

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

ACE TOMATO COMPANY, INC./)	
GEORGE B. LAGORIO FARMS,)	
Employer)	Case No. 83-RC-10-F
)	
and)	
)	
UNITED FARM WORKERS)	
OF AMERICA, AFL-CIO,)	12 ALRB No. 20
)	
Petitioner,)	

DECISION AND CERTIFICATION OF REPRESENTATIVE

On August 16, 1983,¹ the United Farm Workers of America, AFL-CIO, (UFW or Union) filed a petition for certification herein, and on August 23 an election was conducted among the agricultural employees of Ace Tomato Company, Inc./George B. Lagorio Farms (Employer). The official Tally of Ballots showed the following results:

UFW.315
No Union	42
Unresolved Challenged Ballots.	<u>256</u>
Total.613

The Employer filed election objections, of which the Executive Secretary for the Agricultural Labor Relations Board (ALRB or Board) set the following for hearing:

1. Whether the alleged mass chanting by adherents of the UFW and the alleged attack on labor consultant Steven Highfill

¹all dates refer to 1983 unless otherwise noted.

during the polling tended to affect the results of the election;

2. Whether Board agents instructed waiting employees that they should vote for the UFW and if so, whether such conduct tended to affect the results of the election; and

3. Whether violent attacks occurred four days prior to the election by striking workers against nonstriking workers and by workers against labor consultant Alfonso Agraz and whether the alleged conduct tended to affect the results of the election.

A hearing on the objections was held before Investigative Hearing Examiner (IHE) Robert LeProhn commencing May 14, 1985. On November 18, 1985, the IHE issued his Decision, attached hereto, recommending that the objections be dismissed and that the UFW be certified as the exclusive bargaining representative for the Employer's agricultural employees. The Employer filed timely exceptions to the IHE's Decision and a supporting brief.

Pursuant to the provisions of Labor Code section 1146,² the Board has delegated its authority in this matter to a three-member panel.³

The Board has considered the recommended Decision of the IHE in light of the exceptions and brief and has decided to adopt his rulings, findings and conclusions as modified herein.

The Alleged Violent Conduct of Workers on August 20

On the morning of August 20, Alfonso Agraz and Roldan

²All section references are to the California Labor Code unless otherwise specified.

³signatures 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.

Ayala, two labor relations consultants working for the Employer, drove to the Lagorio fields on Drais Road with the intention of speaking to the 200 to 300 workers at the site. When Agraz stopped his car, some workers congregated around the car while the others stayed about 30 feet away. Ayala got out of the car and began to speak. However, the workers, some of whom were wearing UFW buttons, began shouting obscenities, and a group approached the car and began rocking 'it back and forth. Agraz got out and tried to speak, but the workers shouted loudly and told them to leave. Agraz and Ayala got back in the car, rolled up the windows and locked the doors. As they proceeded slowly to leave, some workers threw tomatoes and dirt clods at them.

Later that day, two other labor relations consultants, Steven Highfill and Jose Ibarra, visited the Employer's Turner Ranch to address the workers. As they got out of their car and approached the nearest crew, a woman wearing UFW paraphernalia and an older man asked what they were doing there. When they explained that they had come to talk to each crew about why the Employer wanted them to vote no-union, the woman became argumentative. Highfill stayed and talked to her for about twenty minutes while Ibarra went and talked to crew members and distributed leaflets and flyers.

Presently, some people drove up to the property, climbed over the fence and began going from crew to crew. Highfill testified that one of them used a bullhorn, but from the distance (250 to 300 yards away) he could not hear what was being said. Eventually some of the people got to the crew where he was. They

were wearing union buttons, shouting pro-union slogans, and urging workers to stop work and attend a meeting in the southwest corner of the field. When some of the men approached him, Highfill asked if they were union agents, but they replied that they did not have to answer his questions. He asked them to leave, but they refused.

Shouting "huelga" (strike), the people told the workers to stop picking and go to the meeting. Some of the workers on their way to the meeting, as well as some of the people from the highway, began throwing tomatoes and dirt clods at those who continued working. The workers ceased picking and some of them joined the group walking to the meeting, while others walked over to where their cars were parked. Highfill estimated that about 150 workers attended the meeting, which lasted thirty to forty minutes. From his car, through a pair of binoculars, he saw Juan Cervantes (whom he identified as a UFW employee) standing on something and addressing the workers through a bullhorn. After the meeting, everyone left without returning to work.

The IHE concluded that the conduct occurring on August 20 did not reasonably tend to interfere with voters' free choice and did not justify setting aside the election. In its exceptions brief, the Employer argues that in T. Ito & Sons Farms (1985) 11 ALRB No. 36 (Ito), the Board reexamined its standard for evaluating the impact of violence and threats on the election process and concluded, under facts similar to those in the instant case, that an atmosphere of fear and coercion had been created among employees by UFW representatives and supporters.

In evaluating the effect of coercive conduct on the election process, we employ the same standard as the National Labor Relations Board (NLRB). (T. Ito & Sons Farms, supra, 11 ALRB No. 36.) In assessing the effect of such misconduct, both this Board and the NLRB accord less weight to conduct not attributable to the union or the employer. (Ibid.; N.L.R.B. v. Advanced systems, Inc. (9th Cir. 1982) 681 F.2d 570 [110 LRRM 2418].) The test for setting aside an election because of nonparty conduct is whether the conduct was so aggravated that it created an atmosphere of fear or reprisal making employee free choice impossible. (T. Ito & Sons Farms, supra; N.L.R.B. v. Advanced Systems, Inc., supra.)

In Ito, we found that aggravated nonparty misconduct did require setting aside the election, where (1) during the days preceding the election, striking employees threatened large groups of employees with physical beatings and calling the Immigration and Naturalization Service (INS); (2) those engaged in making threats also committed acts of physical force, including holding rocks in their hands while making threats, blocking vans carrying workers from the field, puncturing tires and in one instance swinging a stick at a management employee; and (3) during the election, groups of union supporters continually campaigned among employees waiting in line to vote, threatening them with job loss or calling the INS if they did not support the Union. Thus, we concluded in Ito, the evidence of widespread, serious threats accompanied by acts of physical force created an atmosphere of fear and coercion rendering free voter choice impossible.

Our Decision in Ito referred to two NLRB cases in which threats of violence by nonunion adherents were held to have established an atmosphere of fear and coercion: Steak House Meat Co., Inc., (1973) 206 NLRB 28 [84 LRRM 12001 and Poinsett Lumber and Manufacturing Co. (1956) 116 NLRB 1732 [39 LRRM 1083]. We then remarked that where actual violence occurs, an atmosphere of fear and coercion is readily established, citing Al Long, Inc. (1968) 173 NLRB 447 [69 LRRM 1366] (Al Long); Ciervo Blanco, Inc. (1974) 211 NLRB 578 [86 LRRM 1452] (Ciervo Blanco); and Phelan and Taylor (1976) 2 ALRB No. 22 (Phelan).

Phelan involved the misconduct of Teamster union organizers who assaulted and injured UFW organizers while both unions were campaigning among workers. In one incident six days prior to the election, a Teamster organizer verbally abused a UFW organizer and then proceeded to strike him with his hands and kick him in the face and shins. Another Teamster organizer aimed a blow at a UFW organizer's camera and instead hit his face. On the day before the election, a group of Teamster organizers surrounded some UFW organizers and uttered loud insults and threats. Both incidents occurred in the presence of workers, and the Board was concerned that such acts could improperly influence employees to vote for the party associated with the violence out of fear of retaliation, or could deter other organizers from campaigning because of fear for their safety. The Board set aside the election, finding that the violence and threats created an atmosphere not conducive to a free and uncercered choice of bargaining representative.

In Al Long, the NLRB set aside an election where, during a strike preceding the election, several incidents involving violence and threats occurred: rifle shots fired through the employer's main window while employees were in the building; anonymous telephone calls, threatening bodily injury to employees eligible to vote in the election; bomb threats made to the employer; and unruly picketing, including harassment of employees with threats of bodily harm. The NLRB concluded that the election was held in an atmosphere of confusion, violence, and threats of violence, that would tend to create anxiety and fear of reprisal. The national board found it irrelevant that the conduct could not be attributed to the union, since the conduct was so aggravated that it rendered impossible a rational, uncoerced expression of choice concerning bargaining representation.

About five weeks before the election in Ciervo Blanco, pickets, in the presence of union organizers, threatened and assaulted employees trying to cross the picket lines. During the week following the filing of the petition, an employee's car was firebombed and homes and cars of other employees were damaged. Strikers, accompanied by union organizers, went to employees' homes and warned them not to cross the picket line or they and their families would be injured and property would be damaged. Although no misconduct occurred during the 30-day period preceding the election, the NLRB found that the conduct nevertheless was of so aggravated a character as to render free choice in the election impossible.

An atmosphere rendering free choice impossible was

clearly established in Ito, where employees were threatened with job loss, physical beatings and calls to the INS, and the threats were accompanied by acts of physical force such as puncturing tires and blocking vans carrying workers from the fields. In the instant case, however, the degree of physical force involved in the August 20 incidents (throwing dirt clods and tomatoes and rocking the labor consultant's car) does not appear to be of the minimum level found sufficient in NLRB and other ALRB cases to justify setting aside elections. There is no evidence that any of the August 20 incidents caused fear among workers, nor do the incidents represent a level of misconduct that reasonably would tend to create fear. Therefore, we conclude that the incidents did not create an atmosphere rendering free choice impossible and do not require setting aside the election.⁴

The Alleged Mass Chanting During Polling

The IHE found that during both the morning and afternoon voting sessions at the Drais Road Ranch polling site, large numbers of workers chanted their support for the UFW, shouting such phrases as "Viva Chavez" and "Viva la Union." From time to time, one of the Board agents would ask the people to keep order, and the shouting would stop for five or ten minutes but then start up again. The evidence did not establish that the leaders of the

⁴Member Henning would also not set aside this election due to the events of August 20. However, he would utilize the standard articulated in the now overruled opinion in T. Ito & Sons Farms (1983) 9 ALRB Mo. 56 (see Member Henning Dissenting, T. Ito & Sons Farms (1985) 11 ALRB No. 36; see also J. R. Norton (1979) 29 Cal.3d 1).

chanting were agents of the UFW,⁵ and the chants did not contain any threats of reprisal for failure to vote for the Union. The IHE concluded that the employee chanting did not constitute conduct preventing a free and uncoerced choice of bargaining representative.

In Perez Packing, Inc. (1976) 2 ALRB No. 13, we set aside the election because of the totality of objectionable conduct, which included beer drinking near the polling site and obvious intoxication of some of the voters; union observers engaging in conversations with prospective voters while they were waiting to cast their ballots; and noise from a crowd which Board agents refused to try to control. The Board held that, considered collectively, the objectionable conduct undermined the integrity of the election. However, in D'Arrigo Bros, of California (1977) 3 ALRB No. 37, we upheld an election in which a large number of persons waiting in line to vote yelled pro-union slogans. Noting that the election proceeded smoothly and that the conduct did not disrupt the voting process, the Board concluded that the conduct did not rise to a level warranting the setting aside of the election. Similarly, the Board certified the election in Vessey Foods, Inc. (1982) 8 ALRB No. 28, where demonstrators stood 50 yards away from voters and yelled and waved union flags during the election. The Board held that the evidence failed to show

⁵The IHE noted that one of the leaders, Jose Andrade, allegedly told Employer attorney Spencer Hipp that he was a UFW organizer. However, Andrade was admitted by the Employer to be a Lagorio employee, and the IHE found his status to be more that of a ranch committee member than a union organizer.

that the demonstration disrupted the election, which was run peacefully and without interruption.

We find that the chanting conduct in the instant case is more akin to the conduct in D'Arrigo Bros, and Vessey Foods than to the conduct in Perez Packing. Here, no disruption of the election process occurred, and in fact the election ran smoothly without confusion or interruption. It does not appear that the chanting created (or reasonably would create) an atmosphere of confusion, violence, fear or anxiety that would tend to affect voter free choice. Therefore, we conclude that the chanting incident does not justify setting aside the election.

The Alleged Attack on Labor Consultant's Automobile During Polling

The Employer's labor consultant Steven Highfill arrived at the Drais Road site after the morning polling had already begun, and parked his car on the shoulder of the road, several hundred yards from the voting tables. At 10 a . m . , assuming that the voting was finished, Highfill drove to a point about 25 yards from the voting tables where there was a large crowd of people. A Board agent came up to the car and asked Highfill what he was doing there. When Highfill said he had thought the voting was over, the agent replied that the voting was not finished, and ordered him to leave.

Highfill began to drive slowly through the crowd, but after getting past the people he realized that the road dead-ended, so he turned his car around to go back the same way he had entered. The Board agent approached him again, and the car was quickly surrounded by about 70 workers. At that point, people

began rocking the car and throwing dirt clods and tomatoes at it. The Board agent told the people to "knock it off," then stepped away, and Highfill proceeded very slowly back to Drais Road. Highfill, who was not struck by any of the objects himself, estimated that the total time, from when he entered the voting area to when he left, was about ten minutes.

The IHE found that the incident was not attributable to the Union. Moreover, the Board agent immediately took control of the situation by telling the crowd to stop its actions and ordering Highfill to leave the vicinity until voting was completed. The conduct did not cause any disruption of the election process, and did not represent a level of violence likely to have had any coercive effect on voters. Therefore, we affirm the IHE's conclusion that the incident did not, and reasonably would not, create an atmosphere of fear or coercion tending to affect voter free choice.⁶

Board Agent Instructions to the Voters

Vicente Garcia, an election observer for the Employer at the Drais Road site, testified that before the morning balloting began, a Board agent used a sample ballot to explain the voting procedure to the workers waiting to vote. Garcia stated that the Board agent told the people:

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⁶We disavow any suggestion in the IHE's Decision that disorderly conduct directed toward management representatives should be taken less seriously than such conduct directed toward employees. (See IHE Decision, p. 23.)

Remember, if you want the union, vote for the eagle, if you don't want the union, vote over here. Now, remember. Did you understand? If you want union, little eagle; if not, here.

When Garcia returned for the afternoon voting session, a Board agent named Medrano organized the lines of voters and explained the voting process to them. Garcia approached Medrano and said the people had already been told how to vote. Medrano replied, "You ain't nobody to tell me what I'm supposed to do."

Garcia testified that he observed "a certain tendency" of the Board agents to make sure that people noticed the eagle on the ballot, but when the IHE asked if the agents also pointed to the no-union side of the ballot, Garcia answered, "Yes." He stated that he thought the Board agent (presumably Medrano) favored the Union because the agent said:

If you want the Union, vote for the little eagle; if not, vote on the other side. But remember, if you want the union, vote for the little eagle.

In Coachella Growers, Inc. (1976) 2 ALRB No. 17, the Board stated that Board agents should not only be free of bias but should refrain from any conduct that would give rise to the impression of bias. We have held that Board agent conduct requires the setting aside of an election if the conduct is "sufficiently substantial in nature to create an atmosphere which renders improbable a free choice by the voters." (Bruce Church, Inc. (1977) 3 ALRB No. 90.)

We affirm the IHE's conclusion that the Board agents' instructions at each voting period were unbiased and could not

reasonably have created an impression of Board agent bias. It was proper for the Board agents to explain to voters how to vote for or against the Union, and the method employed for doing so was evenhanded. Garcia's testimony does not establish that the Board agents spoke about the UFW side of the ballot more often than the no-union side, nor that they in any other way gave greater emphasis to the union side. Therefore, we conclude that the Board agents' instructions do not provide a basis for setting aside the election.

Conclusion

We conclude that the Employer's election objections do not, either individually or cumulatively, justify setting aside the election herein. Accordingly, the objections are dismissed.

CERTIFICATION OF REPRESENTATIVE

It is hereby certified that a majority of the valid votes has been cast for the United Farm Workers of America, AFL-CIO, and that, pursuant to Labor Code section 1156, the said labor organization is the exclusive representative of all agricultural employees of Ace Tomato Company, Inc./George B. Lagorio Farms, in the State of California, for purposes of collective bargaining as defined in section 1155.2(a) concerning employees' wages, hours and working conditions.

Dated: October 21, 1986

JOHN P. McCARTHY, Member

PATRICK W. HENNING, Member

MEMBER CARRILLO, Dissenting:

I am at a loss to explain how the Board could set aside the election in T. Ito & Sons (Ito) (1985) 11 ALRB No. 36, yet now certify the instant election results where the degree of misconduct was much greater. To the extent Ito represented a strong and clear statement by the Board that it will not tolerate misconduct which interferes with employee free choice, the majority's decision undermines that statement.

As in Ito, the majority acknowledges that where actual violence occurs, an atmosphere of fear and coercion is readily established. However, after reviewing the facts of some NLRB and ALRB cases, the majority concludes quite incredibly that the misconduct herein, namely the throwing of dirt clods and tomatoes at labor consultants and employees as well as the rocking of vehicles with labor consultants in them in the presence of employees, is not of a minimum level sufficient to justify setting aside the election. The majority errs in several respects.

Initially, the majority ignores our finding in Ito, supra, p. 19, where we rejected the proposition that the throwing of rocks directed at a large portion of the workforce is minimal violence insufficient to establish an atmosphere of fear and coercion. To those familiar with agriculture, the throwing of hardened dirt clods is every bit as capable of inflicting harm as is the throwing of rocks. There is no doubt whatsoever in my mind that when employees themselves are subjected to the throwing of dirt clods or when they see others subjected to it, such misconduct reasonably tends to cause fear in them and coerces them in the exercise of their rights.

Furthermore, while it can be said that some NLRB and ALRB cases setting aside elections have involved more aggravated instances of violence than those present in this case, e. g. , see Al Long, Inc. (1968) 173 NLRB 447 [69 LRRM 1366], and Ciervo Blanco, Inc. (1974) 211 NLRB 578 [86 LRRM 1452], it does not follow that the misconduct in this case is insufficient to set aside the election. The misconduct in this case was much more serious than in Ito. In Ito, the misconduct consisted primarily of verbal threats by strikers to beat up nonstriking workers and/or to call the Immigration Naturalization Service (INS). The violence that was coupled with it was minimal: vans attempting to exit a field were blocked; one employee swung a stick at a management official; and the tire of a nonstriker's car was punctured. As opposed to the largely verbal threats in Ito, the misconduct in this case went beyond mere words. On August 20, three days before the election, union supporters threw dirt clods

and tomatoes at two labor consultants inside their car, and then rocked their car back and forth after the two tried to speak to a group of 200 to 300 workers, who were gathered only 30 feet away. Later that same day, union supporters threw dirt clods and tomatoes at a large group of workers in a field, successfully stopping all work, in an attempt to force those workers to go to a meeting nearby where a union organizer was speaking. Finally, while the election was in progress, about 70 workers at the actual voting site surrounded the vehicle of labor consultant Steven Highfill, rocked it back and forth and again threw dirt clods and tomatoes at him.

Other NLRB cases demonstrate that misconduct far less serious than that involved in the instant case has caused the NLRB to set aside elections. For example, in Westwood Horizons Hotel (1984) 270 NLRB 802, cited in Ito, the election was set aside where a group of employees verbally threatened to beat up employees who would not vote for the union and forcibly escorted two employees to the voting site. In Poinsett Lumber Manufacturing Co., Inc. (1956) 116 NLRB 1732 [39 LRRM 1083], the NLRB found that verbal threats, unaccompanied by any physical acts, were coercive and interfered with the employees' free choice. I fail to see how the throwing of dirt clods and tomatoes at labor consultants and at a large portion of the workforce, as well as the rocking of labor consultants' vehicles, is somehow less serious than the chiefly verbal threats involved in the above-cited cases.

Finally, the majority partially bases its conclusion that

the misconduct in this case is insufficient to justify overturning the election on the lack of evidence showing that the August 20 incidents caused fear among the workers. The California Supreme Court stated in Triple E. Corp. v. ALRB (1983) 35 Cal.3d 42 that in assessing the coercive effect of misconduct, such as threats, the proper standard is objective, i . e . , whether the misconduct reasonably tended to coerce employees in the exercise of their rights. The Court explicitly rejected a subjective standard which measures the employees' personal reaction, such as fear, to the misconduct. The Board in Ito, supra, p. 11 adopted that reasoning. The majority in this case now ignores it.

In summary, the three incidents herein were not isolated or insignificant. There was actual physical misconduct, in the form of the throwing of dirt clods and tomatoes as well as the rocking of vehicles, which occurred shortly before the election and resurfaced during the election itself. The misconduct was directed at a large number of workers and/or was witnessed by other employees. Since I believe the misconduct was coercive and aggravated, I would set aside the election.

Dated: October 21, 1986

JORGE CARRILLO, Member

STATE OF CALIFORNIA
AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of:		Case No. 83-RC-10-F
)	
ACE TOMATO COMPANY, INC./)	
GEORGE LAGORIO FARMS,)	
Employers,)	
)	
and)	
)	
UNITED FARM WORKERS)	
OF AMERICA, AFL-CIO,)	
)	
Petitioner.)	

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Before: Robert LeProhn
Administrative Law Judge

DECISION OF THE INVESTIGATIVE HEARING EXAMINER

STATEMENT OF THE CASE

ROBERT LE PROHN, Administrative Law Judge:

This case was heard before me on May 14 and May 15, 1985, in Stockton, California.

Following a Petition for Certification filed by the United Farm Workers of America, AFL-CIO (UFW), an election was conducted on August 23, 1983, among the agricultural employees of the employer Ace Tomato Company, Inc./George B. Lagorio Farms. The tally of ballots showed the following results:

UFW	315
No Union	12
Challenged Ballots	256

On February 14, 1984, a second amended tally of ballots issued with the following results:

UFW	315
No Union	42
Unresolved Challenged Ballots	256

The employers filed some 63 objections of which Ace Tomato Company Objections Nos. 6, 8, 9, 15, 22, 23, 26, 31, 33 and 34 together with Lagorio Farms objections Nos. 3 and 14 were noticed for hearing. These objections relate to three subject matters:

1. Mass chanting by UFW adherents and an attack on employer representation Steve Highfill during the polling.
2. Whether ALRB agents told waiting employees to vote for the UFW and if so, whether this conduct tended to affect the

outcome of the election.

3. Striking employee conduct vis-a-vis non-striking employees four days before the election against Labor Consultant Alfonso Agraz.

On October 5, 1984, the Executive Secretary issued an Order Partially Denying Employer's Requests for Review of Executive Secretary's Order Partially Dismissing Objections; Notice Granting Petitioner Opportunity to Respond and to Employers' Request for Review wherein certain Ace Tomato and Lagorio objections were noticed for hearing. By order of the Acting Executive Secretary dated November 28, 1984, the following Ace Tomato Company, Inc., objections were set for hearing:

Objection No. 6:

The ALRB, through its representatives and agents, interfered with the fair operation of the election process and showed extreme bias in favor of the UFW by improperly instructing employees with regard to the choices available on the ballot used during the election.

Objection No. 8:

The ALRB, through its representatives and agents, interfered with the fair operation of the election process and otherwise displayed a totally biased attitude in favor of the UFW by instructing waiting employees that they should vote for the UFW.

Objection No. 9:

The UFW, through its agents, representatives and supporters, interfered with the fair operation of the election process by engaging in illegal campaign activities prior to the election through the use of threats and violence directed to the eligible voters.

Objection No. 15:

The UFW, through its agents, representatives, and supporters, interfered with the fair operation of the election process by engaging in violent activity in the field prior to the election in a manner designed to coerce and restrain employees.

Objection No. 22:

The UFW, through its agents, representatives, and supporters, interfered with the fair operation of the election process by unlawfully campaigning in the polling area to and during the election process, virtually on top of the ballot box.

Objection No. 23:

The UFW, through its agents, representatives, and supporters, interfered with the fair operation of the election process by unlawfully campaigning with voters waiting to vote.

Objection No. 26:

The UFW, through its representatives, agents, and supporters, interfered with the fair operation of the election process by creating an atmosphere of confusion, coercion, and a circus in the polling area by its chanting and unlawful campaigning prior to and during the election process.

Objection No. 31:

The UFW, through its representatives, agents, and supporters, interfered with the fair operation of the election process by taking illegal access and inciting workers in direct violation of the ALRB's Regulations regarding access.

Objection No. 33:

The UFW, through its representatives, agents, and supporters, interfered with the fair operation of the election process by throwing and encouraging others to throw, tomatoes at workers who did not engage in an illegal work

stoppage.

Objection No. 34:

The UFW, through its representatives, agents, and supporters, interfered with the fair operation of the election process by creating an atmosphere of intimidation, coercion, and fear by hitting with tomatoes the car of Company representatives who were trying to speak with employees in the field.

The Acting Executive Secretary's order also set for hearing the following George Lagorio Farms objections:

Objection No. 3:

The UFW, through its agents, representatives and supporters interfered with the fair operation of the election process by engaging in illegal campaign activities prior to the election through the use of threats and coercion directed to the eligible voters.

Objection No. 14:

The UFW, through its representatives, agents, and supporters, (sic) interfered with the fair operation, of the election process by creating an atmosphere of intimidation, coercion, and fear, by hitting with tomatoes the car Company representatives who were trying to speak with employees in the field.

The Acting Executive Secretary's Order further stated that:

The Board shall hear evidence related only to the following allegations:

(1) Regarding Ace's Objection Nos. 22, 23 and 26, whether the alleged mass chanting by adherence of the United Farm Workers of America, AFL-CIO (UFW) and the alleged attack on Steven Highfill during the polling tended to affect the results of the election;

(2) Regarding Ace's Objection Nos. 6 and 8, whether ALR3 agents instructed waiting employees that they should vote for the UFW

and whether this alleged conduct tended to affect the results of the election; and

(3) Regarding Ace's Objection No.s 9, 15, 31, 33 and 34 and George Lagorio Farms Objection Nos. 3 and 14, whether violent attacks occurred four days before the election by striking workers against non-striking workers, and by workers against labor consultant Alfonso Agraz and whether the alleged conduct tended to affect the results of the election.

All parties were represented at the hearing and were given a full opportunity to participate in the proceedings. Upon the entire record, including my observation of the demeanor of the witnesses, and after consideration of the post-hearing briefs submitted by the parties, I make the following findings, conclusions and recommendations:

BOARD AGENT CONDUCT

In substance the employers contend that Board agents engaged in conduct which manifested a pro-union bias. It is further contended that this bias standing alone suffices to set aside the election and if not, coupled with other alleged wrongful conduct adds to a cumulative affect which warrants setting aside the election.

Testimony regarding Board agent conduct at Draais Ranch during the period of the election was elicited from employer witness vicente Garcia who worked as a tomato picker for Rafael Limon, a labor contractor supplying workers for Ace Tomato. He

was an employer observer at the Drais Ranch voting site.¹

Garcia testified as follows:

Prior to the of the election a Board agent stated to people who were gathered to vote:

"Remember, if you want the union, vote for the eagle; if you don't want the union, vote over here.-Now, remember. Did you understand? If you want the union, little eagle; if not, here.'" [Tr. I:130.]²

A similar statement was made to a group of 100-200 people assembled in front of the voting tables as they made ready to vote:

"He (the Board agent) addressed himself to them, and in a high voice so that they all could hear him, 'you know already what you have to do,¹ but it was as a question. And he repeated the same thing, 'If you want the union, you vote for the little eagle; if you don't want the union, you vote over here. Do you understand it all?' And they all clapped. 'Up with Chavez' they shouted and they applauded." [Tr. I:132.]

Essentially the same statements were made after the polls opened to people lined up to vote. [TR. I: 133.]

Following the break in balloting between morning and afternoon voting periods, Garcia returned to Drais Ranch (about 4:00 p.m.) for the second voting period. Garcia testified that Board agent Medrano who had not been present during the morning

¹Voting was conducted at two locations. The employees of Lagorio voted primarily at a site called Turner Ranch. Ace Tomato employees voted at a site variously described as Drais Ranch or the field at the intersection of Highway 4 and Drais Road.

²Reporter's Transcript cited as TR. I or II. Arabic numbers refer to page citations within the volume.

voting period was organizing voters into lines and explaining how to vote if they wanted the union and how to vote if they did not want the union. When Garcia attempted to tell Medrano the voters had already received their instructions, Medrano responded in what Garcia regarded as an aggressive way saying: "You ain't nobody to tell me what I'm supposed to do." [Tr.I:148.]

Garcia's testimony was not controverted. Board agent Medrano was not called as a witness by the UFW. The employer urges that an adverse inference be drawn from the failure to call Medrano. However, since Medrano was not a witness under the union's control though subject to subpoena, drawing an adverse inference would be inappropriate.³ The union cannot be presumed to know how Medrano would testify. However, there is no need for an adverse inference. Garcia's testimony regarding the Board agents' explanation to the workers regarding how to vote for and against the union is independently credible.⁴ However, Garcia's conclusion that the Board Agent's statements manifests a union bias is disregarded.

Coachella Growers, Inc. (1976) 2 ALRB No. 17, spells out a two-pronged test for ascertaining whether Board agent conduct warrants setting, aside an election:

"Board agents should not only be free of bias
but should refrain from any conduct that would
give rise to the impression of bias

³Evidence Code section 413.

⁴Garcia's testimony was uncorroborated as well as uncontroverted. If a witness is otherwise credible, nothing prevents crediting his uncorroborated testimony.

. . . . [T]o constitute grounds for setting an election aside, bias or appearance of bias must be shown to have affected the conduct of the election itself, and have impaired the balloting's validity as a measure of employee choice.⁵

In Coachella the Board found the following Board agent conduct insufficient to justify setting aside the election:

(a) At the preelection conference, the Board agent refused the employer's attorney's request that she sit "as a presiding individual normally does." It was alleged that she aligned herself with the UFW representatives. The Board agent testified credibly that she sat at one corner of a table with UFW representatives on one side of her and employer representatives on the other.

(b) The Board agent refused to give assurances that the authorization cards showed the existence of a bona fide question concerning representation, stating only that the showing of interest had been determined.

(c) The Board agent attempted to set up two voting polls which the employer contended might have permitted employees to vote twice. When that proposal was opposed by the employer's attorney, she made arrangements satisfying the attorney's objections.

In Bruce Church, Inc. (1977) 3 ALRB No. 90 the Board enunciated a standard which requires setting aside an election where complained of Board agent conduct is ". . . sufficiently

⁵Ibid. p. 5.

substantial in nature to create an atmosphere which rendered improbable a free choice by the voter." (Id., p. 3 .) The complained of conducting the instant case does not meet this requirement.

Board agent conduct must be examined in context. One cannot persuasively argue that it was improper for a Board agent to point out to prospective voters how to vote for or against the union. It is difficult to conceive of a more evenhanded method of doing this than that established by Garcia's testimony. There is nothing inherently wrong or inherently coercive in the words attributed to the Board agents by Garcia.

Obviously Garcia's statements to Medrano to the effect that the workers (voters) to whom Medrano was speaking had already been instructed with respect to how to vote was incorrect. In the morning the persons receiving voting instructions were those voters at the polls at that time; there is no indication they did not vote during the morning polling. Thus, the people to whom Medrano was speaking were likely to be people who had not yet voted and had not been instructed prior to or during the morning voting session.

In sum, the instructions given by Board agents at each voting period were unbiased and cannot reasonably be found to have created the impression of Board agent pro-union bias.⁶

⁶I am unimpressed, by Garcia's view that the Board agents reference to the "little eagle" when pointing out where a mark should be placed to vote "yes" manifest bias. The "little eagle" while the symbol of the UFW is also the Board's symbol for a ballot choice in favor of the UFW.

For the reasons set forth above, I recommend dismissal of Ace Tomato Company's Objections Numbers 8 and 9.

THE EVENTS

Election Day at Drais Ranch

Steven Highfill, a self-employed labor relations consultant and trainer, was employed in August 1983 by Ace Tomato Company and by George B. Lagorio Farms in the Manteca-Stockton area in connection with organizing efforts of the UFW. On election day Highfill visited the polling sites at Drais road and at Turner ranch to observe the voting boxes and to insure that employer observers were properly situated. He returned to the Drais Road site between 8:30 and 8:45 a.m. and observed balloting in progress. Highfill parked on the shoulder on the west side of Drais Road and observed cars coming into the area. Using binoculars he was clearly able to observe the voting tables and the gondolas in the area of the tables. He testified there were 200 to 250 people congregated around the tables adjacent to the voting booths and on the gondolas. There were no apparent voting lines.

The polls at the Drais Ranch were noticed to open at 6:00 a.m. They opened at least one hour late. The observers' tables and the voting booths were positioned between a dirt road and two parked flatbed gondola trailers.

During the period before the polls opened, six to twelve unidentified people were observed distributing UFW materials to people coming to work on the property.

While the polling site was being set up, there were 150 to 200 people scattered in the area of the voting tables. Employer representative Spencer Hipp testified there were three "organizers" at the front of the crowd.⁷

People were seated on the trailers wearing UFW buttons, arm bands, and bumper strip type stickers pasted on their shirts. Hipp testified there was constant shouting back and forth which he characterized as chanting; he does not speak Spanish and was unable to testify regarding the substance of what was said; however, he recognized certain pro-UFW statements.⁸ Before and during the period the polls were open, Jose Andrade and a woman named Sota went among the workers shouting "Let 's vote for the little eagle. Remember the little eagle." Both were wearing UFW insignia. As Soto and Andrade shouted, the great majority of people would respond "Up ." One of the Board agents told Soto and the people to keep order. The shouting stopped for 5 or 10 minutes. Jaime Castillo, a company observer, testified that Board agents tried unsuccessfully on two or three occasions to stop the shouting.

At approximately 10 o'clock, when balloting was scheduled to conclude at Drais Ranch, Highfill came onto the

⁷A person whom Hipp believes to be Jose Andrade purportedly told him he was a UFW organizer. Andrade was employed by Lagorio and was an eligible voter. Hipp did not request his removal from the voting area. Hipp could not identify the other two "organizers."

⁸Highfill testified that people on the gondolas were chanting, shouting and whistling "Vote Union", "Arriba Chavez" and "Viva la union". Some were carrying UFW flags.

property. As his car approached to within 25 yards of the voting tables, he was confronted by a large group of people and forced to stop. A Board agent approached and asked why he was there. Highfill responded that he assumed that the voting was over, since the polls had been scheduled to close at 10:00 a.m. The Board agent said voting was no where near complete and told him to leave. Highfill testified the scene looked as if it were a union rally. There were flags and bumper stickers on the gondolas, workers were wearing UFW buttons and bumper stickers on their backs and on the chests. A number of individuals were chanting at Highfill to get out, and chanted long live the union; long live Chavez. Jose Andrade was literally covered with UFW buttons. He approached Highfill's car and screamed at him to get out.

When Highfill learned that the polls were still open, he began to drive slowly through the crowd on a dirt road leading north. After going a short distance beyond the crowd, he discovered that the road ended. He turned around and headed back the way he had entered.

When Highfill got about where he had earlier stopped, a Board agent approached. Highfill's car was quickly surrounded by about 70 workers. An estimated 30-35 people began rocking the car back and forth as if they were trying to turn it over. Andrade was beating on the car with his hands, and it was being pelted with dirt clods and tomatoes. The Board agent was standing next to the driver's window and told the people to

"knock it off;" but the rocking and pelting continued.⁹ Highfill arrived at the Drais site shortly after the polls were initially scheduled to close. Tomatoes were thrown at his vehicle while he was parked, but this conduct ceased in response to shouts from Board agents. The workers continued to shout at Highfill to leave. During the 2-4 minutes Highfill was present, the voting process was uninterrupted.¹⁰ There were 50-80 people in line at the time. Ornales was unsure whether any workers arrived at the polling place after Highfill's departure.

Jose Andrade was also present during the afternoon voting period at Drais Ranch. Again, there was shouting and urging workers to vote for the UFW.

The Events of August 20, 1983

Lagorio's Drais Road Field

Between 6:30 and 7:00 a.m. Alonzo Agraz and labor consultant Roldan Ayala arrived at the Lagorio ranch on Drais

⁹Highfill's account of this incident is generally corroborated by company observers Vicente Garcia and Jaime Castillo. When Castillo testified he saw clods and tomatoes thrown, he could not estimate the number because he was sitting at the voting table and the car was surrounded by people. Board Agent Ornales testified that he saw tomatoes being thrown but no clods.

¹⁰Both Ornelas and Garcia estimated that Highfill was present at the voting site for 2 or 3 minutes. Jaime Castillo, another employer observer, estimated the time at 5 minutes. Castillo and Garcia each testified he was seated at the voting tables while Highfill's car was stopped, and each admitted to an inability to see the number of clods or tomatoes thrown because the workers surrounding the car blocked their view.

road¹¹ to speak to the two to three hundred workers at the site. When Agraz stopped, his car was surrounded by 60 to 90 workers, some of whom were wearing UFW buttons and shouting insults at them.¹²

Ayala got out of the car and began to address the workers. As he did so, there were shouts of "Vendidos" and "Tio Tacos". Agraz translated these words to mean one who sells himself to another cause and Uncle Toms. Other obscenities were shouted which Agraz could not recall. Agraz received the same treatment when he attempted to address the workers.

Jose Andrade was among the Lagorio workers shouting at Agraz and Ayala. Another man with a reddish beard was distributing literature to the workers.¹³

Agraz denied that he and Ayala persisted in trying to talk to the workers after being asked to leave, he testified that he and Ayala got into the car, rolled up the windows, and proceeded slowly from the field. As they did so, the car was pelted with tomatoes and clods. When the barrage ceased, six or seven individuals rocked Agraz's car back and forth. Agraz

¹¹Agraz is an independent labor consultant who at that time was employed by Lagorio Farms.

¹²Agraz placed the 60-90 workers about 10 feet from his car, the remaining workers about 30 feet away.

¹³On the basis of having seen "red beard" talking to UFW representative Juan Cervantes, Agraz characterized him as a UFW representative. Also, he had never seen "red beard" do any work and described him as "quite clean."

estimated that he and Ayala were in the field about 15 minutes.¹⁴

Turner Ranch

On the 20th, later in the day, Steven Highfill and Jose Ybarra, another labor relations consultant, visited the Turner Ranch, a Lagorio property, to address the workers. They went to the northeast corner of the ranch where several crews were working in a north to south direction. They got out of their car and approached the nearest crew. As they did so, a woman and a man approached and asked why they were there. Highfill responded that he had come to tell the worker that the employer wished they not vote for the union. He tried to explain some of the employer's reasons. He said there was to be a "stop work" meeting and urged their attendance. The woman told them not to talk to the workers. Highfill explained that he had a legal right to do so. When the woman became argumentative, Highfill stayed behind the crew to talk with her and her friend. They spoke for about 20 minutes. While Highfill was talking to the two workers, Ybarra went on to speak to some of the individual crew members. He also distributed leaflets and flyers.

About this time some cars stopped along Highway 99; people got out and climbed over the fence onto Turner Ranch.

¹⁴Agraz agreed that a statement contained in his prior declaration to the effect that approximately 200-300 workers surrounded the car is incorrect. He testified that there were that many people at the site but only 30 percent (60-90) surrounded Ayala and him.

¹⁵Highfill defined a "stop work" meeting as one where the employees stop work but are paid for the time spent listening to the employer's spiel.

They were about 250-300 yards away from Highfill. He testified he would not have noticed them but for the fact that one of them began to use a bull horn to address the workers. As Highfill continued to talk to people in his vicinity, he could hear the bull horn but was unable to distinguish what was being said. He observed that the crews to the west of him were beginning to stop work and had begun to congregate in the southwest corner of the field. Some of the people who had come onto the property were going from crew to crew and eventually reached the crew where Highfill was located. He did not recognize any one. They were wearing UFW buttons, and they were shouting "Arriba la union, arriba Chavez" and urging people to stop work and attend the meeting at the southwest corner of the field.¹⁶

When some of the men who had come onto the property approached him, Highfill asked whether they were UFW agents, they responded that they did not have to answer his questions. When Highfill stated that a union meeting on company time was illegal and asked them to leave, they did not leave and responded "Vayanse a la chingada" which Highfill translated as "go get fucked." They were also shouting "huelga" (strike).

The crew to whom Highfill had been speaking was 25-50 yards from the shouters. Some of the crew stopped picking and began walking toward the meeting. Those who did not stop were the target of verbal harassment from those who were leaving.

¹⁶The workers were being addressed in Spanish; Highfill is fluent in Spanish and understood what was being said.

Someone from among those who had come onto the property yelled at the pickers who continued to work "Don't be scabs? go to the meeting" in what Highfill described as a commanding voice. Some of the people going to the meeting, as well as some who'd come onto the property, began throwing dirt clods and tomatoes at people who continued to pick. Rather than go to the meeting, some workers returned to their cars at the north edge of the field. Highfill estimated that 90 percent of the workers ended up at the union meeting. The meeting lasted 30-40 minutes after which everyone departed without returning to work. Highfill remained in the area for an hour and a half. He testified that with the exception of truck drivers and foremen almost no workers remained on Turner ranch.

ANALYSIS

The burden of proof in an election proceeding under Labor Code section 1156.3(c) is on the party seeking to overturn the election.¹⁷ It is a heavy burden and requires an objecting party to come forward with specific evidence showing not only that unlawful acts occurred, but also that these acts interfered with the eligible voters' exercise of free choice to an extent that materially affected the results of the election.

In the agricultural labor context, rerun elections, if they are to have the same standards of employee participation as the initial election, generally cannot be conducted until the next peak of employment which may be the next harvest season, a year

¹⁷Frudden Enterprises, Inc. (1981) 7 ALRB No. 22; TMY Farms 1976) 2 ALRB No. 58.

after the first election. Furthermore, the electorate will likely be substantially changed. Thus, our decision to set aside an election in the agricultural context means that employees will suffer a serious delay in realizing their statutory right to collective bargaining representation if they choose to be represented. We will impose that burden upon employees only where the circumstances of the first election were such that employees could not express a free and uncoerced choice of a collective bargaining representative. (D'Arrigo Bros, of California, 75-RC-14-M, 3 ALRB No. 37, p. 3.

Translated to the present case, the election should be set aside only if the evidence establishes that worker chants of support during a polling period coupled with worker conduct toward an employer representative a few days prior to the date of election established an atmosphere preventing the free and uncoerced exercise of the workers right to vote. For the reasons set forth below, I conclude that the evidence does not do so.

The Events of August 20th

In certifying the results of the election in Frudden Enterprises, Inc. (1981) 7 ALRB No. 22, the Board adopted the following findings of the IHE:

[A]lthough UFW organizers violated the access rule on the dates alleged, the violations and the incidents of violence that accompanied those violations were not of such character as would affect the outcome of the election. The IHE recommended that the employer's objections be dismissed and the UFW be certified
[Slip op. 2.]

The events upon which the IHE based this finding were the following: A caravan of cars bearing 25-50 identifiable UFW supporters and a known UFW organizer pulled into an area

where workers' cars were parked. The supporters entered the fields, approached tomato harvesting machines, shouted strike slogans and obscenities and urged workers to stop work. Tomatoes and possibly dirt clods were thrown and some workers climbed onto the machines. The incident lasted approximately an hour during which time the group went from harvesting machine to harvesting machine harassing workers by climbing onto the machines, waiving flags and urging workers to leave their machines. Tomatoes were thrown at those who did not do so.

"[T]he encounter at each machine lasted about five minutes; union supporters shouted slogans and obscenities at workers on the machines and urged them to leave; some climbed on the machines at the first location but there was no physical violence or throwing of objects at that point; and at the second location no one climbed on the machines but tomatoes and possibly dirt clods were thrown at the workers who did not leave the machine." [Frudden Enterprises, Inc., supra, pp. 16, 17.]

The conduct found insufficient to set aside the election was longer lasting and more disruptive than that urged here as a basis for setting aside the election. As in Frudden there is no evidence that the Union's conduct occurring as it did three days before the election interfered with voters exercise of free choice to an extent that materially affected the results of the election; nor since the conduct found here is within the bounds of that occurring prior to the Frudden election is there reason to infer such an impact. This is so even if one charges the union with the employee conduct occurring on May 20, 1983.

In Phelan and Taylor (1976) 2 ALRB No. 21, the Board expressed its intent to follow NLRB precedents setting aside

elections where physical attacks and threats of physical attacks on organizers and employees contributed to an atmosphere not conducive to the free choice of a bargaining representative. The NLRB sets aside elections when it finds there existed a general atmosphere of confusion or violence which might reasonably be expected to generate anxiety or fear of reprisal and to render impossible a rational, uncoerced voter choice of a bargaining representative. On August 20, the reason certain Lagorio workers were the object of tomato and clod throwing appears to be because they were not proceeding to attend a Union meeting on the property.

There is no evidence of specific threats connected with voting. To the extent that it is possible to determine the purpose of the limited harassment of employees found in this record, it appears it was intended to cause employees to stop work and attend a union meeting and possibly to join a strike. There is no evidence of interference with the polling process or with employees' access to the polls at the Turner Ranch location.

Objective evidence of such an intention or objective evidence supporting an inference of such an intention is a prerequisite for finding that the August 20 conduct can be found to have had a probable effect upon employees' actions at the polls. I recommend dismissal of those objections resting upon events occurring on August 20, 1983.

Drais Ranch Events of August 23, 1983

During both the morning and afternoon voting periods at

Drais Ranch large numbers of workers chanted their support for the UFW; however, there is no evidence that the chants contained threats of reprisals for failure to vote for the UFW. Rather, the atmosphere was one of raucous support for the UFW. An employer witness characterized the scene as like a crowd at an athletic event responding to the urgings of a cheer leader. Moreover, the evidence does not establish the cheer leaders to be agents of the Union.¹⁸

In addition to cheering in support of the UFW, substantial numbers of the workers present manifested their UFW support by wearing union buttons and bumper strips, but again there is no evidence of any attempt to coerce persons not displaying UFW insignia into wearing such items, nor is there evidence that persons not wearing such insignia were subjected to threats or felt threatened.

As the cases establish, the Union is not chargeable with worker conduct, and their expressions of partisanship at the polling site during the period of the election while not manifesting drawing room decorum cannot be said to be conduct preventing a "free and uncoerced choice of collective bargaining

¹⁸The employer has the burden of establishing an agency relationship. No testimony was offered from which one could infer that one of the leaders, Soto, was an agent of the Union. Andrade, the other cheer leader, purportedly told Employer representative Hipp that he was a UFW organizer. However, in view of the fact that he was admittedly an employee of Lagorio, his status appears more analogous to that of a ranch committee member than that of a regular third party organizer. There is no evidence that this agency status was conveyed to the employers by the Union or that he performed any functions in a representative, as opposed to rank and file supporter, capacity.

representative."

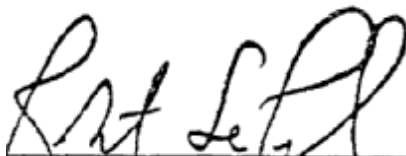
At a time when he thought the voting had concluded, employer representative Highfill came onto the Drais ranch property and his vehicle was briefly subjected to a barrage of clods and tomatoes from a group of thirty or so workers who surrounded his vehicle.

It appears that this incident involved no UFW agents and was terminated after two or three minutes upon the arrival of a Board agent. While such conduct cannot be condoned, there is no evidence it impacted upon any worker in the immediate voting area so as to make him fear violence directed toward him. Disorderly conduct directed toward management representatives cannot reasonably be thought to create in rank and file workers the same apprehension such conduct would likely create if directed toward fellow workers. I recommend dismissal of those objections relating to the impact of election day chanting upon the eligible voter.

CONCLUSION

Having recommended the dismissal of all objections noticed for hearing, I recommend that the UFW be certified as the bargaining representative for all agricultural employees of Ace Tomato Company, Inc./George B. Lagorio Farms.

Dated: November 18, 1985

A handwritten signature in black ink, appearing to read "Robert Le Prohn", written over a horizontal line.

ROBERT LE PROHN
Investigative hearing examiner