Exeter, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

SEQUOIA ORANGE CO., EXETER ORANGE CO., SEQUOIA ENTERPRISES, CARL A. PESCOSOLIDO, JR., MARVIN L, WILSON, OLEAH H. WILSON, LINDA PESCOSOLIDO, WILLIAM PESCOSOLIDO, WILLIAM L. MARTIN II, RICHARD B. VIND, BADGER FARMING COMPANY, WILSON & WILSON, RICHARD J. PESCOSOLIDO, and DOES A-K, doing business as FOOTHILL FARMS, TROPICANA RANCH, VALLEY VIEW RANCH, SEQUOIA DEHYDRATOR/WEAVER, ENTERPRISE I, ENTERPRISE II, NORTH SLOPE RANCH, ROLLING HILLS RANCH, CAP RANCH, COUNTY LINE RANCH, HIATT RANCH, TEE DEE RANCH, JMW RANCH, KERN/CAMEO RANCH, PRICKETT RANCH, BURCH RANCH, MADERA 240 RANCH, MERRYMAN RANCH, OSO RANCH, and PANOCHE RANCH, a single agricultural employer, Employer, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Petitioner.	Case Nos. 83-RC-4-D 83-RC-4-1-D 13ALRB No.18 (13ALRB NO.9) (11ALRB No.21)

DECISION AND ORDER SETTING ASIDE ELECTION

On May 15, 1987, the Agricultural Labor Relations Board (ALRB or Board) issued a Decision and Order to Show Cause in this proceeding. (Sequoia Orange Co., et al. (1987) 13 ALRB No. 9.) In its decision, the Board considered the Regional Director's (RD) Amended Challenged Ballot Report, in light of the exceptions and

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supporting brief filed by the Designated Employers[1/] (Employer), and decided to adopt the RD's recommendations that 37 challenges be sustained and 35 challenges be overruled. The Board directed the RD to open the 35 challenged ballots and thereafter prepare and serve upon the parties a revised Tally of Ballots. Upon resolution of the issues and challenges in its Order to Show Cause, the Board stated that it would decide the effect, if any, of the inadequate notice to Curtis Contracting employees.

In its Order to Show Cause, the Board retained jurisdiction over the remaining 45 challenges and the alleged discrepancy in the number of packing shed employees' challenged ballots, including its effect upon the integrity of the election process. The Board stated that unless any party can show cause why it should not, the Board will:

(1) consider the official ballot count as reflecting the number of ballots actually cast by the packing shed employees;

(2) sustain the challenges to the 42 voters whose ballots were placed in abeyance by the RD in his Amended Challenged Ballot Report; and

(3) find the 3 remaining challenged ballots to be void.

In accordance with the Board's Decision and Order in Sequoia Orange Co., et al., supra, 13 ALRB No. 9, the RD opened and counted 35 challenged ballots and issued an Amended Tally of

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[1/]As indicated in footnote 1 of the Designated Employers' Response to Order to Show Cause, the term "Designated Employers" refers to all the employing entities to which the parties had stipulated as constituting a single, integrated employer.

Ballots, with the following result:

UFW	235
No Union	195
Unresolved Challenged Ballots	45
Total	475
Number of Void Ballots.	19[2/]
Total Number of Voters	531
Total Number of Names on Eligibility List	596[3/]

As the number of remaining unresolved challenged ballots is sufficient to affect the outcome of the election, the Board must resolve these challenges pursuant to the Order to Show Cause.

In its Response to Order to Show Cause, the Employer agrees with the Board that the challenges to the 42 voters whose ballots were placed in abeyance by the RD should be sustained. The Employer objects to the proposed voiding of the 3 challenged ballots, but fails to present any legal argument or factual evidence in support of its objection. No response to the Order to Show Cause has been filed by any other party. Accordingly, the Board will sustain the challenges to the 42 voters whose ballots were placed in abeyance by the RD in his Amended Challenged Ballot Report and find the 3 remaining challenged ballots to be void.

[2/] The number of void ballots increased by 1 due to the voiding of one *of* the 35 challenged ballots opened and counted by the RD in preparing the Amended Tally of Ballots.

[3/] This figure does not include the packing shed employees.

As a result of the Board's resolution of the remaining 45 challenges, the RD ' s Amended Tally of Ballots reflects what would otherwise be the final election result, with the United Farm Workers of America, AFL-CIO (UFW or Union) winning the election by 40 votes over the No Union choice. However, before we can certify this result, we must determine the effect, if any, of the inadequate notice to 54 Curtis Contracting employees.

The record reveals that the Employer and Union stipulated that the 54 Curtis Contracting employees were not allowed to vote in the election. (R.T. Vol. I, p. 31.) The undisputed facts are that these employees did not receive any notice of the election. The Administrative Law Judge correctly found that the RD had determined that the Curtis Contracting employees were employees of a custom harvester, and hence were not eligible to vote in the election. However, in Sequoia Orange Co., et al. (1985) 11 ALRB No. 21, the Board determined that Curtis Contracting, Inc. was a labor contractor, not a custom harvester, and that its employees were therefore eligible to vote in the election. Thus, through no fault of the Employer or Union, the Curtis Contracting employees received no notice of the election and were thus disenfranchised. Since the number of disenfranchised Curtis Contracting employees is outcome determinative—i.e., greater than the margin of victory, the election must be set aside.[4/] (See, e.g.,

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[4/] As the election is set aside due to the outcome determinative number of disenfranchised Curtis Contracting employees, it is not necessary that we reach and decide the alleged discrepancy issue and its effect, if any, upon the integrity of the election process.

Leo Gagosian Farms, Inc_. (1982) 8 ALRB No. 99; Versail Manufacturing, Inc. (1974) 212 NLRB 592 [86 LRRM 1603]; McCormick Lumber Co., Inc. (1973) 206 NLRB 314 [84 LRRM 1267].) Accordingly, the election is hereby set aside.

ORDER

By authority of Labor Code section 1156.3(c), the Board, finding that an outcome determinative number of voters was disenfranchised, declines to certify the election.

Dated: November 5, 1987

BEN DAVIDIAN, Chairman[5/]

JOHN P. MCCARTHY, Member

GREGORY L. GONOT, Member

[5/] The signatures of Board Members in all Board Decisions appear with the signature of the Chairman first, if participating, followed by the signatures of the participating Board Members in order of their seniority. Member Ramos Richardson did not participate in the consideration of this matter.

MEMBER HENNING, Concurring:

I reluctantly concur in the result of this long overdue decision. Because an outcome determinative number of voters was disenfranchised, we must set aside the results of this nearly five-year old election. However, I write separately to suggest that there must be a better way of processing elections under the Agricultural Labor Relations Act (ALRA or Act), a way that fulfills rather than frustrates the goal of the Act to avoid prolonged consideration of election matters.

The ALRA was specifically designed to rapidly process election petitions and get the parties to the bargaining table, should employees select union representation. Section 1156.3(a) of the Act directs that elections be conducted within seven days (or even shorter if a strike is in progress) of the filing of a valid petition and that objections to the conduct of the election be filed within five days of the election. Section 1160.3 permits the Agricultural Labor Relations Board (ALRB or Board) to make

employees whole for losses attributable to the employer's refusal to bargain, and since employers can only seek review of the Board's election certifications by refusing to bargain, delays in the onset of bargaining are effectively discouraged except in the most meritorious cases.

Now, consider the facts of this election. On March 14, 1983, the United Farm Workers of America, AFL-CIO (UFW or Union) filed a petition for certification and some eight days later the election was held. The petition was followed, first, by a response from the employing entity that it had no agricultural employees at all and then, a few days later, by an objection by the employing entity that its packing shed employees must be entitled to vote. The Regional Director had to decide complicated factual and legal questions concerning who the employer was, who was a custom harvester and who was not, who was an agricultural employee and who was a supervisor or commercial employee, what the extent of the bargaining unit should be, all the while coordinating the balloting of potentially some 600 voters. Meanwhile, the Regional Director was dealing with combatants who chose to disclose only such information as would further their chances of success in the outcome of the election. The Regional Director decided that one small harvester, little used by the packing shed and the northernmost, was not appropriately within the bargaining unit to be balloted. He was incorrect. Because of his judgment call, we now set this election aside, and the respect this Act merits suffers anew.

While we have in the past placed the burden on the

parties to shoulder some of the load in notifying the electorate of the upcoming balloting (see, e.g., Lu-Ette Farms (1976) 2 ALRB No. 49; Sun World Packing Corp. (1978) 4 ALRB No. 23; Leo Gagosian Farms, Inc. (1982) 8 &LRB No. 99; J. Oberti, Inc., et al. (1984) 10 ALRB No. 50), the issue has not arisen where, as here, the Regional Director has ordered that notice to a group of employees is inappropriate and no party, at that moment, disagrees with the decision of the Regional Director. The unfortunate lesson of this protracted litigation is that Regional Directors must be exceedingly wary of making any election decision that may disenfranchise any potential voter. Henceforth, I would be disappointed in the conduct of any election that did not preserve the potential issues through the challenged ballot procedure.

Dated: November 5, 1987

PATRICK W. HENNING, Member

CASE SUMMARY

Sequoia Orange Co., et al. (UFW)

13 ALRB No. 18
Case Nos. 83-RC-4-D, 83-RC-4-1-D

ORDER TO SHOW CAUSE

Pursuant to the Board's Decision and Order to Show Cause in this proceeding (13 ALRB No. 9), the Board retained jurisdiction over the remaining 45 challenges and the alleged discrepancy in the number of packing shed employees' ballots and its effect, if any, upon the integrity of the election process. Upon a revised Tally of Ballots and resolution of these challenges, the Board stated that it would decide the effect, if any, of the inadequate notice to Curtis Contracting employees.

BOARD DECISION

Pursuant to its Order to Show Cause, the Board sustained the challenges to the 42 voters whose ballots were placed in abeyance by the RD in his Amended Challenged Ballot Report and found the 3 remaining challenged ballots to be void. As a result of the resolution of these challenges and the final election result, the Board had to determine the effect of the inadequate notice to 54 Curtis Contracting employees. The Board found that through no fault of the Employer or Union, the Curtis Contracting employees received no notice of the election and were thus disenfranchised. Due to the outcome determinative number of disenfranchised employees, the Board set aside the election.

CONCURRENCE

Member Henning concurred, arguing that decisions by Regional Directors that may result in the disenfranchisement of potential voters should, in the future, be preserved by the challenged ballot procedure. He lamented the delay in the resolution of this matter.

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