Santa Paula, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

LIMONEIRA COMPANY, Employer, and JUAN LARIOS, ANTONIO MARTINEZ, Petitioners, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Certified Bargaining Agent.	Case No. 85-RD-l-OX 13 ALRB No. 13

DECISION AND ORDER SETTING ASIDE ELECTION

Pursuant to a petition to decertify the United Farm Workers of America, AFL-CIO (UFW or Union), an election was held among the agricultural employees of Limoneira Company (Employer) on February 20, 1985.[1/] Following resolution of outcome determinative challenged ballots, the vote was 75 for the Union and 79 for no union with two unresolved challenged ballots outstanding.

All parties participated in an evidentiary hearing on the UFW's objections to the election. Thereafter, Investigative

[1/]The UFW was certified as the exclusive bargaining representative of all agricultural employees of the Employer on May 2, 1978. (See Decision and Order Clarifying Bargaining Unit (1981) 7 ALRB No. 23.) The instant petition was filed by employees Juan Larios and Antonio Martinez.

Hearing Examiner (IHE) Marvin J. Brenner issued the attached Decision on January 14, 1986. He concluded therein that neither the Employer's campaign in support of decertification nor the conduct attributed to the Petitioner's observer at the polling place affected the results of the election. Accordingly, he recommended that the Agricultural Labor Relations Board (ALRB or Board) certify the results of the election and decertify the UFW as the exclusive representative of the agricultural employees of the Employer.

The UFW timely filed exceptions to the IHE's Decision with a brief in support of exceptions and the Employer filed a brief in response to the UFW's exceptions.

The Board has considered the record and the IHE's Decision in light of the exceptions and briefs of the parties and has decided to decline to certify the results of the election.

The UFW has excepted, inter alia, to the IHE's refusal to find that the Employer promised to improve employees' medical benefits and that the conduct was calculated to, and did, affect the results of the election.

Julio Hinojosa, the only union witness on this issue, testified that supervisor Craig Colton addressed an assembly of nine to ten employees during a regular departmental meeting shortly before the election. Colton spoke to the employees through supervisor Sixto Galvan, his Spanish speaking interpreter, because, as Hinojosa explained, Colton "does not speak too much Spanish." Hinojosa testified further that Galvan thereupon told

the employees "[t]hat if we got rid of the Union they were going to give us a better medical plan . . . that we were going to have something better than we had before." He testified similarly on cross-examination, again quoting Colton as having said "we were going to have better insurance than we had before." Rather than calling either Colton or Galvan to testify, the Employer relied solely on two employees who attended the meeting described by Hinojosa, who testified they did not hear the supervisors discuss medical benefits, and whose testimony was discredited in its entirety by the IHE.[2/]

By contrast, the IHE found that Hinojosa's statement regarding the promise to improve medical benefits "on the surface . . . appeared believable," but did not find the statement sufficient in itself to sustain the Union's burden of proof as to conduct affecting results of election.[3/] A careful reading his analysis discloses that he did not discredit Hinojosa as a

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[2/]Even had the IHE found these witnesses credible, the fact that they did not hear a particular discussion would not be conclusive as to whether such a discussion may actually have occurred.

[3/]As the IHE explained, upon closer examination of Hinojosa's overall testimony, "it contains a sufficient number of gaps and uncertainties to persuade me that standing by itself, it is not sufficient to overturn the results of this election." He enumerated those perceived shortcomings as follows: (1) Hinojosa failed to describe other matters which surely must have been discussed during the pertinent meeting; (2) Hinojosa stated both that the remarks were made at a regular Tuesday meeting as well as three or four days before the election whereas the election was held on a Wednesday; (3) the Union called no other witness to corroborate Hinojosa; and (4) since Hinojosa indicated that employees were told the new medical plan would be the same as that presently granted to foremen, the Employer may have merely invited employees to compare the two programs and "no doubt many of the employees would have known some aspects of both insurance policies anyway." With regard to the last point, the IHE essentially constructed a comparison of benefits for which there is no evidentiary support whatsoever.

witness/ but simply did not feel that an election should be invalidated on the strength of what he regarded as an incomplete account of the relevant incident by one witness.

The question thus presented is whether the Board believes Colton uttered the statements[4/] attributed to him by Hinojosa and, if so, whether they were such that by an objective standard they would tend to interfere with employee free choice and affect the results of the election. (See, e.g., Electra Food Machinery, Inc. (1986) 279 NLRB No. 40 [122 LRRM 1046] and cases cited therein.)

It is a well-settled general principle that even though a hearing on objections is investigative in nature rather than adversarial, the objecting party nevertheless has the burden to bring forth evidence which will sustain the allegations. (See, e.g., Campbell Products Department, Harry T. Campbell Sons Company (1982) 260 NLRB 1247 [109 LRRM 1339].) But, "[a]n administrative board must accept as true the intended meaning of uncontradicted and unimpeached evidence." (Martori Brothers Distributors v. Agricultural Labor Relations Board (1981) 29 Cal.3d 721 [175 Cal.Rptr. 626].) As the Martori Court explained:

> . . . when a party testifies to favorable facts, and any contradictory evidence is within the ability of the

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[4/]The focus of our inquiry must be on the words employees understood Galvan to have relayed irrespective of whether his interpretation and/or subsequent translation may have differed from the message Colton had intended.

> opposing party to produce, a failure to bring forth such evidence will require acceptance of the uncontradicted testimony unless there is some rational basis for disbelieving it. (29 Cal.3d 721, 728.)

Inasmuch as Hinojosa's testimony with regard to insurance benefits was neither effectively controverted nor discredited, the statement stands and the Union has made its case on that point.

In National Labor Relations Board v. Gissel Packing Co., Gissel, Inc. (1969) 395 U.S. 575 [71 LRRM 2481], the Supreme Court teaches that an employer is free to communicate to his employees any of his general views about unionism or any of his specific views about a particular union so long as the communications do not contain a "threat of reprisal ... or promise of benefit.[5/] When evaluating allegations of threats or promises, the Court cautions that the Board

> . . . take into account the economic dependence of the employees on their employers, and the necessary tendency of the former, because of that relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear. (Emphasis added.) (395 U.S. at 617.)

[5/] To the extent that our concurring colleague proposes a concept of employer neutrality that would deprive employees of the right to hear all sides of a representation question, we vigorously disagree. Whether in an initial certification, a rival, or a decertification election, "the effective silencing of one source of information would be a clear disservice to employees faced with the need of making an informed choice." (Dow Chemical Company, Texas Division v. National Labor Relations Board (5th Cir. 1981) 660 F.2d 637, 646 [108 LRRM 2924].)

In our view, the Employer's statements exceeded the bounds of permissible electioneering conduct as "[e]mployees are not likely to miss the inference that the source of benefits now conferred is also the source from which future benefits must flow." (National Labor Relations Board v. Exchange Parts Co. (1964) 375 U.S. 405, 409 [55 LRRM 2098].) The message to be derived from the remarks in question here was not less likely to be missed, especially in light of Hinojosa's further testimony that at least one employee spoke up during the meeting to request that the Employer explain how the proposed plan would be an improvement over existing benefits. Thus, we find that the Employer conveyed a promise which would tend to interfere with employee free choice.

This conclusion is buttressed by the fact that the remarks were not isolated, but were made before an audience of about ten employees. Moreover, statements made during campaigns can reasonably be expected to have been disseminated and discussed among employees. (Standard Knitting Mills, Inc. (1968) 172 NLRB 1122 [68 LRRM 1412].) Finally, we are mindful of the closeness of the election results. Accordingly, we conclude that the election should be, and it hereby is, set aside.[6/]

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[6/]Because of our disposition of this matter on the grounds of an impermissible promise of benefits alone, it is not necessary that we reach and decide the remaining allegations of election misconduct.

ORDER

By authority of Labor Code section 1156.3(c), the Board/ finding misconduct affecting the results of the election, declines to certify the election. Dated: June 30, 1987

BEN DAVIDIAN, Chairman

IVONNE RAMOS RICHARDSON, Member

MEMBER HENNING, Concurring:

I agree with the majority's decision to set this decertification election aside due to improper campaigning by Limoneira supervisor Craig Colton.[1/] While it is not, therefore,

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[1/]According to the Regional Director's Report on Challenged Ballots/ Juan Larios (the decertification petitioner) was on extended leave from Limoneira from November 26, 1984 until February 11, 1985 and therefore ineligible to participate in this election. On February 13, 1985, Larios filed the petition to decertify the United Farm Workers of America (UFW). No evidence was offered by any party supporting Larios[1] status to file such a petition and the Regional Director's Report strongly suggests that Larios sought support for the decertification petition at *a* time when he was not employed by the Limoneira Company (Employer).

Section 1156.7(c) of the Agricultural Labor Relations Act (ALRA or Act) states:

> Upon the filing with the [Agricultural Labor Relations Board (ALRB or Board)] by an employee or group of employees of a petition signed by 30 percent or more of the agricultural employees in a bargaining unit represented by a certified labor organization which is a party to a valid collective-bargaining agreement, requesting that such labor organization be decertified,

(fn. 1 cont. on p. 9.)

strictly necessary to discuss the myriad of other problems I see in the Investigative Hearing Examiner's (IHE) analysis of this election, I write separately to offer some guidance as to my view of employer anti-union campaigns during decertification elections.

It is important to note that at the time of its vigorous no-union campaign the Employer had an obligation to confer in good faith with the certified representative, the UFW, to abide by

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(fn. 1 cont.)

> the board shall conduct an election by secret ballot pursuant to the applicable provisions of this chapter, and shall certify the results to such labor organization and employer.

The above language clearly limits who may file decertification petitions. Section 9(c)(1)(A)(ii) (29 USC §159(c)(1)(A)(ii)) of the National Labor Relations Act (NLRA) permits the filing of such petitions by... "an employee or group of employees or any individual or labor organization acting in their behalf...." (Emphasis added.) As the statutory language is distinctly different, National Labor Relations Board (NLRB) precedent is largely irrelevant. (See, e.g., Abbott Laboratories (1961) 131 NLRB 569, n. 2 [48 LRRM 1118]; Clyde J. Morris (1948) 77 NLRB 1375 [22 LRRM 1142]; Suburban Home Corp. (1968) 173 NLRB 497 [69 LRRM 1402].)

There is no ALRB precedent on this issue. (Cf. Nick Canata (1983) 9 ALRB No. 8.; M. Caratan, Inc. (1978) 4 ALRB No. 68.) In Cadiz v. ALRB (1979) 92 Cal.App.3d 365, the Court held that since 1156.7(c) was unique, applying NLRB precedent regarding election bars was untenable. Since the ALRA statutory language was clear and unambiguous, the Court held it must be implemented. While the Court was discussing the second paragraph of 1156.7(c), the language of the first paragraph also appears clear and unambiguous: nonemployees may not file decertification petitions.

Since there is a plain and obvious question regarding our statutory authority to act on Larios[1] petition, I would remand the case to the Investigative Hearing Examiner (IHE) to determine if Larios was an employee of Limoneira on February 13, 1985, when he filed the petition, and if he has not, dismiss the petition as improperly filed.

written contract with the UFW, to recognize the UFW as the exclusive representative of its employees and to refrain from expressing any views, arguments or opinions containing threats of reprisal or force or promises of benefit in derogation of the UFW or bargaining relationship. (Act, §§ 1153(c), (e), 1155, 1155.2.) While under these restrictions imposed by the ALRA, this Employer engaged in a "vigorous 'no Union[1] campaign." Six or seven foremen, led by the harvest superintendent, engaged in frequent and lengthy captive audience speeches emphasizing the inadequacy of the exclusive bargaining agent in protecting employment opportunities or obtaining benefits. Two of those foremen are alleged to have transgressed the limits of permissible campaigning.

I would find, even absent explicit promises by supervisory personnel, that the Employer exceeded his campaign rights by referring to the medical benefits here. The facts here are different from those presented in Jack or Marion Radovich (1983) 9 ALRB No. 45, where the employer compared non-union coverage at other employers. Here, the Employer compared existing insurance coverage to a benefit it presently afforded only nonbargaining unit employees. In a somewhat similar situation in Angelica Corporation (1985) 276 NLRB No. 38 [120 LRRM 1128], the NLRB set aside a decertification election (the IHE and a concurring NLRB member would have set aside the election and issued a bargaining order against the employer). In that case, the employer, among other objectionable practices, compared the benefits at its unionized shop with the medical benefits at its

nonunionized shops. The employer's implementation of its implicit promises after the election was referred to by the NLRB as a "hallmark" violation of the NLRA. (Angelica Corporation/ supra, partial dissenting opinion, Slip Opn. at p. 6; see also, NLRB v. Jamaica Towing (2d Cir. 1980) 632 P.2d 208, 212-213 [105 LRRM 2959].) Comparisons between other employers, as in Radovich, can be considered merely informational, but comparisons between actually existing medical plans at the same employer's various operations must generally be considered an unlawful promise of coverage, particularly when coupled with rapid implementation of the promised benefits, as occurred here. The Employer's "comparison" here was an effective use of the "fist inside the velvet glove," promising continued medical benefits while undermining the collective bargaining process. (See e.g., NLRB v. Rich's of Plymouth, Inc. (1st Cir. 1978) 578 F.2d 880 [98 LRRM 2684] .)

Finally, I would set aside this election based upon the no union campaign of the Employer, even if the campaign had not contained explicit and improper threats and promises. In my dissenting opinion in Jack or Marion Radovich, supra, 9 ALRB No. 45, I set forth the basis for my opinion that employers should not be free to ignore their obligation to recognize the certified union as the exclusive bargaining representative of their work force by conducting vigorous anti-union decertification election campaigns.

Under section 1155 of the Act, expressions of views, arguments, or opinions, whether in written, printed, graphic, or

visual form shall not constitute evidence of an unfair labor practice, provided such expressions contain no threats of reprisal or force, or promises of benefit. The corresponding NLRA section is section 8(c).

The legislative history of section 8(c) indicates that the U.S. Congress was concerned with the federal board's tendency to use employer speeches or leaflets in order to attribute motivation for other employer conduct and to construe employer speeches and leaflets as coercive in themselves. The legislative history indicates that section 8(c) was directed at the case where an employer makes an anti-union but noncoercive speech and soon thereafter discharges an employee for reasons which could relate either to his work record or to his union activities. Section 8(c) forbids the board from treating the speech "as evidence of an unfair labor practice" by inferring from it that the discharge was for anti-union reasons. (German, Basic Text on Labor Law (1976) p. 150.)

An employer's right to free speech, however, must be balanced against the rights guaranteed to its employees under section 1152 of the Act. (NLRB v. Gissel Packing Co., Inc. (1969) 395 U.S. 575, 617 [71 LRRM 2481].) Such a balancing of employers' rights on the one hand, and employees' rights on the other, must take into account the dependence of employees on their employer, as well as the tendency of employees to pick up the intended implications of communications from their employer. (Gissel Packing, supra.) Accordingly, if an employer's remarks restrain or coerce its employees in their free choice of a bargaining

representative, the speech will not be protected by section 1155 of the Act. Thus an employer may express an opinion about a union organization but may not coerce, intimidate, threaten, or make promises of benefits as part of its opposition to a union campaign.

During the initial organizing drive, there is no relationship whatsoever between the union and the employer. In fact, an employer commits an unfair labor practice if it recognizes or bargains with a union which has not been certified by the Board. (ALRA section 1153(f).) On the other hand, once a union is certified, the employer is required to recognize it as the exclusive bargaining representative of his employees and to bargain with it in good faith.

The NLRB has held that, during a strike, where an employer distributed a leaflet advocating that the employees abandon their bargaining representatives to save themselves the expense of paying dues, it commits a violation of the national act. In concluding that this type of employer communication amounted to an 8(a)(l) violation [§ 1153(a) of the ALRA], the national board stated:

> ...At a time when Respondent was supposed to be engaged in good faith bargaining to reach a new collective bargaining agreement it was inconsistently acting in opposition to such a goal by advising employees of the futility of supporting the labor organization which represented them and with which Respondent was engaged in collective bargaining and telling them that they did not need a union. The issuance of such a publication, particularly at the time it was, was certainly a violation of the Act. [Citations] (Mark Twain Marine Industries, Inc. (1981) 254 NLRB 1095 [107 LRRM 1008].)

The national board thus recognized that although an

employer has free speech rights under section 8(c), its duty to recognize and bargain with the certified bargaining representative requires it to abstain from conduct in derogation of that duty. Thus, the employer's "right of free speech" is qualified and subject to regulation. (See, e.g., Bausch and Lomb, Inc. v. NLRB (2d. Cir., 1971) 451 F.2d 873, 878 [76 LRRM 2648].) The NLRB also seeks to achieve employer impartiality in rival union elections by, for example, ordering employers to continue to honor their obligation to bargain with the incumbent union until the election results have been certified. (Dresser Industries, Inc. (1982) 264 NLRB 1088 [111 LRRM 14363; but see, e.g., National Council of Young Israel dba Shalom Nursing Home (1985) 276 NLRB No. 118 [120 LRRM 1237] .)

I urge some adaptation of this standard to ALRB decertification elections. This would require adapting the Dresser and Mark Twain Marine Industries, Inc. unfair labor practice decisions to the unique agricultural representational setting of the ALRA and imposing restrictions on an agricultural employer's ability to undermine an incumbent union during an abbreviated decertification election campaign while balancing the need for an informed electorate. Absent a contract, the employer can, for example, extol the virtues of its bargaining proposals without engaging in unlawful direct dealing. (See, e.g., Bruce Church, Inc. (1983) 9 ALRB No. 74, revd. on other grounds in an unpub. dec.) However, while a contract exists, campaigning in derogation of that contract undermines the ordered collective

bargaining structure set up by the ALRA. Employer objections to an existing contract should be addressed to the exclusive bargaining agent in negotiations, not to the electorate in a decertification election. The inadequacy of a contract as an issue for decertification is not a proper concern of the employer (who can correct the inadequacy through the bargaining process) but rather an item to be considered solely by the affected employees. As the benefits provided by a previous collective bargaining agreement negotiated by Limoneira with the Union and the Union's ability effectively to protect the work force from erosion of employment opportunities were the main focus of Limoneira's no union campaign, I would apply the above standards to this election and find the Employer overstepped its rights of free speech.

For all the above reasons, I agree that we must reverse the IHE and set aside this election.

Dated: June 30, 1987

PATRICK W. HENNING, Member

MEMBER McCARTHY and MEMBER GONOT, Dissenting:

We disagree with the majority's analysis of the Colton statement and would not set aside the results of the election.[1/]

[1/]The question of whether employee status is jurisdictional or whether the parties have waived the right to argue that the statutory definition of employee was not met is irrelevant in this case as the Regional Director (RD), in her Report on Challenged Ballots, found Juan Larios to be an employee on seasonal leave during the eligibility period. (RD's Report on Challenged Ballots, pp. 3-4.) Although Juan Larios was not an eligible employee for voting purposes, he was still an employee at the time he filed the decertification petition. The Investigative Hearing Examiner (IHE) also found that Juan Larios and Antonio Martinez, the individuals who filed the Petition for Decertification, were employees of the Limoneira Company (Employer or Respondent). (IHED, p. 2.)

Our concurring colleague would have us infer from the absence in our own statute of language permitting any "individual" to file a decertification petition that the Legislature meant to confine the right to file a decertification petition to "employees employed during the eligibility period." If the difference in language between the Agricultural Labor Relations Act (ALRA or Act) and the National Labor Relations Act (NLRA) is to guide us in this case, we think it equally possible that since the Legislature did not say that "only employees eligible to vote" may file a decertification petition, it did not mean to express such a

[fn. cont. on p. 17]

Although we agree with the majority that the United States Supreme Court in NLRB v. Gissel Packing Co., Inc. (1969) 395 U.S. 575 [71 LRRM 2481] set forth the proper standard for evaluating employer speech to employees when the employer is expressing his views of unionism or a particular union, we would find that neither the Colton nor Magdaleno statements constitute a "threat of reprisal or promise of benefit." We would also note that the National Labor Relations Board (NLRB), the Agricultural Labor Relations Board (ALRB or Board) and the courts have applied the Gissel standard in both certification and decertification contexts. (See e.g., Campbell Chain, Div. of Unitec Industries (1969) 180 NLRB 51 [72 LRRM 1587]; Mohawk Bedding Company (1973) 204 NLRB 277 [83 LRRM 1317]; Dow Chemical Company, Texas Division v. NLRB (5th Cir. 1981) 660 F.2d 637 [108 LRRM 2924]; see also, Jack or Marion Radovich (1983) 9 ALRB No. 45.)[2/]

The Colton Statement

Employee Julio Hinojosa testified that, three or four days before the election, Craig Colton addressed the tractor

[fn. 1 cont.]

limitation. Accordingly, we adhere to the literal meaning of section 1156.7(c) which permits decertification petitions to be filed by an "employee." It is clear that workers on leave, or even on layoff, do not cease to be "employees" within the meaning of the Act. (See, e.g., Little Rock Crate & Basket Co. (1977) 227 NLRB 1406 [94 LRRM 1385] where the national board reinforced its prior holding that the term "employee" means "members of the working class generally," including "former employees of a particular employer.")

[2/]We agree with the majority in refusing to adopt a concept of employer neutrality and believe that the Board should continue to apply NLRA precedent which permits employer participation through speech in both certification and decertification contexts.

drivers, irrigators, and sprayers at their regular morning meeting to tell them "that if we got rid of the Union they were going to give us a better medical plan." (R.T. Vol. VI, p. 54.) Although Hinojosa provided few details of what else was said during the 10 or 15 minute meeting,[3/] when pressed by Limoneira's counsel for Colton's exact words, he insisted that Colton said "we were going to have better insurance than we had before." (R.T. Vol. VI,

p. 57.) The Company did not call Colton or his interpreter, supervisor Sixto Galvan, to deny having made such a statement;[4/] instead, it called two employees, Rafael Pacheco and Cornelio Peno, who testified that they were present during Colton's presentations and that they did not hear him promise a better medical plan. The IHE found the testimony of these two employees to be disingenuous. Nevertheless, the IHE was unpersuaded by Hinojosa's testimony and refused to find that Colton made a promise of a better medical plan. He found that Hinojosa's testimony contained a sufficient number of "gaps and uncertainties" and was insufficient, standing alone, to overturn the results of the election. Hinojosa's seeming inability or

[3/]Hinojosa also testified that Colton was asked how the benefits would be better, but there is no testimony whether Colton answered this question. Hinojosa testified that there were no other discussions about the medical plan.

[4/]We would not draw any negative inference from the absence of testimony by Colton or his interpreter, supervisor Sixto Galvan. Respondent called two employees to testify and may well have believed that third-party testimony would be found more objective and persuasive than statements by a supervisor. Additionally, although it had the opportunity to do so, the United Farm Workers of America, AFL-CIO (UFW or Union) did not call Colton or Galvan as an adverse witness.

unwillingness to recall other details about the conversation on medical benefits, a conversation which he estimated as lasting seven or so minutes, contributed to the IHE's misgivings about the testimony.

As the IHE did not make a credibility finding on the basis of Hinojosa's demeanor, we may draw inferences about the testimony on the basis of the record as a whole. Like the IHE, we are troubled by the gaps and uncertainties in the testimony and the abruptness of Hinojosa's answers. We are left with serious doubts as to whether his description of the meeting was accurate.

Section 1156.3(c) of our Act provides that:

> Unless the board determines that there are sufficient grounds to refuse to do so, it shall certify the election.

With this language, the Legislature has in effect established a presumption in favor of certification. (California Lettuce Co. (1979) 5 ALRB No. 24, pp. 3-4.) The burden of proof is on the party seeking to overturn an election to come forward with specific evidence showing that unlawful conduct occurred and that this conduct tended to interfere with the employees' free choice. (Bright's Nursery (1984) 10 ALRB No. 18.) We would find that this burden was not met by the UPW through the testimony of Hinojosa.

Magdalene's Statements

With regard to statements by supervisor Guillermo Magdaleno, the Board is faced with a sketchy record, consisting of confusing and inconsistent testimony. Employee Vidal Alamillo described an occasion when Magdaleno addressed the Rodriguez crew. According to Alamillo, Magdaleno began his speech by noting that

some workers were circulating a decertification petition. Alamillo testified that:

> He [Magdaleno] told us, and questioned us, Sirs, are you better now than six years ago before the Union? Then he told us that before the Union was on the ranch that there was more growers, and there was more work for everybody. Then he told us the workers should be with the Company, and to vote against the Union. And then after that we would have more work for everybody. (R.T. Vol. VI, pp. 34-35.)

Alamillo also described another occasion when Magdaleno and other foremen addressed the Rodriguez crew; however, Alamillo stated only that foreman Francisco Franco spoke of how the Company had been like a family before the advent of the Union, but was now divided by its presence. Alamillo did not testify regarding anything that Magdaleno said to the workers on that occasion.

Magdaleno testified that he addressed the Rodriguez crew several times, including one occasion with Franco. Magdaleno stated that he made the remarks about which Alamillo testified when Franco was present. According to Magdaleno, after Franco made his "divided family" speech, he (Magdaleno) told the employees that some of their fellow workers had filed a decertification petition and "that I would like their support, and to vote for -- for the Union—for the Company." (R.T. Vol. VII, p. 180.) When Alamillo asked him who the petitioners were, Magdaleno said he did not know and, in any event, he could not say. Alamillo then attempted to elicit a promise from Magdaleno:

> Then he [Alamillo] said, well you make -- you tell us why we should vote for the Company, and if you make us a promise, I'll even vote for the Company myself. And at that point I said, Mr. Alamillo, you know as well as most of our employees here we cannot make any promises. And you know that I can't promise you anything. That

was my answer to Mr. Alamillo's question. (R.T. Vol. VII, p. 180.)

After repeating that he had told the employees that he could not make any promises, Magdaleno further testified as to his remarks at the meeting:

> Q. (by Limoneira's counsel) Were there any questions about what would happen if the Union lost the election with respect to more work? Did anybody ask any questions about that?
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> A. It was not a question. It was a comment that -- that one of our employees directly said to me. That's --but it was not a -- not a question.
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> Q. And was that at this same meeting?
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> A. A statement -- a statement. Yes.
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> Q. What did -- who was that employee?
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> A. That employee, his name, if I'm correct, is Ricardo Guzman. I'm not very sure about his name, but his name is -- his number -- I know his number. It was 11-12. He -- he made that comment, and I just -- I just said that, under no circumstances that -- there would be -- the Company would have any less -- less work, or the -- that there was a possibility that we had lost some work in the past. And that's about what I said, that we had lost some work, some growers.
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> (R.T. Vol. VII, pp. 181-182.)

On the basis of Alamillo's and Magdaleno's testimony, the IHE found that Magdaleno had, on one occasion, made a speech in which he promised "more work" and, on another, made a speech in which he promised that "under no circumstances would there be any less work." Despite characterizing both statements as "promises," the IHE discounted their influence on the ground that they were merely "exaggerated deviations" from the Employer's otherwise

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lawful conduct of its campaign.[5/]

Both NLRA section 8(c) and ALRA section 1155(c) plainly speak of "threats or promises of benefits" as within the general proscription of NLRA section 8(a)(l) or ALRA section 1153(a). Therefore, under the Gissel standard and its subsequent application by the NLRB and the ALRB, if we were to find that the statements under review constituted explicit "promises," we would be required to set aside the election.[6/]

The IHE's finding that Magdaleno made a promise rests principally on the ground that, in his view, Magdaleno appeared to have admitted to making one. However, the transcript reveals that Magdalene's answers during his testimony were spoken in such a halting and hesitant manner, and were on occasion so quickly recanted, that we are unable to view them as expressing any kind

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[5/]As we have noted, both Magdaleno and Alamillo agree that Magdaleno made a number of speeches to the Rodriguez crew. Thus, it is possible, as the IHE concludes, that Alamillo's account of the Magdaleno "promise" is based upon remarks made on a different occasion than the one to which Magdaleno referred in his testimony. However, from the record as a whole, it is not clear to us that the two men are relating different remarks made on different occasions. Alamillo's testimony places Magdaleno's remark on the occasion when Magdaleno indicated that some men were circulating a decertification petition. Magdalene's testimony places his remark on the same occasion, which may mean that both men are describing the same remark. The IHE appeared puzzled that no other witness testified to Magdalene's remark on what he considered "the second occasion." The possibility that the two men were describing the same occasion eliminates the puzzle. In light of this possibility, we are inclined to view Magdalene's and Alamillo's testimony as contradictory. For purposes of argument, we would treat the remarks as being made on two separate occasions.

[6/]The Union lost this election by a very small margin. Since the record is clear that the remarks were made before groups larger than the Union's margin of defeat, they would have to be viewed as outcome determinative.

of explicit promise. It may be that the IHE credited the portions of Magdaleno's remarks which sounded like promises because the were uttered with a discernible candor which entitled them to be credited over his denials and recantations; but, if that was the case, the IHE did not say SO.[7/] Moreover, the remarks were prefaced with an unambiguous disclaimer concerning the Employer's inability to make any promises.[8/] Even if an implicit promise could be inferred from what was said by Magdalene, we believe that its effect would have been neutralized by Magdaleno's unambiguous disclaimer. (See Uarco Incorporated (1974) 216 NLRB 1, 2 [88 LRRM 1103]; Interlake, Inc. (1975)

[7/]As the IHE did not make a credibility finding on the basis of Maqdaleno's demeanor, we may draw inferences about Magdaleno's testimony from the record as a whole.

[8/]On cross-examination, Magdaleno reaffirmed his testimony that he made no promises:

> Q. (by the UFW representative) Now, you also told Mr. Guzman that — he asked questions about, well, what will happen if the Union goes? Is there going to be more work? Did you tell him that you couldn't promise more work?
>
> A. Yes.
>
> Q. Because that would be a benefit that you're not allowed to say --
>
> A. No, because -- because we -- we're -- we don't -- we don't have control over -- and -- that all depends. I told --
>
> Q. Depends on what?
>
> A. I told him that --
>
> Q. What does it depend on?
>
> A. I told him we could not bring -- promise him any work because we didn't know the -- we didn't know the future. (R.T. Vol. VII, p. 190.)

218 NLRB 1043, 1050 [89 LRRM 1794]; Dow Chemical Company, Texas Division v. NLRB, supra, 660 P.2d 637, 644.)

Neither would we find that Magdalene made the promise attributed to him by Alamillo. In view of the natural tendency to hear what one wants to hear and the fact that Alamillo was president of the Union's ranch committee at Limoneira, we would find Magdalene's uncontradicted testimony that Alamillo sought to elicit a promise from him to be significant. (R.T. Vol. VI, pp. 42-43; R.T. Vol. VII, p. 180.) While this piece of evidence was ignored by the IHE, in our estimation it seriously diminishes the weight that should be accorded to Alamillo's testimony on the question of promises made by Magdaleno. As the record strongly suggests that Alamillo was predisposed to construe Magdalene's remarks as a promise of "more work," we cannot rely on his testimony as a basis for concluding that a promise was actually made.

In light of Magdaleno's plainly-stated disclaimer regarding his inability to make a promise and the fact that the confusing testimony and abbreviated record as a whole do not demonstrate that any explicit promise was made, we would view Magdaleno's remarks as having had no untoward effect on the employees' ability to exercise their free choice in the election.

For all of the above reasons, we would uphold the results of the election.

Dated: June 30, 1987

JOHN P. MCCARTHY, Member

GREGORY L. GONOT, Member

CASE SUMMARY

Limoneira Company (UFW)

13 ALRB No. 13
Case No. 85-RD-l-OX

IHE DECISION

In a representation election in which the petitioner sought to decertify the incumbent United Farm Workers of America, AFL-CIO (UFW or Union), the final tally of ballots showed 75 votes for the Union, 79 votes for no Union, and 2 unresolved challenged ballots. Following an evidentiary hearing on the UFW's objections to the election, the Investigative Hearing Examiner (IHE) concluded that the Employer had neither threatened employees with loss of work nor promised them more work and/or an improved medical insurance program in order to dissuade them from voting for the Union. He recommended that the election be upheld and that the UFW be decertified as the exclusive bargaining representative of all agricultural employees of the Employer.

BOARD DECISION

The Agricultural Labor Relations Board (ALRB or Board), upon review of the IHE's Decision in light of the Union's exceptions thereto, reversed his finding on one issue and concluded that since its finding on that issue was sufficient to set aside the election, it need not reach a decision on the remaining questions. Specifically, the Board found that the Employer, within a few days of the election, advised a group of about 10 employees that they could expect to receive a better medical plan if they got rid of the Union. In accordance with prevailing precedents of the National Labor Relations Board and controlling ALRB precedents, the Board concluded that the conduct interfered with employee free choice and affected the results of the election. Accordingly, the Board invalidated the election.

CONCURRING OPINION

Member Henning concurred in the Board's Decision to set aside this election due to improper campaigning by the Employer. Member Henning expanded upon his view regarding an employer's limited campaign rights in decertification elections, finding the employer's vigorous no-union campaign here inherently coercive and intimidating, even if not encumbered with improper promises.

DISSENTING OPINION

Members McCarthy and Gonot would certify the results of the decertification election.

In determining whether the Employer promised more work or alternatively, no less work if the Union was decertified, the Dissent adopted the Gissel standard for evaluating an employer's expression of views about unionism or a particular union in both certification and decertification contexts. (NLRB v. Gissel

Packing Co., Inc. (1969) 395 U.S. 575 [71 LRRM 2481].) After considering the totality of the circumstances, including the disclaimer, confusing testimony and abbreviated record, the Dissent concluded that the statement had no untoward effect on the employees' ability to exercise their free choice in the election.

In reference to the alleged statement promising a better medical plan, the Dissent found that the UFW failed to meet its burden of coming forward with specific evidence showing that unlawful conduct occurred and that this conduct tended to interfere with the employees' free choice.

* * *

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

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of:	Case No. 85-RD-l-OX
LIMONEIRA COMPANY,	
Employer, and	
JUAN LARIOS and ANTONIO MARTINEZ,	
Petitioners,	
and	
UNITED FARM WORKERS OF AMERICA, AFL-CIO,	
Certified Bargaining) Agent.	

Appearances:

Leon L. Gordon
Gordon & Glade
25600 Rye Canyon Road, Suite 500
Valencia, CA 91355
for the Employer

Ned Dunphy Henry Avila
United Farm Workers P.
0. Box 30 Keene, CA
93531

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 September 17, 18 and 19, 1985, in Oxnard, California. The facts giving rise to this proceeding can be briefly stated as follows: On February 13, 1985, Juan Larios and Antonio Martinez, employees of the Limoneira Company (hereafter "Company" or "Employer"), filed a Petition for Decertification[1] seeking to have the United Farm Workers of America (hereafter "UFW" of "Union") decertified, the effect of which would be that the UFW would no longer represent for purposes of collective bargaining the agricultural workers of the Company.

The Agricultural Labor Relations Board conducted an election on February 20, 1985, a Wednesday. The results were as follows:

No Union	79
UFW	75
Unresolved Challenged Ballots	14
Total Number of All Ballots	168

On February 22, 1985, the Regional Director overruled the challenges to the ballots of all employees except for two and as those would not affect the outcome of the election, they were not opened. (See Regional Director's Report On Challenged Ballots). No exceptions were filed to the Regional Director's

[1]I take official notice of the Petition for Decertification, the Regional Director's Report on Challenged Ballots, Objections to Conduct of Election and Conduct Affecting Election Results, and Notice of Objections Set for Hearing; Notice of Partial Dismissal of Objections; Notice of Right to Request Review.

Decision. . But on March 1, 1985, the Union did file six objections to the election (Objections to Conduct of Election and Conduct Affecting Election Results), and on July 24, 1985, the Executive Secretary set three of the Union's objections for hearing as follows:

1. Whether the Employer in its election campaign promised better benefits and provided economic inducements to the voters, including but not limited to, promises of better medical insurance than that provided by the Incumbent Union, promises of more work if the Incumbent Union were decertified, sponsorship of carne asada parties for employees two days before the election, and sponsorship of a restaurant dinner for employees on the night before the election; and if so, whether such conduct affected the results of the election;

2. Whether the Employer threatened employees with discharge and/or permanent layoff if they voted for the Incumbent Union, including but not limited to, threats of discharge and/or layoff of one hundred employees, threats that growers would leave the company resulting in loss of jobs, threats of discharge and/or layoff of specific employees and threats of discharge and/or layoff of employees with the least seniority; and if so, whether such conduct affected the results of the election; and

3. Whether the Decertification Petitioners' observer and the Employer's observer campaigned in the voting area during the election by conduct including, but not limited to, exclaiming loudly to the voters that they had already won the election, and

by leaving the observers' table to go outside the building to talk to waiting voters; and if so, whether such conduct affected the results of the election.

The hearing proceeded on these objections. The Employer and Union were present throughout the entire hearing, participated fully in the proceeding, and filed briefs after the close of the hearing. The Petitioners made no appearance at this hearing and did not file briefs.

Upon the entire record,[2] including my observation of the demeanor of the witnesses, and after careful consideration of the arguments and briefs submitted by the parties, I make the following:

FINDINGS OF FACT

The Jurisdiction

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

II. The Business Operation

The Company primarily grows citrus crops but also has a packing operation. It sells and ships its products. In addition, it performs cultural services or harvesting for other growers (II:169.)

The Company maintains a seniority list which is used

[2]Hereafter, the Union's exhibits will be identified as "U. __"; and the Company's exhibits as "Co. __.". References to the Reporter's transcript will be noted as (Volume: page).

for hiring and layoff purposes. Workers with the least seniority are laid off first and senior workers are hired back first. (II:141-142.)

The parties stipulated that the UFW was certified as the exclusive bargaining representative for Limoneira's workers in 1978. Subsequent thereto, there were two negotiated contracts, the first one expiring sometime in 1981 and the second one in February of 1985 just prior to the election. (I:126.)

III. The Election Campaign

The Company ran a vigorous "no Union" campaign. (Its Personnel Director claimed that it was rather low key compared with the previous two elections (II:153).) It sent various foremen and supervisors around to the crews and called several meetings to explain the Company's position. In addition, on Washington's birthday, the Monday before the election, the Company sponsored barbecue and beer dinners at various supervisors' houses and also threw a dinner at an Oxnard restaurant the night before the election that approximately 60-70 employees attended.[3] (II:14, 154, 166-167.)

This case concerns what statements were made during those contacts, whether they constituted threats or promises, and if so, whether they affected the results of the election. Basically, the remarks that were made fall into two general

[3]The UFW abandoned its claim that the dinners were objectionable conduct affecting the outcome of the election. Instead, this evidence was admitted to show the extent of the company's "no Union" campaign.

categories — discussions over past layoffs and discussions regarding medical benefits.

A. The Alleged Promises of More Work If the UFW Were Decertified; the Alleged Threats of Layoff If the UFW Were Retained

1. Vice President Guilin's Statement

Umberto Guzman has worked for the Company for 11 years as a picker and was in Eduardo Berume's crew at the time of the election. Guzman testified that about one week before the election, while working in the orchard, Company Vice President Alfonso Guilin engaged him in a conversation which lasted one hour. During that conversation, according to Guzman, Guilin told him that during the six years the UFW had been on the property, the Company had laid off 100 workers for lack of work owing to the fact that several growers had left. Guilin is further alleged to have told Guzman that if the workers got rid of the Union, the Company could get back its lost ranches and rehire the 100 workers. (I:70-71, 73, 76-78.)

Guzman further testified that each crew contained 30-40 workers and that he was aware that there had been six crews when the Union first won the election but that there were only four crews now, and he attributed this to the fact that some growers had left. He also testified that this was basically what Guilin had said in their conversation. (I:74.)

Alfonso Guilin has worked for the Company sins 1966 and has been in charge of labor relations and personnel. For the last three years he has served as the Company's Executive Vice

President. Guilin testified that he knew Umberto Guzman, recalled that Guzman had served on the Union's Ranch Committee during the time the contract was in force, and testified he had contact with him during negotiation sessions and grievance meetings. (II:134-135, 170-171.)

Guilin testified about his conversation with Guzman in a much more complete manner. He testified that they spoke from 10-15 minutes around 10:30-11:00 on the Friday before the Wednesday election in a lemon orchard close to his office. According to Guilin, he had heard that there had been an incident in the area where the harvesters wait for the buses in which some pushing and shoving had occurred between Guzman and Petitioner Juan Larios and being concerned about violence, he went to talk to both workers. He spoke to Guzman first; no one else was present. After telling Guzman the Company did not condone violence on anyone's part, whether it was a pro-Union or a pro-Company employee, and that the question ought to be resolved in a reasonable manner through the ballot procedure, Guilen testified he then told Guzman that this was an official warning and that he was going to tell Larios the exact same thing. (II:136, 170-171.) At that point Guzman then brought up the election and volunteered that the Union had done a good job for the workers. Guilin responded that prior to the advent of the Union, the Company had had a good relationship with the workers but that now the Company was facing economic difficulties and was having problems competing in the present environment. Guilen admitted

telling Guzman that there were two fewer crews presently because of the business the Company had lost the previous year. Guilin denied saying the Company had fired anyone. (II:139.)

Guilin testified that at the end of the conversation, Guzman told him that he still favored the Union. (II:137.)

During his testimony, Guilin expanded on his statement to Guzman regarding the loss of the two crews. Guilin testified that normally during February (and in February of 1984) the Company had six crews harvesting lemons but that because of lost business, including the loss of a major packer involving about 800 acres in the fall of 1984, the number of crews utilized never reached beyond four in the 1984-85 season resulting in a reduction of about 70-90 workers. Guilin attributed these losses to the fact that several growers had left the Company explaining that they couldn't afford to stay and that they could have the work done more cheaply elsewhere. These losses meant, according to Guilin, that approximately 1,000-1,200 fewer acres were being farmed; ergo, the need to reduce the number of crews.[4] (II:140-141, 149-150, 173-175.)

2. The Map Illustration - Franco's Visit

UFW witness, Antonio Patino, a Company employee for 22 years and presently living at the labor camp, testified that a week before the election he was picking lemons under the supervision of his foreman, Roberto Rodriguez, when

[4]Guilin acknowledged that some of the growers that left were still utilizing the Company's packing facilities; however, they were utilizing their own labor for the harvest. (II:145-146.)

avocado foreman Francisco Franco visited the crew to talk about the campaign.5 Patino testified that Franco, whom he had known for years, personally spoke to him for 3 hours, as he worked. (I:9-10, 15, 25-27.) During the course of their conversation, Franco, according to Patino, told him, inter alia, that ". . .if we were going to vote for the company, then there was going to be more work. And if the union were going to continue here, the job was going to be over." (I:11.) Patino testified that he understood this to mean that if the Union won, the growers were going to be leaving. (I:11.) To illustrate his point, Franco, according to Patino, drew a map in the soil demonstrating by blocks the current composition of the farm, including the McKevit, Milton, LaQuesta, and Forty Acres ranches and an "x" which showed the reduced acreage of what would be left if the Union continued to represent the employees. (I:12-13.) (U.I.)

Patino further testified that Franco told him that he was worried that if the Company lost any more growers, he could lose his job as he had very low seniority compared with the other foremen. But Franco also indicated that he was not speaking to Patino (and the others) on his own initiative but that he was being paid for his time by the Company. (I:19-20, 23.)

Another member of Patino's crew, Vidal Alamillo,

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[5]A lot of the Company's campaign seemed to focus on this lemon picking crew. One worker, Vidal Alamillo, testified that the majority of this crew had low seniority and that around 15 were new hires. (I:37.)

testified that Franco visited the crew,[6] stayed the entire day and returned the following day. While he spoke to various workers on these occasions, he did not speak to Alamillo nor attempt to do so.[7] (I:33, 35-36, 40-41, 43.) Later, however, while on the bus going home from work, Alamillo testified he overheard three of his co-workers – all relatively new employees with little seniority – commenting that Franco had told them that there would be less work if the Union won the election.[8]

Francisco Franco is foreman of the avocado crew and has been a foreman since 1969 or 1970. He has known Patino for a number of years as a co-worker and now as a neighbor. Franco testified he spoke to Patino about an hour a few days before the election at the McKevit Ranch. According to Franco, he pointed out to Patino the ranches the Company had lost since the Union came in and what had existed on the property before the Union. And to express the reality of just what had been lost, he drew a map in the soil showing the ranches that no longer existed. Franco also acknowledged telling Patino that if the Company lost any more ranches, he was going to be out of work because he didn't have enough seniority compared to other foremen. But

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[6]Alamillo placed the date of this visit as 5 days before the election not one week as Patino had testified.

[7] This is probably explained by the fact that Alamillo as the top Union official at the ranch, (he was President of the Ranch Committee (I:42-43)) would have been considered unreachable on the decertification question.

[8]Job security, especially among the newly hired, was one of the workers' greatest concerns as they approached the election. (I:81-83, 86-87, 101-102, 123-124.)

Franco denied that he represented that the lost companies would be back if the Union were decertified. Finally, Franco testified he told Patino that he was free to make a decision and that he (Franco) would continue talking to the rest of the crew. (II:270-273, 283.)

Following his conversation with Patino, Franco continued to campaign among other Rodriguez crewmembers, speaking to at least 15 of them but as there was not enough time left in the day to speak with all of them, Franco came back the next day. Franco testified that in his conversations with these other workers, he did not make any drawings but did mention – possibly to every single person he spoke to – that growers had left the Company since the Union arrived. (II:284.) According to Franco, he told them basically what he had told Patino.[9] (II:292.)

3. The Magdaleno Speech

Five to six days prior to the election, harvesting superintendent Guillermo Magdaleno gave a speech to this very same Rodriguez crew of 29-30 workers which lasted 15-20 minutes. According to Alamillo, Magdaleno informed the crew that a group of workers was going around asking for signatures to remove the Union and that each worker should question himself as to whether he was better off now than he was six years ago before the Union

[9]Franco also testified that besides the Rodriguez crew, he went to each harvest crew with a group of foremen, including Guillermo Magdaleno. Franco testified that on those occasions he explained to the workers their rights and that things had been different before the Union came in but did not mention anything about growers leaving the Company, layoffs, or medical benefits. (II:288-290, 293.)

came in. Alamillo further testified that Magdalene told the crew that before the Union came on the ranch there were more growers and more work for everyone and that in order for everyone to have more work the Company position should be supported. (I:34-35, 43-44, 48.)

4. The Meeting with the Six Foremen

Patino testified that the day following his conversation with Franco, six foremen came to his crew,[10] the Rodriguez crew, told them that there was going to be a meeting and to stop working. According to Patino, the foremen then spoke to the crewmembers, focussing their discussion on the fact that unionization had brought a lot of problems and that in order to eliminate those problems, the workers should help the Company get rid of the Union. (I:14-15.)

Alamillo also testified about this meeting. Stating it occurred on a Saturday, Alamillo testified that Guillermo Magdaleno introduced Franco and that Franco spoke of how all the workers had been like a family with no problems before the Union cam in and that if the Union were removed, it would be the same as it was before. (I:39.)

Guillermo Magdaleno testified he spoke to all the crews and some more than once. (II:177-178.) On a Saturday around 10:30 at the upper section of the McKevit Ranch he spoke to the Rodriguez crew at a meeting that lasted at least one hour. He

[10]Patino identified them as Francisco Franco, Guillermo Magdaleno, Benito Martinez, Sixto Galvan, Marco Rico, and Rogelio Rodriguez. (I:14.)

did most of the talking. (Magdaleno testified that he spent more time with this crew than any of the others he visited because of the extensive discussion and comments of the employees at this meeting (II:181, 199).) According to Magdaleno, one of the things he told the assembled workers was that the Company was much more competitive before the Union came in — ". . . that before the Union . . . there was lots of work and since the union, . . . there isn't." (II:195.) In short, the information he sought to convey was that there was much more work available prior to the Union's coming on the property. (II:194-195.)

Magdaleno testified that following his speech and those of other foremen (e.g., Franco), workers asked if they would be better off without the Union, and he replied that he and the others knew that he couldn't make any promises. (II:177-180.)

Magdaleno also testified that one employee, a Richard Guzman, asked what would happen to the work if the Union lost the election, and that he replied that he couldn't promise anything but that though work had been lost in the past, under no circumstances would the Company have any less work than it did now. (II:181-182, 190.)

B. The Alleged Promise of Better Medical Benefits

Some witnesses on behalf of the UFW testified that promises were made by Company representatives to the effect that if the Union would decertified, the employees would receive a better medical plan. Julia Hinojosa has worked for the Company as an irrigator for 10 years and lives at the labor camp. At the

time of the election, there was an office in the camp called "Olive Land" where all the workers who worked by hours — tractor drivers, irrigators, and sprayers — would meet in the morning with their foremen for work assignments. In addition, on Tuesday mornings work problems would be discussed. (I:51-52.) Hinojosa described one such Tuesday meeting three or four days before the election at which time Craig Colton, who supervised the irrigation, tractor driver and sprayer foremen, spoke to 9-10 assembled workers for a short time. According to Hinojosa, Colton stated that if the workers got rid of the Union, they'd get a better medical plan, the one that the foremen presently had. (I:53-54, 57-58, 60-61.)

Umberto Guzman testified that Guilin told him during an individual conversation that without the Union, he'd get a better medical plan. (I:70-71, 73, 76-78.)

Patino testified that during his conversation with Franco in which the map was drawn in the soil, Franco also mentioned that he had changed his mind about supporting the UFW because he didn't like its medical plan and that the Company's plan for its foremen was better. But Patino denied that Franco promised that the foremen's plan would be provided if the Union were voted out. (I:23-24.) And Patino also testified that at the Saturday meeting with the six foremen no promises were made regarding the medical plan.

Magdaleno agreed that he made no promises. He testified that the subject was raised at the Saturday meeting

when Alamillo asked what would happen to the medical benefit if the Union were voted out. Magdaleno testified he responded: "... And I said nothing about medical. I said you yourself have relatives. Your wife, I recall — I told him your wife works at the packing house. Does she have a medical plan?" (II:181, 203.) Magdaleno testified that he also told the workers that before the Union came in, the Company had medical, vacation and sick leave benefits; but he denied comparing benefits or expressing an opinion as to which was better, as he said he knew this was illegal to do. (II:185-186.)

Guilin likewise denied making any promises. He testified that Guzman asked him where the employees would be if the Union left and would they be better off, and that he told him several times that he (Guzman) should know that he couldn't promise anything during a campaign but that he also knew how the Company had provided a medical plan prior to the Union in 1978 and that currently the Company provided insurance for non-unit employees such as packing house workers and supervisors. Guilen testified he mentioned this because he knew that one of the employees' concerns during the election campaign was that they not be left without any medical plan whatsoever. But Guilen denied that he ever promised Guzman better medical benefits should the Union be ousted. (II:138-139, 147, 172-173.)

The Company also called worker witnesses to dispute Hinojosa's testimony regarding Colton's speech. Rafael Pacheco denied that there was any reference whatsoever to medical

benefits (or layoffs) and denied that Colton had promised a better medical plan if the Union were removed. (III:300-302, 310.) According to Pacheco, the only mention of an election was that Colton stated – at three morning meetings in the week preceding the election – that the workers had a right to vote for whomever they wanted and that it was a free election. According to Pacheco, the Company never asked its employees for their support during these meetings, and the major topics discussed were work-related problems. Pacheco estimated that work matters were discussed for 15 minutes and the election for 5 minutes.[11] (III:312-313.)

Ultimately a new medical plan was placed into effect by the Company following the election, in May. (I:31; 11:147.) Alamillo testified he believed it was the same plan that the foremen had. (I:37-38.) Hinojosa testified that it was a Blue Shield plan whose main benefit was a $1,000,000 umbrella. (I:55.) According to Hinojosa, supervisor Guilin and foreman Felix Reyes presented the new policy to his crew and told them that it would mean greater benefits.[12] (I:64-65.)

Guilin testified that two benefits of the policy not

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[11]Contrary to Pacheco, Company witness Cornelio Peno testified that the election was discussed for 10-15 minutes on Thursday, 10 minutes on Friday, and for 10 minutes on the following Tuesday the day before the scheduled election. (III:317-321.)

[12]All workers did not necessarily agree that the new medical policy was better than the Union's RFK program. For example, Hinojosa testified that he was happier under the old policy because as there was a lower deductible, more items were covered. (I:62-63.)

included under the Union plan were the one million dollar coverage (as compared to $20,000 under the Union policy) plus optical benefits. (I:40.)

IV. The Alleged Election Irregularities

Manuel Magdaleno was the UFW observer during the election and received his instructions from Regional Director Alina Lopez, serving as Board agent in charge of the election. Magdaleno testified that these instructions were repeatedly violated by Petitioner's observer, Gabriel Salazar. (I:87.) According to Magdaleno, quite often when a voter would walk into the room .where the election was taking place, Salazar (and sometimes the Company's observer, as well) would smile and then make a gesture with his palms extended upwards indicating "we're going to make it" in what was obviously a gesture of encouragement to his side. In fact, Magdaleno testified that those actual words were used three or four times. (I:92-93, 122-123.) On those occasions, according to Magdaleno, other workers who were in line by the front door waiting to enter and vote would have overheard the remarks or seen the gesture. (I:119-120.) Magdaleno could not be sure Lopez saw the gesturing, but he testified she would tell the offending observer to cease doing it when he called it to her attention. Nevertheless, according to Magdaleno, the gesturing continued. (I:120-122.)

Magdaleno also testified that a threat was made at one point when Salazar told a worker who had just voted not to tell for whom he had voted because he might get his tires slashed.

Although Lopez was present when the statement was made, she did not, according to Magdalene, react to it. (I:94-95, 116.) But on cross-examination he testified Lopez indeed heard the statement and told Salazar not to make remarks like that again.

In addition, Magdalene recalled on occasion in the middle of the election when both observers left the room without permission and went to the area where at least five prospective voters were waiting in line and spoke to them for two to three minutes. (Magdaleno was unable to hear their conversation.) Magdaleno testified he called this matter to Lopez's attention, that she became very upset and asked both observers to come back inside, which they did. (I:95-98, 112-114, 117-118.)

Finally, Magdaleno testified that Salazar also frequently wandered around the room while the election was being conducted which he pointed out to Lopez who at first paid little attention but then later asked Salazar to be quiet and resume his seat. (I:114-115.)

Alina Lopez was called as a witness for the Employer. She testified that she gave the standard instructions to the observers informing them that she was the only person allowed to speak to voters and that any irregularities should be reported to her. Lopez also testified that her instructions were that no one was to vote unless she was there and that in fact, she was in the room at all times that any voting went on. She had to leave the room twice; on those occasions, she left the care of the ballot boxes to other Board agents. (II:210-217.)

Lopez testified that in the voting room she had arranged for the observers to be seated around her (the Company's and Petitioner's observers to her left and the Union's to her right) in a "U" position and that she was able to see and hear them from her position in the room. (II:217-218.) (Co. 1.) Later in her testimony, however, she admitted that in order to see the Petitioner's observer (Salazar) she actually had to turn her head. (II:230.)

According to Lopez, no observer ever left the room without her permission, no observer ever went out and spoke to people who were waiting in line to vote, no one ever had to be pulled from the line and brought back inside, and that if someone had left the room, she would have seen him. Lopez further testified that the only times permission was sought from her by observers to leave the room was when there were no prospective voters in the line. (II:218-219, 223-224.)

Lopez also testified that the greatest number of voters that would either be inside the voting room or outside but capable of seeing inside at any given time would be four. While she would be checking on the eligibility of one voter in front of her desk, there might have been two others in the voting booth while another prospective voter might have been outside the door to the room waiting to come in and would have been able to see inside the room. (II:242.)

She admitted that on occasion some of the observers had to be reprimanded. Lopez testified that one time one of the

voters was rather nonchalant about the secrecy of his ballot and was about to state the way that he voted when Lopez instructed him not to say anything. At that point Salazar, in a voice loud enough for all to hear, remarked that if he did, his tires would be slashed. After a strong protest from Magdalenp who was very upset, Lopez told Salazar that it was not proper for him to speak to the voters, that those remarks would not be allowed to be uttered, and that his job was only to observe the conduct of the election. Lopez could not be sure if there were any voters in the voting booth or in the doorway at that time. No further remarks were made by Salazar. According to Lopez, previous to this incident, Salazar had made a few other comments – short, smart remarks directed to Magdaleno. Lopez could not recall if any voters were present. (II:220,233-234.)

Salazar was also involved in other irregularities. Lopez testified that whenever she stopped a disagreement between Salazar and Magdaleno, the former would make gestures, holding out his hands or shrugging his shoulders, but she could not recall if the gestures were made to any voters as they entered the voting room. She testified Salazar did this a few times, though she acknowledged that given his position slightly behind her, he may have made other gestures to incoming voters that went unnoticed by her. (II:231-233.) (Lopez could not be sure if these gestures were for her benefit or for the benefit of Magdaleno.) Lopez denied she heard Salazar or any other observer state "we've got it made" or words to that effect. (II:224-226,

239-241.) Finally, Salazar fell asleep during a break in the voting when the parties were waiting for more ballots to be printed up. (II:223.)

Salazar did not testify but another one of Petitioner's observers, Pedro Magdaleno, did. According to Magdaleno, observers were not allowed to leave the room as the balloting progressed, and he never saw Salazar leave while voting was talcing place. Both he and Salazar were allowed, however, to exit from the room with permission for a short period when no voting was going on. Magdaleno also testified that he never saw Salazar speaking to prospective voters outside while they were in line waiting to vote. (II:261-262.)

Magdaleno could not recall Salazar's statement about the slashing of tires, any remarks to the effect of "we've got it made" or any gestures. However, Magdaleno could remember that some of Salazar's remarks to voters elicited warnings from Lopez. (II:261-266.)

ANALYSIS AND CONCLUSIONS OF LAW I.

Introduction

The burden of proof in an election proceeding is on the party seeking to overturn it to come forward with specific evidence showing that unlawful acts occurred and that these acts interfered with the employees' free choice to such an extent that they affected the results or the election. TMY. Farms (1976) 2 ALRB No. 58. As agricultural elections generally cannot be conducted again until the next peak or often a year after the

first election, the resultant burden of a new election upon the employees will not be imposed unless it is clear that they could not express a free and uncoerced choice of a collective bargaining representative. D'Arrigo Bros, of California (1977) 3 ALRB No. 37.

It is, of course, established that an employer is entitled to express its views on the decertification election. Jack or Marion Radovich (1983) 9 ALRB No. 45. It is only when those views are expressed coercively or in such a way as to tend to interfere with employee free choice that they can be said to be prohibited by the Act. Ibid. As stated by the Board:

> . . . Employees are entitled to receive information relevant to their decision to vote regardless of whether the information comes from the union, the employer or third parties, so long as it is not coercive or otherwise unlawful, so that they can make an informed as well as a free choice. Employer speech in a decertification campaign should be prohibited only when it is coercive or tends to interfere with he free choice of employees. We agree with the ALJ that it is the free choice of employees, not the union's survival, that is at issue in a decertification election. We shall thus adhere to the same standard in decertification elections as applies to representation elections. (See D'Arrigo, Inc. (1977) 3 ALRB No. 37.) We shall set aside decertification elections only where the circumstances of the election were such that employees could not express a free and uncoerced choice or misconduct occurred which tended to affect the results of the election. (Fn. omitted.) 9 ALRB No. 45 at p. 9.

In determining whether campaign rhetoric is sufficient to set aside any election, the Board looks not only to the nature of the campaign speech itself but also to whether, in the light of the total circumstances, it improperly affected the result. Albert C. Hansen dba Hansen Farms (1976) 2 ALRB No. 61.

II. The Predictions

The most troublesome element in employer-speech cases has been that of distinguishing between illegal threats and legitimate prophecies. The U.S. Supreme Court's opinion in NLRB v. Gissel Packing Co. (1969) 395 U.S. 575, 71 LRRM 2481 was an attempt to provide a guideline for evaluating employer speech. 1 Morris, The Developing Labor Law (2d Ed. 1983) p. 82. The Court held:

> Thus, an employer is free to communicate to his employees any of his general views about unionism or any of his specific views about a particular union, so long as the communications do not contain a "threat of reprisal or force or promise of benefit." He may even make a prediction as to the precise effects he believes unionization will have on his company. In such **a case,** however, the prediction must be carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control .... If there is any implication that an employer may or may not take action solely on his own initiative for reasons unrelated to economic necessities and'known only to him, the statement is no longer a reasonable prediction based on available facts but a threat of retaliation based on misrepresentation and coercion and as such without the protection of the First amendment. . . . 395 U.S. at 618.

Thus, in Gissel the Court tried to harmonize the employer (and employee) interest in free and full disclosure of information and the employee interest in an uncoerced decision on collective bargaining, placing heavy emphasis upon two factors: the extent to which the untoward consequences of unionization were within the power of the employer to implement or were beyond its control, and the extent to which the employer's assertions were based upon demonstrable probabilities. Gorman, Basic Text on Labor Law (1976) p. 152.

Testimony in this case established that normally by February in any given year (and at the time the Union first won the election) the Company would have had six lemon harvesting crews working but that a serious business decline began to occur in late 1984 so that by February of 1985 only 4 crews were being utilized and 60-80 workers (the estimates varied) were never recalled to work. The reason for this decline was credibly explained by Company Vice President Al Guilin who testified that growers who had previously utilized the services of the Company left it to go elsewhere because they wanted the work performed at a cheaper cost. The result of their leaving was that 1,000-1,200 acres were no longer being picked.

The UFW presented no evidence to refute this testimony,[13] and there is not the slightest hint that it was inaccurate or designed to mislead. I find it to be reliable.[14] As such, this evidence plus other related evidence adduced at the hearing can be said to have established certain objective facts of the kind referred to in NLRB v. Gissel Packing Co., id, as

[13]In fact, at least two Union witnesses, Umberto Guzman and Manuel Magdaleno, confirmed it. Guzman, a former member of the Union's Ranch and Negotiating Committees, acknowledged that six crews had been working at the time the UFW had commenced representing the workers but that only four crew remained because some growers had taken their business to other companies.

[14]An administrative board must accept as true the intended meaning of uncontradicted and unimpeached evidence. Martori Brothers Distributors v. Agricultural Labor Relations Board (1981) 29 Cal.3d 721, 728. In addition, Guilin impressed me as being honest and quite professional (though at times he seemed very uncomfortable admitting that the Company's message to the workers was the prediction that unionization or a union contract might mean fewer jobs).

follows:

(1) that at least during the last year of the UFW contract, the Employer, through no acts of its own, had lost several customers amounting to a loss of acreage from 1,000-1,200 acres;

(2) that the reasons given for the loss were that customers felt it could be done less expensively elsewhere;

(3) that as a result, there was a reduction of the work force from 6-4 crews or anywhere from 60-80 workers; and

(4) that these facts were known to the workers. (In fact, such information was fresh in their minds as they could plainly see at the time of the February election that there were 2 fewer crews employed. [15])

The idea that the Company was no longer competitive and that the Union contract had caused a loss of customers and therefore, a resultant reduction in work opportunities was one of the central focuses of the Company's campaign.[16] This explains why Company personnel spent so much time with the Rodriguez lemon picking crew, a crew with low seniority and as many as 15 new hires. The Company's strategy was that workers, already insecure with the recent knowledge of the loss from their ranks of more

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[15]Obviously, when Employer's representatives asked its employees during the campaign to ask themselves if they were better off now than 6 years ago, the employees knew exactly what he was talking about.

[16]It is also clear, judging by the questions asked by workers following the Company-called meetings, that this subject and medical benefits were the two topics discussed the most.

ranks of more than 70 co-workers, would draw the conclusion it wanted them to – that those business losses were the result of the Union contract. To this end, the Company, either through individual or group contact, emphasized time and again that work had been lost because customers were driven away by high prices.

I find that overall the statements made by Company personnel were based on objective fact. Thus, Guilin may have told Guzman (as Guzman testified) that 100 workers were laid off for lack of work because several growers had left, but this was essentially true.[17] Franco may have drawn a map for Patino showing the reduced acreage if the Union remained;[18] but even if he did, this represented his prediction based upon objective facts of what had occurred during a period of time when the Union had been present on the property, i.e., crews had been reduced and there was less work.[19] Patino said he understood Franco's statements to mean that if the Union won, growers would be

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[17]Given Guilin's demeanor and his labor experience of negotiating with Union representatives, I do not believe (as Guzman testified) that he would have promised a member of the Union's Ranch Committee (Guzman) that if the workers got rid of the Union, those 100 workers would be rehired. It would have been especially unlikely for him to make such a comment right after reprimanding Guzman for participating in a shoving match with Petitioner Juan Larios. Besides, the recall of these 2 crews was not an issue in the election campaign; holding onto the work that was still there was.

[18]Franco testified he only showed the ranches that had been lost since the Union's arrival.

[19]This was the impression received by the workers going home on the Company bus, as reported by Alamillo.

leaving,[20] again something that had actually happened since the Union had won the election.

These remarks were not employer threats to take future action, within its control, against its employees should they support the Union. Rather, it was this Employer's prediction of what could reasonably be said might happen in the future based upon what had already happened in the past. They were "... phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control ..." NLRB v. Gissel Packing Company, supra, (1969) 395 U.S. 575, 71 LRRM 2481. See also Giumarra Vineyards Corp, et al. (1981) 7 ALRB No. 24, p. 28 (where the employer lawfully predicted that a combination of costs resulting from unionization and unfavorable market developments beyond its control might necessitate greater mechanization at the cost of some jobs.

This does not mean that other customers of the Employer would absolutely have left if the Union were retained or that if they did leave, there would have had to have been a further reduction in jobs. It simply means that based upon the prior year's history of lost business and fewer crews, the Employer's prediction of continued untoward consequences over an area he did not control were not improper.

In any event, there is no indication that the Union was prohibited in any way from responding in kind to the campaign

[20]Though Patino testified that Franco actually told him the job would end if the Union won the election, he obviously did not take these words at their literal meaning.

predictions being made by the Employer in plenty of time before the election actually took place.

The only evidence that could be construed as unlawful promises made by Company supervisors were two statements of Guillermo Magdaleno, one testified to by Alamillo, the second brought to light by Magdaleno himself and not mentioned by any other witness. Alamillo testified that one of the things Magdaleno told the workers was that if the Union were voted out, there would be more work for everyone.[21] And Magdalene's own testimony suggests that at one point during the Saturday speeches, he may have come close to virtually assuring the employees that if the Union lost the election, there would, under no circumstances, be any less work than there was at the time the statement was made. Though Magdalene's statement was less than precise and it is not clear what meaning the workers would have given it, interspersed as it was with other thoughts, I believe he rather ineptly conveyed a promise to the workers that if the Union were decertified, there was no way there would be any less work at the Company and therefore, by implication, there would not be any further layoffs. Thus, this statement, and the one mentioned by Alamillo, were improper promises of work opportunities which, it could not be said, were based on any objective fact. That is to say that there was no evidence of any history at this Company in which a labor union were decertified

[21]I credit Alamillo that the comment was made, especially in view of Magdalene's own testimony, infra. Alamillo seemed forthright and not prone to exaggeration.

and that the next growing season showed a result of either more work or by no means, any less work than had been the case before the election. Also the statements suggest that it was the Company that had the power to decide whether there would be more work or at least, no reduction in work requirements.

Did this conduct affect the results of the election? It would be facile of me to abstract these two statements from the context of the election as a whole and find that they constituted such improper conduct as to render the entire election null and void. One noted authority has commented on the difficulty in voiding elections over remarks made by the parties during the campaign:

> In all these cases, of course, it will be conceivable that the election might have gone the other way had the statements in question never been made. As we have already observed, however, any effort to seize upon such statements to overturn the election runs a grave risk of proving misguided and ineffectual - misguided because it exaggerates the rationality of the voting process by emphasizing the importance of individual items of fact; ineffectual because it ignores the array of rumors, misapprehensions, and exaggerations beyond the reach of the law which will inevitably deflect the efforts of the Government to promote greater fairness and rationality by policing meticulously the public statements of the parties.
>
> . . . (A)n adequate opportunity to reply will go far to remove the need for expanding controls over the content of speech. (Bok, The Regulation of Campaign Tactics in Representation Elections Under the National Labor Relations Act (1964) Harv.L.Rev. 91.

I regard Magdalene's implied promise of no further layoffs and promise of more work as isolated remarks and merely exaggerated deviations from the otherwise lawful theme of the rest of the campaign — set by Magdalene's other statements as

well as those of other supervisors. That theme rested on the premise that continued representation by the Union could lead to continued loss of customers, the converse of that being that a defeat of the Union could stop the decline; hence, no further layoffs.

I note that no UFW witness even mentioned Magdalene's no layoff remark, including Alamillo, the President of the Ranch Committee.[22]

As to Alamillo's testimony regarding the promise of more work, a closer look at the context of the actual testimony reveals that rather than a promise of more work, Magdaleno's comment could just as easily have been interpreted to mean that with the Union out, customers would no longer leave and work would remain intact:

> Q: Did he say anything else?
>
> A: (By Alamillo) Then he continued talking more. He told us, and questioned us, Sirs, are you better now than six years ago before the Union? Then he told that before the Union was on the ranch that there was more growers, and there was more work for everybody. Then he told us the workers should be with the Company, and to vote against the Union. And then after that we would have more work for everybody.

Finally, there is no indication that either in the case

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[22]Of course, whether a statement is coercive does not turn on the employee's subjective reaction but instead depends upon whether the statement reasonably tends to coerce. T. Ito & Sons Farms (1985) 11 ALRB No. 36. Here, the point is not that the Union's witnesses did not believe the remark but the fact that none chose to mention it in their testimony which adds support for the proposition that the remark was so imprecise or ambiguous as not to be considered coercive.

of the more work promise or the no layoff promise, the Union did not have an opportunity to give its side of the story in sufficient time before the election to counter Magdalene's statements and to thereby give the workers the chance to evaluate the representations of both sides.

III. The Medical Benefits

NLRB precedents unambiguously establish that a wage increase or a promised increase in benefits is a violation of the law if its effect is to interfere with the organizational rights of workers, whether or not coupled with any threats or conditioned upon nonparticipation of employees in union activity. NLRB v. Exchange Parts (1964) 375 U.S. 405, 55 LRRM 2098; Rupp Industries (1975), 88 LRRM 1603; International Shoe (1959) 123 NLRB 682, 43 LRRM 1520.

The ALRB has also addressed the issue of the effect of promised increase in benefits on workers' rights prior to elections in a number of cases. See, e.g., Albert C. Hansen dba Hansen Farms, supra (1976) 2 ALRB No. 61; Prohoroff Poultry Farms (1977) 3 ALRB No. 87; Royal Packing Co. (1979) 5 ALRB No. 31.

Only two witnesses, Umberto Guzman and Julio Hinojosa, testified about any direct Company promises of a better medical plan if the Union were decertified.

A. The Guzman Testimony

Guzman testified that he and Guilin spoke one hour about the forthcoming election and that the only mention of the medical plan was the following: "I asked him if he could insure

better benefits in relation to the medical plan. He said yes." (I:71.)

Much more convincing however, was the testimony of Guilin who set this conversation in context and who gave it a completely different tone. According to Guilin, Guzman was concerned with whether he would have any medical coverage if the Union were voted out. Guilin testified that he told Guzman that though he couldn't make any promises, it was a fact that the nonunion work force at the farm was provided with its own, separate plan. Guilin denied saying that the plan was better. For the same reasons I have credited Guilin before, I credit him here. Given his experience in labor relations and his demeanor while testifying, I believe he would have been too savvy to answer "yes" to a direct question of whether he was offering better benefits.[23] What he did answer, however, raises another question. Did Guilin's statement that another medical plan was provided by the Company to employees who were not members of the Union (e.g., packing house workers and foremen) constitute a promise of a benefit?

I find that it did not. During the course of any decertification effort, it would only seem natural for workers who were voting to decide whether to retain a bargaining representative to be concerned about what benefits, if any, would be left should they decide to vote the union out. It is only

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[23]The testimony of UFW witnesses Patino, Alamillo, and Manuel Magdaleno confirm the cautious approach generally taken by Company representatives to questions regarding medical insurance.

fair that this Employer ought to be allowed to point out to its employees that there was, in fact, a medical plan both in effect prior to the Union's coming and while the Union's plan was in effect, which applied to non-unit workers and foremen. Though the inference is clearly that the same non-unit plan would be extended to the formerly unionized workers, this is not necessarily unlawful as a promise of a benefit but is rather a statement of an objective fact – that this Company provided medical insurance to its nonunionized work force. The employer's right to free speech necessitates that he be allowed to recite past benefits for which he was responsible so long as they were decided upon before any union activity and which were not tied into the results of the election. Albert C. Hansen dba Hansen Ranch, supra, (1976) 2 ALRB No. 61. Otherwise, an employer during any election campaign would be placed in the unjust position of having to stand mute when asked what benefits employees might expect to have if there were no union when in fact all the employer intended to do was to grant the same benefits to them he had granted in the past to his other employees who were not working under a union contract.

B. The Hinojosa Testimony

Hinojosa testified that the only statement ever made by any Company representative about medical benefits occurred on an occasion when supervisor Craig Colton stated to a group of 9-10 irrigators and tractor drivers that if the workers got rid of the Union, they'd get a better medical plan, the one

that the foremen presently had. This is different, of course, from merely reminding the employees of what benefits they had before the Union or what benefits its nonunion workers presently receive. Rather, it could be interpreted as suggesting a direct promise of better benefits should the Union be voted out.

On the surface Hinojosa's statement appeared believable, especially when compared with the disingenuous testimony of Company witnesses Rafael Pacheco and Cornelio Peno, infra. However, upon closer examination, I find that it contains a sufficient number of gaps and uncertainties to persuade me that standing by itself, it is not sufficient to overturn the results of this election.

First, the UFW established no real context for the statement, only that it, and it alone apparently, was made during *a* meeting in which the election was supposedly discussed for at least 7-8 minutes. What else was said during this 7-8 minutes and by whom? What was said directly before Colton's alleged statement that gave rise to it? What was the workers' response to Colton's remarks and the Company's reaction.[24]

Second, no one was called to corroborate this important conversation.

Third, Hinojosa testified that these remarks were made at a regular Tuesday meeting, 3 or 4 days before the election.

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[24]On cross-examination, Hinojosa testified that some worker asked Colton what kind of better benefits they would have (I:58), but neither party bothered to ask the witness what Colton's reply was.

But if the meeting were held on a Tuesday, this would have been either 1 or 8 days from the Wednesday election.

Fourth, on direct examination, Hinojosa testified that Colton had indicated better benefits would be instituted in the form of the present foremen's medical plan, which suggests, as in the case of some of Guilin's discussions with workers, that Colton, in response to inquiries about medical protection in the event of a Union defeat, was merely making reference to the Company's already in place medical plan for its nonunion work force. Even if Colton (or Guilin) had used the word "better" to describe the nonunion plan, he was not talking about instituting a new benefit but was at most, inviting a comparison between an existing benefit with the Union's program. No doubt many of the employees would have known some aspects of both insurance policies anyway. From this standpoint, whether a Company representative called one of the policies "better" was not a promise but a statement of opinion which many workers could judge for themselves since both policies were in existence at the time. In fact, some thought the Union program was better anyway, as shown by the testimony of Hinojosa.

In Jack or Marion Radovich, supra, (1983) 9 ALRB No. 45, the employer had distributed a leaflet which, inter alia, had compared the benefits in effect at nonunion ranches to UFW contract benefits and accused the UFW of telling lies and making false promises. In finding no unlawful activity, the Board held:

> . . . Although promises of benefits need not be explicit to be unlawful, the NLRB generally views

> employer comparisons of existing benefits between union and nonunion shops, absent a more explicit inducement, as "permissible campaign techniques which fall within the bounds of free speech permitted by section 8(c) of the Act", even when the unionized employer cites better benefits available at his own nonunion shops. (Thrift Drug Co. (1975) 217 NLRB 1094 [89 LRRM 1292].) Although section 8(c) of the national act and its ALRA counterpart, section 1155, do not apply specifically to representation cases, we shall not set aside an election on the tenuous possibility that a comparison of existing benefits such as the one herein might be perceived by potential voters as an implicit promise to pay them more favorable benefits if they vote against the Union. We find that the employees' interest in full disclosure and maximum information concerning the advantages and disadvantages of unionization outweighs any arguable or possible coercive effect of the statements.[25] 9 ALRB No. 45 at pp. 5-6. (Fns. omitted.)

In short, the Union bore a heavy burden of proof to show that unlawful acts occurred and that these acts interfered with free choice to such an extent that election results were affected. TMY Farms, supra, (1976) 2 ALRB No. 58. It cannot be said that it has carried its burden through the testimony of Hinojosa[26] or Guzman.

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[25]By deciding, the Board appears to have overruled its earlier ruling in Jack or Marion Radovich (1983) 9 ALRB No. 16 which held that an employer's reminding workers of a better insurance policy before they voted the union in was an implied promise to restore the superior benefit and therefore, a violation of the Act. See Jack or Marion Radovich, supra, 9 ALRB No. 45, fn. 4, p. 5.

[26]This is not to say that I was particularly impressed by the unexplained absence of Colton from these proceedings or the testimony of Pacheco and Peno. The latter two both testified that 3 meetings were held to specifically discuss the upcoming election but that all that was ever said at any of them was that there was going to be an election, that it was to be a free election, and that workers had a right to vote for whomever they wanted. I find this incredulous testimony. Even less credible was Peno who testified the Company conducted no election campaign and that the only thing he ever learned from Company

IV. The Election Conduct

To sustain this allegation,[27] the UFW's case rests exclusively upon the testimony of Manuel Magdaleno regarding the conduct of Petitioner's observer, Gabriel Salazar. Salazar is alleged to have made encouraging gestures to prospective voters, to have stated "we're going to make it" to them, to have left the voting area without permission to talk with prospective voters who were waiting in line to vote, and to have made a threat to a voter.

It is necessary to begin our analysis by recognizing that the selection of an observer does not make that individual an agent of any party. C. Mondayi & Sons d/b/a Charles Krug Winery (1977) 3 ALRB No. 65. Thus, Salazar was not the agent of the Decertification Petitioners herein, let alone that of the Employer. This is an important consideration because when a non-party is alleged to have engaged in misconduct, the Board gives it less weight in determining whether to set aside the election than if it had been the party that had committed the improper act. Ibid.; Takara International, Inc. (1977) 3 ALRB No. 24; Kawano Farms (1977) 3 ALRB No. 25; San Diego Nursery, Inc. (1979) 5 ALRB No. 43; Matsui Nursery, Inc. (1983) 9 ALRB No. 42. This is because the conduct of non-parties tends to have less effect

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representatives about the election was the fact that there was going to be one.

[27]The Union concedes that this allegation, standing alone, may not be sufficient to overturn the results of this election. (II:132.)

on voters than similar conduct by one of the parties. Kawano Farms, Inc., supra, (1977) 3 ALRB No. [25].

A. The Gestures

Magdaleno testified that Salazar frequently smiled and then made a gesture with his palms as if to say "we're going to make it". The Board agent in charge of the election, Alina Lopez, testified that she also observed these gestures but that they arose out of the context of disagreements between him and Magdaleno and were directed not at prospective voters but rather at either her or Magdaleno. In any event, she acknowledged that she was not in the best position to see Salazar if he were making gestures to voters as he was slightly behind her.

I have little doubt that Salazar was making some kind of gestures to voters though how frequently and how many voters remains in question. I credit Magdaleno here as he testified straightforwardly and without hesitation. Salazar did not testify, and his absence was unexplained. However, I cannot see that the gestures would have interfered with the election. To begin with, it is not very clear what the gesture — described in the testimony, including a hearing room demonstration, as palms extended upwards — really meant. Magdaleno gave his view certainly. But the UFW failed to call any prospective voter who actually saw the gesture so that the record does not reflect either that such a person observed any gesture or if so, what it meant to him. Moreover, it is not uncommon for gesturing to take on ambiguous meanings. For example, in S.A. Gerrard Farming

Corp. (1980) 6 ALRB No. 49, IHED pp. 20-21, the UFW observer was accused of winking at and saying "Now, yes, now" to from 60-70 voters or every voter that came by. This was held not to be the kind of behavior which interfered with free choice. The observer's statements and winks did not necessarily amount to instructions to vote for the UFW.

Likewise, other forms of communication, including those clearly understood, do not render the election void. In Chula Vista Farms, Inc. (1975) 1 ALRB No. 23, the Board held that the mere wearing of buttons or other insignia in the polling area by union observers was not prejudicial to the fair conduct of an election based upon the reasoning that the identity of election observers and their special interest in the outcome of the election generally was well known to the employees. Though the wearing of such a button was in violation of the Board's Regulations, it was just one factor to be considered in the determination of whether conduct was so prejudicial to the fairness of the election as to warrant setting it aside. See also D'Arrigo Bros. of California, supra, (1977) 3 ALRB No. 37.

B. The Statements

Magdaleno testified that in addition to the gesturing, Salazar actually used the words, "we're going to make it" three or four times and that on those occasions it was directed to the voter who was at the front door. Lopez testified she did not hear the statements. Again I credit Magdaleno that that expression was used. But as shown about in S.A. Gerrard

Farming Corp., supra, (1980) 6 ALRB No. 49, IHED, pp. 20-21, the law imposes a rather high standard to prove the observer is actually instructing the voter how to vote. See also South Pacific Furniture, Inc. (1979) 241 NLRB No. 89 and Amalgamated Industrial Union (1979) 246 NLRB No. 124. And even if such an instruction were given here, it did not impact upon the fairness of the election.

C. The Threat

There is no dispute but that at some point Salazar told a worker who had just voted that if he announced for whom he voted, he would get his tires slashed. There is no evidence that there were any prospective voters around who heard these remarks. After a strong reprimand from Lopez, the remark or similar remarks were not repeated.

The UFW argues that Salazar's statement was a threat, but I do not regard it as such. It certainly was not a threat that certain action would be taken if the voter failed to vote a certain way as the vote had already been cast and the tire slashing was to occur without regard to whether that vote was for the Company or Union. The "threat" then was not intended to influence votes but rather to punish the voter for revealing his vote, whatever that vote may have been.

D. The Conversation with Prospective Voters

Magdaleno testified that both of Petitioner's observers left the room without permission and went to the voting line where they spoke to at least five prospective witnesses for

two-three minutes. When he called this to Lopez's attention, she became upset and. asked both observers to re-enter the voting area.

The UFW offered no corroboration for this serious allegation, either from Board agents, other observers or any of the prospective voters. Lopez denied the incident ever happened. I credit Lopez that it did not occur. Lopez exhibited a good memory and was a convincing witness. She was a neutral participant in these proceedings and had no reason to fabricate or exaggerate. An experienced Board agent who has handled several NLRB elections, *I* cannot believe that in her presence she allowed two observers to leave the voting room and proceed out the door to the line of prospective voters, allowing them to converse for 2 or 3 minutes. Even if she had missed their departure from the room, certainly she would have recalled Magdaleno's protest. Though I have credited Magdaleno on some of the other factual disputes in this case, I cannot do so here. I can only charitably conclude that in this instance he has let his imagination run a little wild.

Even if I were to credit Magdaleno that a contact was made between the observers and the prospective voters, it would not, under the facts of this case, be sufficient to warrant setting aside the election. Where an observer (as opposed to a real party) is involved in conversations with prospective voters, the Board may inquire as to the substance of those conversations to determine whether they are of such character as to affect free

choice. Perez Packing, Inc. (1976) 2 ALRB No. 13; Harden Farms of California, Inc. (1976) 2 ALRB No. 30.

Here the Union failed to produce any employee to testify what, if any, actual conversation took place. See NLRB v. USM Corp. (6th Cir. 1975) 517 F.2d 971, 89 LRRM 2585, fn. 16. And since Magdaleno did not overhear the conversation, there is no evidence that even if the observer were talking to prospective voters, that he was electioneering as opposed to, for example, merely responding to their question or just greeting them. Vessey Foods, Inc. (1982) 8 ALRB No. 28. Of course, had this supposed contact merely been an exchange of greeting by observers with voters, it would not be of such a character as to affect free choice. Kawano Farms, Inc., supra, (1977) 3 ALRB No. 25; Harden Farms of California, supra, (1976) 2 ALRB No. 30. Even if the conversation had gone beyond mere greetings, as where an observer asked a voter why she didn't have her UFW button on or told another voter which side of the ballot represented the UFW, the election would not be overturned. Ibid. See also Pleasant Valley Vegetable Co-Op (1982) 8 ALRB No. 82.

In Debrum-Knudsen Dairy (1982) 8 ALRB No. 49, the Board found that a union observer's asking another employee about his new job, translating *a* Board agent's voting instructions, and also translating the agent's answer to an employee's question about his eligibility to vote, even though done In the polling area, were innocuous conversations, did not constitute electioneering, and did not warrant setting aside the election.