jack or Marion Radovich (1976) 2 ALRB No. 12. Thus, even if the foliage crew was in every one of the ranges during the election week, there was no reliable evidence that they spoke to anyone from other crews about the remarks. The Employer's evidence basically is that members of Espinoza's foliage crew may have eaten lunch with or may have been loaned to or worked with or may have been in the vicinity of members of other crews and that during that time (whenever it was) the said remarks of Gil and Bernal may have been communicated to workers in those other crews.[10] On this evidence, the Employer would have me overturn the results of an election which the Union won by a vote of 80 to 14.[11]

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[10]At no time did the Employer call even one witness (unlike Triple E) either from any of the other crews or from among those supposedly in the vicinity when the threats were made (other than Vasquez and Barber who were hardly corroborative) who could testify he/she actually heard the threats or heard about them.

[11]Even if each and every worker that potentially

(Footnote Continued)

Even had the Gil and Bernal statements been disseminated to other workers, a close examination of what the remarks actually conveyed lessens their impact. In the case of Gil's remark, it suggested a threat to explode a car or burning down a house of someone who "goes and tells to the office", but it is unclear what the connection was between these words and the organizational campaign. Moreover, a serious question lingers as to whether this statement was even directed to Espinoza and if not, to whom, if anyone, was it directed? Assuming arguendo that Espinoza was the intended recipient, which apparently she assumed, the Gil threat was not taken seriously by her, and Espinoza testified she was not intimidated or frightened.

Basically then, the statement by Gil, if addressed to Espinoza, was an isolated, virtually meaningless "threat" by one Company agent, to do harm to another. And claiming that its agent's statement poisoned the election atmosphere, the Employer asks me to overturn the entire proceeding. I will not because I cannot fairly conclude that Gil's statement in any way affected the results of the election. Ranch No. 1, Inc., supra, (1979) 5 ALRB No. 1.

Similarly, Bernal's threat to harm Espinoza if she backed off (presumably meaning if she recanted her previous

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(Footnote Continued)
could have come into contact with Espinoza's crew were informed of the Gil and Bernal statements, the total number would be no greater than 40 workers. (See Fragoso's testimony, pp. 14-16, 30-34.)

Union support) was also an isolated threat to harm a supervisor, this time made by a unit employee. As mentioned, there was no reliable evidence that anyone else heard it at that time, and the only persons who later heard about it-were Barber and Vasquez because Espinoza, according to her testimony, chose to tell them. And Espinoza acknowledged that both were already Union supporters.

Both the Gil and Bernal incidents involved threats (arguably) made to a supervisor who could not vote in the election.[12] Assuming arguendo that the statements were made close enough to some bargaining unit employees that they might have overheard them, there was a lack of evidence that a large enough group was involved so as to have had any effect on the election, especially here where the Union won by such a decisive margin. The Board requires that the misconduct must be threatening, coercive or disruptive in order to warrant setting aside an election. When the employee or other third party engages in such conduct, the election will not be set aside unless it appears that the electioneering substantially impaired the employees' exercise of free choice. Pleasant Valley Vegetable Co-Op, supra, 8 ALRB No. 82. Such was not the case here.

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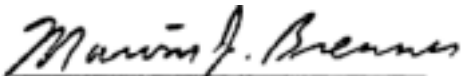
[12]The Employer acknowledges that a threat against a supervisor is much less chilling to employee rights than a threat directed to a bargaining unit employee. See Employer's Request for Review, May 31,1985, p. 8.

For all the foregoing reasons, I recommend that the Employer's objection be dismissed, and that the UFW be certified, pursuant to Labor Code section 1156, as the exclusive bargaining representative of all agricultural employees of Sandyland Nursery Co., Inc. in the State of California for purposes of collective bargaining as defined in Labor Code section 1155.2(a) concerning employees' wages, hours, and working conditions.

DATED: October 21, 1985



MARVIN J.BRENNER
Investigative Hearing Examiner