Selma, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

AGRI-SUN NURSERY, Employer, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Petitioner.	)	Case No. 85-RC-4-F 13 ALRB No. 19

DECISION AND ORDER

On June 17, 1985, the United Farm Workers of America, AFL-CIO (UFW or Union) filed a Petition for Certification seeking to represent a bargaining unit of all agricultural workers employed by Agri-Sun Nursery (Employer). An election was conducted by the Agricultural Labor Relations Board (ALRB or Board) on June 22, 1985. The initial Tally of Ballots showed the following results:

UFW.	18
No Union	14
Unresolved Challenged Ballots	6
Total	38

Because the number of challenged ballots was outcome-determinative, the Regional Director conducted an investigation. He issued a recommendation that three of the challenges be overruled, and that the challenge to Carol Howard (alleged to be a confidential employee and/or supervisor) be sustained. Since the remaining two challenges involved employees

who were terminated before the election but whose terminations were the subject of unfair labor practice (ULP) charges, the Regional Director recommended that no action be taken on those two ballots pending resolution of the ULP charges.

The Employer excepted only to the Regional Director's recommendation that the challenge to Carol Howard's ballot be sustained. The Executive Secretary ordered that the three ballots to which no exceptions were filed be opened and counted, and a revised tally showed the following results:

UFW	18
No Union	17
Unresolved Challenged Ballots	3
Total	38

The Employer had meanwhile filed a number of election objections, and the Board ultimately ordered that a consolidated hearing be held on five of the Employer's objections as well as the issue of Carol Howard's challenged ballot. A hearing was held before Investigative Hearing Examiner (IHE) James Wolpman on March 19, 20 and 21, 1986, on the following issues:

1. Whether Carol Howard was a supervisor, and therefore ineligible to vote;

2. whether ALRB agents demonstrated prounion bias during the preelections conference and, if such misconduct occurred, whether it tended to affect the outcome of the election;

3. whether the UFW threatened eligible voters with loss of employment if they failed to vote for the Union and, if so,

whether such conduct tended to affect the outcome of the election;

4. whether the UFW engaged in and condoned threats of physical violence and intimidation and, if so, whether such conduct tended to affect the outcome of the election; and

5. whether Board agents interfered with the fair operation of the election and demonstrated prounion bias by (a) telling eligible voters that the Employer treated its employees like slaves; (b) encouraging employees to take the Employer to court; and/or (c) telling eligible voters that seeing people in elections was good because previously there was no union; and, if any such misconduct occurred, whether it tended to affect the outcome of the election.

During the course of the hearing, the IHE granted the Employer's motion to overrule the challenge to Carol Howard's ballot because of a failure of proof that Howard possessed the standard indicia of supervisory status. The IHE also granted the UFW[1]s motion to dismiss the Employer's objection regarding alleged Board agent misconduct during the preelection conference. No party excepted to the dismissal of these two issues.

In his Decision, the IHE recommended that all of the Employer's remaining election objections be dismissed. The Employer timely filed exceptions, along with a supporting brief.[1/] No exceptions or reply briefs were filed by any other party.

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[1/]As previously noted, no party excepted to the IHE's dismissal of the challenge to Carol Howard's ballot or to his dismissal of the Employer's objection regarding alleged Board agent misconduct during the preelection conference.

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

The Board has considered the record and the IHE's Decision in light of the Employer's exceptions and brief, and has decided to affirm the IHE's rulings, findings and conclusions, as modified herein.

Alleged Threats of Loss of Employment

Agri-Sun employee Juan Torres testified that during the election campaign he heard four co-workers say at various times that if he did not vote for the Union he would lose his job. Ladislao Echeverria, who did not vote in the election because he was in Mexico at the time, testified that co-employees told him that those who did not vote would be fired, that those who did not vote for the Union would be fired, and that once the Union came in, only the employees who were in the Union would be working. Echeverria also stated that co-employee Raul Espino told him he had to sign a card,[4/] and that if he did not sign it he was going to lose his job. Finally, employee Jose Mesa testified that three co-workers told him that he and others would be fired if the Union won the election, and that he understood the statement to mean

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

[3/]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.

[4/] We presume that the card to which Echeverria referred was an authorization card, although he did not so describe it.

that if the Union won and he wanted to continue working, he would have to join the Union.

Under the rule of law established in both ALRB and National Labor Relations Board (NLRB) cases, elections will be set aside on the basis of threatening conduct not attributable to one of the parties where the conduct is sufficient to create an atmosphere of fear or reprisal rendering employee free choice impossible. (Price Brothers Company (1974) 211 NLRB 822 [86 LRRM 1517]; T. Ito & Sons Farms (1985) 11 ALRB No. 36; Triple E Produce Corp. v. ALRB (1983) 35 Cal . 3d 42.) The party seeking to overturn an election bears a heavy burden of proof, requiring specific evidence that misconduct occurred and interfered with employee free choice to such an extent that it tended to affect the results of • the election. (Bright 's Nursery (1984) 10 ALRB No. 18; TMY Farms (1976) 2 ALRB No. 58; N.L.R.B. v. Sauk Valley Manufacturing Co., Inc. (9th Cir. 1973) 486 F.2d 1127, 1130 [84 LRRM 2674].) The test of whether a threatening statement is coercive does not depend upon its actual effect upon listeners, but rather upon whether it would reasonably tend to have an intimidating effect. (Sav-On-Druqs , Inc. (1977) 227 NLRB 1638, 1644 [95 LRRM 1127]; Triple E. Produce Corp. v. ALRB, supra, 35 Cal. 3d 42; T. Ito & Sons Farms, supra, 11 ALRB No. 36.)

Both the ALRB and the NLRB accord less weight to misconduct of party supporters than to misconduct attributable to party agents or representatives. (Sonoco of Puerto Rico, Inc. (1974) 210 NLRB 493 [86 LRRM 1122]; Ace Tomato Company, Inc. (1986)

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12 ALRB No. 20; Pleasant Valley Vegetable Co-op (1982) 8 ALRB No. 82.) The IHE correctly found that the only union official involved in the election campaign herein was Humberto Gomez, and that no one testified that Gomez had threatened any employees with loss of their jobs.

The IHE also concluded that employee Raul Espino was not an agent of the UFW. Although Espino attended and spoke at union campaign meetings, the IHE noted that Espino had no official role in conducting the meetings and was not a member of the organizing committee. The IHE further found that the Union did nothing to create any impression that Espino was a UFW representative, and that Espino's involvement with the Union and the election was not sufficient to show that he acted with the apparent authority of an agent. (San Diego Nursery (1979) 5 ALRB No. 43; Pleasant Valley Vegetable Co-op, supra, 8 ALRB No. 82.)

Because the evidence shows that Espino apparently circulated authorization cards and told at least one employee that he would lose his job if he did not sign a card, we will consider Espino's status in light of a recent NLRB decision, Davlan Engineering, Inc. (1937) 283 NLRB No. 124 [125 LRRM 1049] (Davlan). In Davlan, four employees who solicited their fellow employees to sign union authorization cards made statements to the effect that if an employee signed a card prior to the election, his or her union initiation fee would be waived. The regional director concluded that the employee/solicitors were not agents of the union because they were not members of the organizing committee and were not vested with any substantial authority

regarding distribution of authorization cards. Moreover, the regional director found no evidence that the union had adopted or ratified the employees' statements or otherwise held the solicitors out as agents acting on the union's behalf. In 1982, the national board initially adopted its regional director's recommendations and certified the union, affirming its traditional rule that the solicitation of authorization cards by employees, standing alone, does not make those employees agents of the union .

However, in its 1987 Davlan decision, the NLRB vacated its prior decision and its certification of the union. The board observed that it had all too frequently been faced with election objections based on improper initiation-waiver statements made by employees soliciting card signatures. Moreover, "the harm resulting from improper fee-waiver statements can be largely avoided by unions undertaking a clear explanation of their policy." (Davlan Engineering, Inc., supra, 283 NLRB No. 124, Slip Opinion, pp. 4-5.) Thus, the board concluded that

> ... in the absence of extraordinary circumstances, employees who solicit authorization cards should be deemed special agents of the union for the limited purpose of assessing the impact of statements about union fee waivers or other purported union policies that they make in the course of soliciting. (Id., at p. 6 .)

Because of their status as special agents of the union, the employee-solicitors' statements in Davlan concerning union policy were attributable to the union itself, and therefore, under NLRB precedent, constituted union interference with employee free

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choice in the election. (NLRB v. Savair Mfg. Co. (1973) 414 U.S.270 [84 LRRM 2929].)

We find Davlan distinguishable from the instant case. In Davlan, the national board was concerned with a frequently encountered problem of employees expressing an apparent union policy of waiving initiation fees -- a matter strictly within the union's control--in exchange for signatures on authorization cards. By contrast, the allegation herein was that Espino told an employee that if he did not sign a card he would lose his job. Espino's statement was not a representation of union policy on a matter within the Union's actual or apparent control. Nor was Espino's statement one from which potential harm could be largely avoided by the Union's undertaking a clear explanation of its policy, since he was not expressing a union policy and was not making a statement which the Union should reasonably have anticipated he would make in the course of soliciting card signatures. It may be an easy matter for a union to publicize a lawful fee-waiver policy in a manner reasonably calculated to reach unit employees before they sign authorization cards, but we cannot reasonably expect a union to anticipate every improper statement that an employee soliciting signatures might make on matters other than internal union policies.

Davlan appears to be decided in part on the basis of the NLRB's policy consideration that unions should be encouraged to undertake clear explanations of their initiation fee-waiver practices because, in the past, the national board had frequently been presented with election objections based on statements made

by employees soliciting signatures. We find no such policy consideration to be applicable in the instant case,[5/] and we are unwilling to presume that an employee making a statement such as Espino's is thereby acting as a union agent whether or not he has been specifically authorized or instructed by the union to speak on that subject. Therefore, we find nothing in Davlan to justify overturning the IHE's finding that Espino was not a union agent, and we hereby affirm that finding.

Thus, the applicable standard for statements made by Espino and other union supporters herein is whether their conduct was so aggravated that it created an atmosphere of fear or reprisal making free choice impossible. (Ace Tomato Company, Inc., supra, 12 ALRB No. 20; T. Ito & Sons Farms, supra, 11 ALRB No. 36? N.L.R.B. v. Advanced Systems, Inc. (9th Cir. 1982) 681 F.2d 570 [110 LRRM 2418].) The test to be applied in determining whether nonparty conduct is coercive is an objective,

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[5/] We also note that under the National Labor Relations Act (NLRA) an employer can voluntarily recognize a union solely on the basis of union support expressed by a majority of employees signing authorization cards, whereas under the Agricultural Labor Relations Act (ALRA), authorization cards merely provide a showing of interest sufficient to hold a representation election. (In Harry Carian Sales (1980) 6 ALRB No. 55, enforced, Harry Carian Sales v. ALRB (1985) 39 Cal.3d 209, this Board did rely on authorization cards to establish that a majority of employees supported the union. However, Carian involved rare circumstances in which the employer's egregious unfair labor practices made a free and fair election impossible.) Thus, an employee's decision to sign or not to sign an authorization card has a greater significance under the NLRA than under the ALRA.

not a subjective, test.[6/]

We find that the IHE erred in concluding that, before he voted, Juan Torres himself understood that the Union could not cause him to lose his job if he failed to cast his vote for the Union. The issue was not Torres' subjective feeling, but rather whether an employee would reasonably feel coerced by a co-employee's statement that his job would be taken away if he failed to vote for the Union, or whether he would be able to evaluate the statement as mere campaign propaganda. We also conclude that the IHE erred in comparing the union adherents' statements herein to statements in prior cases which we found to be merely descriptive of a union shop agreement. The instant case, like Triple E, is distinguishable from Jack or Marion Radovich (1976) 2 ALRB No. 12, in that here there is no existing contract containing a union security provision; hence, the Board cannot reasonably infer here that employees were familiar with the clause and its effects. (Triple E Produce Corp. v. ALRB, supra, 35 Cal.3d at p. 51.)

Nevertheless, we affirm the IHE's ultimate conclusion that the union supporters' threats of job loss for failure to vote for the UFW, failure to sign an. authorization card, or failure to join the Union if it won the election, did not create a general atmosphere of fear and reprisal rendering free choice of a

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[6/]"Thus, in assessing the effect of the threat, we do not inquire into the subjective individual reactions of a particular employee or group thereof, but rather determine whether the statements, considering the circumstances surrounding their utterance, reasonably tended to create an atmosphere of fear and coercion." (Triple E Produce Corp. v. ALRB, supra, 35 Cal.3d at p. 55.)

representative impossible. The policy of this Board and the NLRB of according less weight to campaign conduct which is not attributable to the union or the employer

> ... credits employees with the ability to give true weight to the possibly impulsive allegations of fellow employees induced by the heat of a campaign. The Board [NLRB] recognizes that because, as a practical matter, unions and employers cannot prevent misdeeds or misstatements by those over whom they have no control, a rule which gives the 'same weight to conduct by third persons as to conduct attributable to the parties [would] substantially diminish . . . the possibility of obtaining quick and conclusive election results . . . .' [Citation omitted.] N.L.R.B. v. Sauk Valley Manufacturing Co., Inc., supra, 486 F.2d 1127, 1131, n. 5.)

The job-loss statements herein are distinguishable from the threats made to employees by union organizers in Triple E that if employees did not vote for the UFW they would be replaced in their jobs by union people. The California Supreme Court found that the organizers' threats in Triple E were pervasive and carried a reasonable implication that the union would know of each worker's vote and would exercise some control over job tenure. (Triple E Produce Corp. v. ALRB, supra, 35 Cal.3d at p. 51.) In contrast, the statements herein were made by co-employees with no authority to speak as agents of the Union. We are unwilling to hold the Union accountable for employees' statements which it neither authorized nor condoned.

We also distinguish the threats made herein from the threats made in T. Ito & Sons Farms, supra, 11 ALRB No. 36, by co-employees, during the voting process, that they would physically beat employees and call the Immigration and Naturalization Service if they failed to support the union. In

Ito the timing of the threats, their violent nature, and the obvious ability of the perpetrators to carry them out, persuaded the Board that the threats created a coercive atmosphere affecting free choice. Here, however, the employees had no actual or apparent ability to carry out their threats.

We find the threats made in the instant case to be more closely akin to those made in two NLRB cases, Central Photocolor Company, Inc. (1972) 195 NLRB 839 [79 LRRM 1568] and Bancroft Manufacturing Co. (1974) 210 NLRB 1007 [86 LRRM 1376]. In Bancroft, a union organizer told employees that if they did not vote for the union they would be fired or laid off. Although the threats were made by a party representative, the NLRB upheld the election after finding that employees would be able to evaluate the threats as campaign propaganda, and that the reprisals referred to in the statements were not within the union's power to carry out. In Central Photocolor, the NLRB upheld an election where union supporters had threatened employees that the union, if it won the election, would pressure employees who had voted against it to join the union or face losing their jobs. The NLRB concluded in Central Photocolor--as we conclude herein—that the nonparty conduct was not so aggravated as to create a general atmosphere of fear and reprisal rendering free choice impossible. We conclude, therefore, that the election should not be set aside on the basis of the alleged threats of loss of employment.[7/]

[7/] We affirm the IHE's decision to exclude, as inadmissible hearsay, a declaration from employee Martin Rodrigues which the

(fn. 7 cont. on p. 13)

Alleged Threats of Physical Violence and Intimidation

On June 21, the day before the election, Agri-Sun conducted a meeting after work in which it provided beer for the employees and engaged in some campaigning. Juan Torres testified that he drank three or four beers at the meeting and that afterwards he and a group of other workers went to a usual gathering place called Chappa's Market, where they continued drinking. After a while, UFW representative Humberto Gomez arrived and told the employees they should all go home because they were getting drunk. Instead of going home, a number of the workers went on to Johnny's Market where they continued drinking. Torres testified that a group of workers gathered around him at Johnny's and asked why he no longer supported the Union. He stated that one worker called him a son-of-a-bitch and that he felt threatened because some of them looked angry.

Lupe Gonzales, a former supervisor who no longer worked at Agri-Sun, testified that the workers present at Johnny's, including Torres, were intoxicated. He stated that when he arrived, several men had Torres "pinned to a car" and Torres was crying and shaking. When the group with Torres broke up, Gonzales stated, he (Gonzales) got angry and pushed one of the men aside.

(fn. 7 cont.)

Employer sought to introduce as corroboration of alleged co-employee threats. The reliability of the declaration was especially questionable since it constituted "double hearsay"— that is, the declaration itself was hearsay and it also purported to quote statements made by other persons. Contrary to the Employer's argument, the declaration does not fall within the "state of mind" exception to the hearsay rule, since Rodrigues' subjective state of mind was not, and should not be, at issue.

Ruben Alejandro, Gonzales' cousin, grabbed Gonzales and stopped him, telling him not to start any trouble.

UFW representative Humberto Gomez testified that when he arrived at Johnny's, Juan Torres was so intoxicated that he could not walk. He was leaning against an automobile because he could not stand up, and as soon as he stepped away from the car he would fall. Gomez described Torres' speech as "totally abnormal" and his condition as "totally emotional," and said he advised Torres to get a ride from someone and go home.

Gomez stated that his main concern was that the election was going to be held early the next morning and the employees had to show up for work. He said he broke up the gathering and told all the workers to go home. Several other employees who were present at the gathering confirmed that Gomez told the workers to stop drinking and go home.

We affirm the IHE's findings and conclusions about the incident at Johnny's. The evidence fully supports his factual findings that Torres was not physically touched or threatened, that there was a vehement argument that stirred emotions but did did not intimidate anyone, and that Gomez' actions in dispersing the workers and getting them to go home showed the workers that the Union disapproved of their behavior. Therefore, we conclude that the conduct of union supporters at Johnny's on the night before the election did not tend to affect the results of the election. (Ace Tomato Company, Inc., supra, 12 ALRB No. 20; T. Ito & Sons Farms, supra, 11 ALRB No. 36; N.L.R.B. v. Advanced Systems, Inc., supra, 681 F.2d 570.)

Board Agent's Alleged Misconduct

The Board stated in Coachella Growers, Inc. (1976) 2 ALRB No. 17 that its agents should not only be free of bias but should refrain from any conduct that would give rise to an impression of bias. Board agent misconduct requires the setting aside of an election if the conduct is "sufficiently substantial in nature to create an atmosphere which renders improbable a free choice by the voters." (Bruce Church, Inc. (1977) 3 ALRB No. 90, as quoted in Ace Tomato Company, Inc., supra, 12 ALRB No. 20, at p. 12.)

Ed Perez, the Board agent in charge of the election herein, testified that during a lull in the election when no one was voting, he had a conversation with election observers during which he answered their questions about the functions of the ALRB. As he was explaining the Agency's electoral process to the observers, he said he enjoyed his job because he was responsible for providing a procedure by which people could participate in the democratic process. He told the observers that it made him feel good that some of the people were casting a vote for the first time. Perez testified that he never said he was pleased that they were casting a vote for the Union, but only that he was pleased about the process itself. He said that he used his father as an example of someone who was a farm worker at a time when the ALRB did not exist and farm workers did not have the opportunity to participate in the democratic process. However, he did not use Agri-Sun or the UFW as examples during his explanation of the process.

Jose Mesa, an observer for the Employer during the

election, testified that during his explanation, Perez used the word "slavery" to describe the condition of farm workers before the law permitted representation elections. Subsequently, however, Mesa shifted his testimony to state that Perez used the term "slavery" in regard to Agri-Sun requiring workers to remain sitting for eight hours with nothing to do, and that Perez also told them such a practice was illegal and that they could sue "the Company . "

Perez denied making any reference to slaves or slavery. He did not recall any of the observers talking to him about Agri-Sun requiring workers to sit for eight hours, and he denied suggesting to the workers that they should file charges against the Company. Perez' testimony was corroborated by Tony Sanchez, another Board agent who was present during the election.

The IHE credited the testimony of Perez, whom he found to be an honest and straightforward witness. He credited Perez' denial that he ever used the term "slavery" or "slaves" and believed that Perez' testimony about his explanation of Board processes accurately described what was said. Regarding Mesa's testimony that Perez said "they could sue the Company" for requiring workers to remain seated for eight hours, the IHE believed the worker's complaint was made and that Perez responded, but not that he told them Agri-Sun had violated the law and should be sued. Had that been his response, the IHE reasoned, then Perez ' tone would have been more accusatory when he discussed the

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incident with supervisor George Howard after the election.[8]/ Instead, Perez simply acknowledged that he had received a complaint. The IHE believed that what Perez must have told the worker was that if the Company had mistreated its employees, then they would have legal recourse with another governmental agency. This construction was borne out by Mesa's testimony that Perez said the workers "could," not "should," sue.

We affirm the IHE's factual findings concerning this incident, as they are well supported by the record. We also affirm the IHE's conclusion that nothing in Perez' explanation of Board processes indicated a prounion or anti-employer bias or would create an impression of bias in the mind of a reasonable listener. Thus, we conclude that Board agent Perez did not engage in any conduct which rendered improbable a free choice by the voters in this election. (William Buak Fruit Company, Inc. (1987) 13 ALRB No. 2; Ace Tomato Company, Inc., supra, 12 ALRB No. 20.)

Disposition of the Case

The IHE was unable to recommend *a.* final disposition of the election petition, since the challenges to the ballots of two discharged workers were unresolved at the time his Decision issued. However, the eligibility status of the two workers, Atanacio Zuniga and Raul Espino, was recently resolved in our Decision in Agri-Sun Nursery (1987) 13 ALRB No. 10. In that

[8]/Howard testified that, during a meeting with Perez after the election, Howard brought up the subject of the workers being made to sit for eight hours. Howard stated that Perez told him a worker had complained of the incident during the election, and Howard wanted to explain the matter to Perez.

Decision, we found that the employer had unlawfully discharged Zuniga and Espino on April 18, 1985, because of their protected concerted activities. The evidence in that case clearly indicated that both employees would have been employed during the voting eligibility period but for their unlawful discharge.[9/] Therefore, we will direct the Regional Director to open and count their ballots. (Karahadian & Sons, Inc. (1979) 5 ALRB No. 19.)

As we are affirming the IHE's recommendation to overrule the challenge to Carol Howard's ballot, we will also direct the Regional Director to open and count Howard's ballot.

ORDER

The election objections filed herein are hereby dismissed.

The challenges to the ballots of Raul Espino, Carol Howard and Antanacio Zuniga are hereby overruled. The Regional Director is directed to open and count the aforementioned challenged ballots and thereafter to prepare and serve upon the parties a revised Tally of Ballots.

Dated: November 17, 1987

JOHN P. MCCARTHY, Member

IVONNE RAMOS RICHARDSON, Member

[9/] In the unfair labor practice hearing, George Howard testified that Agri-Sun generally conducted layoffs in January, February, March, late June or early July, and mid- to late August or mid- to late September. Since the election took place on June 17, the eligibility period was not a period when employees would have been on layoff.

CHAIRMAN DAVIDIAN, Concurring:

Like my colleagues, I also find that the grounds asserted here are not sufficient to warrant setting aside the election. My decision, not easily made, is based on a careful reading of the record. Although I have serious concerns about some of the events which transpired prior to the election, I do not believe the election atmosphere was so tainted that *a* 'fair and free election was impossible.

I begin by recognizing the long-standing policy of the National Labor Relations Board (NLRB), as well as that of the Agricultural Labor Relations Board (Board or ALRB), which accords less weight to election interference by rank-and-file employees than to conduct attributable to one of the parties. (See, e.g., Steak House Meat Co. (1973) 206 NLRB 28 [84 LRRM 1200]; S & J Ranch, Inc. (1986) 12 ALRB No. 32.) But another compelling policy consideration is the absolute freedom of choice that must be assured to employees in selecting a bargaining representative.

Therefore, my own focus in such matters is not solely on whether it can be shown that one of the parties is responsible for objectionable conduct, but rather whether conduct, whatever the source, created such an atmosphere of fear and coercion that the concept of a fair and free election was rendered meaningless. As expressed by the Third Circuit Court of Appeals, "[I]f the conduct, though that of *a* mere Union adherent and not that of a Union agent or employee, is sufficiently substantial in nature to create a general environment of fear and reprisal such as to render a free choice of representation impossible, then it will require the voiding of the election." (Zeiglers Refuse Collectors, Inc. v. National Labor Relations Board (3d Cir. 1981) 639 F.2d 1000 [106 LRRM 2333].)

In applying those principles, I believe it is incumbent upon the Board to closely scrutinize all allegations of preelection threats in light of the nature of the threats, the timing of the threats vis-a-vis actual balloting, the number of threats in relation to the size of the electorate, whether the threats were of the type that would likely be disseminated among the work force and, finally, the closeness of the vote.

Employees Jose Mesa and Juan Torres voted in the election. They testified that they clearly understood the "threats" to mean that continued employment was contingent upon their joining the Union should it prevail in the election. Although Ladislao Echeverria was not in the country at the time of the election, he also understood that "[0]nce the Union came in, that only those that were in the Union would be there. And

all who were not in the Union would be [taken] out of work."[1/]

Moreover, the record does not prove, nor even suggest, that the verbal threats were backed up by actual or threatened violence. Unlike the situations in Sonoco of Puerto Rico, Inc. (1974) 210 NLRB 493 [86 LRRM 1122] and Diamond State Poultry Co., Inc. (1953) 107 NLRB 3 [33 LRRM 1043], there is no showing that employees were threatened with serious physical harm if they failed to vote for the Union. Only one employee, Juan Torres, manifested any semblance of fear, but that occurred under circumstances in which his emotions may have had little to do with his sentiments either for or against the Union.

As there is insufficient evidence to indicate that any voters, including Torres, were, or reasonably could have been, intimidated to the point of voting contrary to their own convictions, I do not find a general atmosphere of fear and confusion which, by an objective standard, would serve to invalidate the election.

Dated: November 17, 1987

BEN DAVIDIAN, Chairman

[1/]My colleagues are quite correct in holding that the statements in question herein must be measured by an objective standard. Nevertheless, I believe it is useful to consider the declared subjective effect of those same statements inasmuch as such evidence is available. It is clear to me from my reading of the record that none of the witnesses who was an object of threats from fellow employees believed that a Union victory would automatically serve to end his employment.

CASE SUMMARY

Agri-Sun Nursery
UFW

13 ALRB No. 19
Case No. 85-RC-4-F

IHE DECISION

On June 17, 1985, a representation election was conducted among the agricultural employees of the Employer. The final tally showed 18 votes for the United Farm Workers of America, AFL-CIO (UFW or Union), 17 votes for no union, and 3 unresolved challenged ballots. Two of the challenges involved employees who were discharged before the election but whose terminations were the subject of unfair labor practice charges; the Regional Director recommended that no action be taken on those two ballots pending resolution of the unfair labor practice charges. An evidentiary hearing was held on 5 of the Employer's election objections as well as the issue of the third challenged ballot. Following the hearing, the Investigative Hearing Examiner (IHE) concluded that the challenge to Carol Howard should be overruled for failure of proof that she was a supervisor. The IHE also concluded that union supporters' preelection threats of job loss for failure to vote for the Union, failure to sign an authorization card, or failure to join the Union if it won the election, did not create an atmosphere of fear and reprisal rendering free choice in the election impossible. The IHE further concluded that neither the petitioning union nor its supporters engaged in or condoned threats of physical violence or intimidation tending to affect the outcome of the election. Finally, the IHE concluded that the Board agent in charge of the election had not demonstrated prounion or anti-employer bias while explaining Board election processes to election observers during a lull in the voting. Thus, the IHE recommended that all of the Employer's election objections be dismissed, and that the challenge to Carol Howard be overruled and her vote counted. The IHE was unable to recommend that a new tally form the basis for certification of the election results since the challenges to the ballots of the two discharged employees were still unresolved.

BOARD DECISION

Applying recent National Labor Relations Board (NLRB) precedent, the Board concluded that the status of the employees who made preelection threats of job loss was only that of union supporters, not union agents, and that therefore the applicable standard for their conduct was whether it was so aggravated that it created an atmosphere of fear or reprisal making free choice in the election impossible. Although the Board overruled part of the IHE's analysis of the union adherents' conduct, the Board affirmed the IHE's ultimate conclusion that the conduct did not render free choice impossible. The Board also affirmed the IHE's conclusion that neither the Union nor its supporters had engaged in or

condoned threats of physical violence or intimidation tending to affect the outcome of the election. The Board further affirmed the IHE's conclusion that the Board agent in charge of the election did not exhibit prounion or anti-employer bias during his discussion with election observers. The Board also affirmed the IHE's recommendation to overrule the challenge to Carol Howard's ballot.

The Board noted that the voting eligibility status of the two discharged employees whose ballots were challenged had been resolved in the Board's Decision in Agri-Sun Nursery (1987) 13 ALRB No. 10, wherein the Board found that the Employer had unlawfully discharged the two workers because of their protected concerted activity. Since the evidence in that case clearly indicated that both employees would have been employed during the voting eligibility period, but for their unlawful discharge, the Board overruled the challenges to their ballots.

The Board therefore dismissed the Employer's election objections and directed the Regional Director to open and count the ballots of Carol Howard and the two discharged workers, and thereafter to prepare and serve upon the parties a revised Tally of Ballots.

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

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STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of: AGRI-SUN NURSERY, Employer, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Petitioner.	)	Case No. 85-RC-4-F

Appearances:

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Before: James Wolpman
Investigative Hearing Examiner

DECISION OF THE INVESTIGATIVE HEARING EXAMINER

JAMES WOLPMAN, Investigative Hearing Examiner:

This case was heard by me on March 19, 20, 21, 1986 in Fresno, California.

A Petition for Certification was filed by the United Farm Workers of America, AFL-CIO, on June 17, 1985, seeking to represent all agricultural employees at Agri-Sun Nursery in Selma, California. (G.C. Ex. 1-C.) Thereafter, on June 22, 1985, the Agricultural Labor Relations Board conducted an Election among those employees. (G.C. Ex. 1-E.) The results were:

UFW	18
No Union	14
Unresolved Challenged Ballots	6
Total	38

G.C. Ex. 1-H)

Because there were enough challenged ballots to affect the outcome of the election, the Regional Director investigated and issued his Recommendation that three challenges be denied and the ballots counted and that one challenge (to employee Carol Howard) be sustained and the ballot not counted. (G.C. Ex. 1-K.) The remaining two challenges involved employees who were terminated before the election but whose terminations were the subject of unfair labor practice charges. The Regional Director recommended that no action be taken on those ballots pending resolution of the charges.[1]

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[1]Those charges resulted in a complaint and subsequent hearing, and are now pending before Administrative Law Judge for decision. (Case No. 85-CE-64-D.) Given the outcome of the instant proceeding, their disposition will determine the outcome of the election.

The employer excepted only to the portion of the Recommendation which sustained the challenge to Carol Howard. (G.C. Ex. 1-L.) The Executive Secretary thereupon ordered that the three ballots to which no exceptions had been taken be opened and counted. This was done and a revised tally issued showing:

UFW	18
No Union	17
Unresolved Challenged Ballots	3
Total	38

G.C. Ex. 1-N)

On February 7, 1986, the Board issued its Order refusing to accept the Regional Director's Recommendation with respect to Carol Howard and directing that a hearing be held to resolve the challenge. (G.C. Ex. 1-P.)

Meanwhile, the employer had filed a number of timely objections to the conduct of the election. (G.C. Ex. 1-J.) On February 7, 1986, the Executive Secretary issued an Order setting four of those objections for hearing and dismissing the rest. (G.C. Ex. 1-0.) The employer requested Board review of the dismissed objections. (G.C. Ex. 1-S.) Thereafter, the Board ordered the hearing on objections to be consolidated with that on the challenged ballot and eventually ordered that one of the dismissed objections be heard. (G.C. Exs. 1-T and 1-X.)

As a result, six issues were presented to me for hearing and resolution:

1. Whether Carol Howard was a supervisor, and therefore ineligible to vote.

2. Whether the ALRB interfered with the fair operation of the election and demonstrated bias in favor of the United Farm Workers by telling eligible voters at the pre-election conference

that it would help the Union if they said bad things about a meeting they had had with George Howard and, if such misconduct occurred, whether it tended to affect the outcome of the election.

3. Whether the ALRB interfered with the fair operation of the election and demonstrated bias in favor of the UFW by telling eligible voters during the election that the Employer treated its employees like slaves and had threatened employees and by encouraging employees to take the Employer to court and, if such misconduct occurred, whether it tended to affect the outcome of the election.

4. Whether the ALRB interfered with the fair operation of the election and demonstrated bias in favor of the UFW by telling eligible voters during the election that seeing people vote in elections was good because before there was no union, thereby implying that employees should vote for the union and, if such misconduct occurred, whether it tended to affect the outcome of the election.

5. Whether the UFW interfered with the fair operation of the election by engaging in and condoning threats of physical violence and intimidation and, if such misconduct occurred, whether it tended to affect the outcome of the election.

6. Whether Petitioner threatened eligible voters with loss of employment if they failed to vote for the union and, if so, whether such conduct affected the outcome of the election.

Both the employer and the union participated fully in the hearing and both filed post hearing briefs. The General

Counsel participated in the portion of the hearing concerned with the conduct of Board agents, but filed no post hearing brief.

Upon the entire record, including my observation of the witnesses, and after careful consideration of the arguments and briefs submitted by the parties, I make the following findings of fact and reach the following conclusions of law.

I. JURISDICTION

Agri-Sun Nursery is an agricultural employer within the meaning of section 1140.4(c) of the Act, and the United Farm Workers is a labor organization within the meaning of section 1140.4(f).

II. MATTERS DISPOSED OF AT HEARING

Two of the six issues were disposed of by rulings made during the hearing.

I granted the union's motion to dismiss the objection concerning possible Board Agent misconduct at the pre-election conference (Issue No. 2). (II: 17.) The testimony of Juan Torres, the employer's only witness on the issue, was that when the employer's alleged threat to close the nursery if the union won the election came up during the conference, the Board Agent cautioned the employees whom he intended to question that "... the important thing was to tell the truth whether he [the employer] had acted badly ... so that the election could be carried on or take place." (I: 28.) That uncontradicted statement establishes that the Agent was engaged in an unbiased attempt to search out the truth. There is nothing to indicate otherwise.

Additionally, I granted the employer's motion to dismiss the union's challenge to Carol Howard. (III: 39.) The UFW was unable to produce evidence that she possessed the standard indicia

of supervision as described in Labor Code section 1140.4(j). Her behavior at the election and during the campaign is no more indicative of supervisory status that it is of the strong anti-union bent of an employee who enjoys some following among his or her co-workers.

III. THREATENING CONDUCT

A. Introduction

Two of the four remaining issues involve alleged threats: One of physical violence or intimidation (Issue No. 5) and the other of loss of employment for failure to vote for the union (Issue No. 6).

The legal rules by which threatening conduct is to be judged are well established. An election will be set aside upon proof of misconduct sufficient to create an atmosphere of fear or reprisal rendering employee free choice impossible. (Triple E Produce Corp. v. ALRB (1983) 35 Cal.2d 42; T. Ito & Sons Farms (1985) 11 ALRB No. 36; Price Brothers Company (1974) 211 NLRB 822.) The party seeking to overturn an election bears a heavy burden of proving by specific evidence that the misconduct occurred and that it affected the outcome of the election. (Bright's Nursery (1984) 10 ALRB No. 18; TMY Farms (1976) 2 ALRB No. 58.) The determination of whether conduct is threatening or coercive is to be based on an objective assessment of whether it reasonably tends to interfere with voter free choice rather than on the subjective reactions of the employee or employees involved. (Triple E. Produce Corp. v. ALRB, supra; T. Ito & Sons Farms, supra; Save-On-Drugs, Inc. (1977) 227 NLRB 1638.)

Misconduct attributable to union supporters or workers is entitled to less weight than that attributable to union agents or representatives. (Ace Tomato Company (October 21, 1986) 12 ALRB No. 20; Pleasant Valley Vegetable Co-op (1982) 8 ALRB No. 82; Sonoco of Puerto Rico, Inc. (1974) 210 NLRB 493.) That is so because employees attach less significance to the possibly impulsive actions of their co-workers and because unions [and employers] cannot, as a practical matter, prevent misdeeds and misstatements by those over whom they have little or no control. (NLRB v. Sauk Valley Manufacturing Co., Inc. (9th Cir. 1973) 486 F.2d 1127, 1131, fn. 5.)

Given that there is one standard for the misconduct of a party and a somewhat different one for that of non-parties, it is best to begin by determining whether or not the threats here alleged are attributable to the UFW.

B. Union Responsibility

The only union official involved in the organizational campaign was the Manager of the UFW's Grape and Tree Fruit Division, Humberto Gomez. He was the one who initially met with the workers interested in unionization and it was he who later went to the nursery to campaign for the union. He conducted the campaign meeting at Chappa's Market at which one witness testified to being told that those who did not vote for the union would lose their jobs. And Gomez was also present at Johnny's Market the night before the election when employee Juan Torres was allegedly abused and physically intimidated. There is, however, nothing to implicate him in the misconduct alleged to have

occurred on either occasion. No one testified that he ever said -- at Chappa's or elsewhere -- that employees would lose their jobs unless they voted for the UFW. The one employee who testified about the meeting at Chappa's attributed the loss of job comments to two fellow workers and could not recall whether Gomez was even present at the time, but did recall having been at the meeting for an hour or so before he arrived. As for the alleged intimidation of Juan Torres, all of the witnesses agreed that Humberto Gomez had acted to calm the situation, although there is some disagreement as to the steps he took.

The employer also asserts that Raul Espino — a former employee who is alleged to have threatened others with the loss of their jobs and possibly to have been involved in the Torres incident -- was an agent of the UFW.

Espino was among those who originally went to the Union for assistance, and he attended most of the campaign meetings at Chappa's Market. But he was not a member of the organizing committee; and, while he did speak up at meetings, he had no official role in conducting them. When he was discharged shortly before the election, the union undertook to represent him, but at no point did it act to create the impression that he represented it; nor did he claim a representative capacity with the UFW.

Espino's involvement in the election and with the Union is not enough to make him an agent under traditional apparent authority principles as interpreted and applied by the Board in San Diego Nursery (1979) 5 ALRB No. 43 and Pleasant Valley Vegetable Co-op, supra. His relationship with the UFW was, if

anything, weaker than that of the employees in those cases, none of whom were found to be union agents or representatives.

Since the conduct and comments here at issue cannot be attributed to the UFW, what occurred must be judged according to the standards applicable to non-party participants.

But before doing that, it is necessary to address the union's argument that I am without authority to consider non-party misconduct because of the wording contained in the orders setting the objections for hearing. Those orders direct my inquiry, in one instance, to: "Whether the UFW interfered with the fair operation of the election by engaging in and condoning threats of physical violence and intimidation ..." (G.C. Ex. 1-0); and, in the other, to: "Whether Petitioner threatened eligible voters with loss of employment if they failed to vote for the union..." (G.C. Ex. 1-X.) Neither speaks of possible non-party misconduct.

While it is true that a literal reading of the two Orders would indicate that only UFW conduct be investigated, I decline to interpret my mandate so narrowly. The employer objections which engendered the Orders read, in each instance: "The UFW, through its agents, representatives and supporters, interfered ..." (G.C. Ex. 1-J, objections 12, 14 & 15.) The supporting declarations flesh out the meaning of those objections by describing the statements and conduct of union supporters. At hearing, no attempt was made to confine the evidence to the acts and statements of UFW agents. Both employer and union witnesses were allowed fully to describe, deny and controvert incidents involving

persons who obviously had no status beyond that of active union adherents.

I therefore cannot accept the union's argument. I read the words "Petitioner" and "UFW" as broadly as they were used in the underlying objections — to include union supporters as well as union agents and officials.

C. Threats of Loss of Employment for Failure to Support the Union (Issue No. 6)

Findings of Fact. The employer introduced evidence from three employees on this issue: Juan Torres testified that at one time or another he was told by Raul Espino, Raimundos Lopez, Jose R. Gomez and Alberto Gomez that if he did not vote for the union, he would loss his job.

Torres was a difficult witness. He had trouble explaining himself, focusing on questions being asked, and recalling events clearly. In spite of this, I do believe that—in one form or another--the comments he described were made by at least some of the employees he identified.

Immediately after recounting what had been said, he was asked:

> Q (By Mr. Hipp) Mr. Torres, as far *as* at the time that the statements were said, and this was before the election, as far as you knew could the Union do that?
>
> A At first I personally did not know. Afterwards I began to see by myself that probably it could not be. (I: 42.)

The record was never clarified to indicate whether "afterwards" meant "after the election" or "after he 'at first' heard the statement, but before the election," and there is nothing to make

one construction more persuasive than the other.[2] Since the burden of establishing the seriousness of the threat is with the employer, I am obliged to adopt the latter construction and find that before he voted Torres understood that his job was not in jeopardy.

Jose Mesa testified that Alberto Gomez, Raimundo Lopez and Lupe Santillan, among others, told him that, "If the union won, they were going to fire me and my brother and all those who were along with me." (I: 120.) He later explained that he (and his brothers) understood the statement to mean, "That if the union won and that if I wanted to continue working I would have to join the union or else I wouldn't continue working. That is what I understood." (I: 128.) I have no reason to doubt his testimony and I therefore find that the comments were made and understood as described.

Ladislao Echeverria testified that at a meeting held at Chappa's Market early in the campaign, Raul Espino and Jose Santillan said to him, "That if one did not vote one was going to be taken out of work." (I: 77.) Moments later, he elaborated, "That if we did not vote for the union they were going to fire us from work." (I: 78.) (emphasis supplied) But then he shifted his testimony to say, "[T]hey would say that once the union came in, that only those that were in the union would be there. And all who were not in the union would be taking (sic) out of work.

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[2]That Torres shifted his allegiance away the union shortly before the election indicates that he may have come to this understanding before the election or, at least, that he was not overly intimdiated by what he had heard.

(emphasis supplied) (I: 78.) Minutes later he was asked:

> Q (by Mr. Hipp) And did Raul [Espino] say anything to you about what if anything would happen if you didn't sign the [authorization] card?
>
> A Well, that if we didn't do it or if I didn't do it, I was going to lose the job. (I: 81.)

This was followed by a return to his original statement, "That if we didn't vote ... they were going to fire us from the job." - (I: 81.) Later in his testimony he indicated that Santillan had made a similar comment to him at work. (I: 93-94.)

Having observed Echeverria's dameanor while testifying, I am convinced that he was unaware that each time he described what he had heard, he gave it a different meaning. He was simply unable to make the verbal distinctions necessary to an accurate and helpful description of whatever it was that he heard, and honestly believed that he was repeating the same thing over and over.

From such testimony it is impossible to extricate what was actually said. I am therefore once again obliged to fall back on the burden of proof and adopt the least incriminating interpretation. I therefore find that he was told that, if the union won, those who were not or did not then become members would lose their jobs.

At one point Escheverria testified that he considered Raul Espino's comments about loss of employment intimidating because of his violent reputation. (I: 96.) In its brief, the employer picks up on this theme and argues that Espino's reputation was enough to infuse his comments with an unacceptable element of coercion.

While a union adherent's propensity to violence would

indeed be relevant in evaluating threats of physical harm or intimidation, it has no logical connection to the comments here at issue which were confined to the union's use of its power to secure the discharge of those who vote against it. In so far as Escheverria believed otherwise, his belief does not measure up to the objective standard to be applied in determining whether conduct is coercive. (Triple E Produce v. ALRB, supra; Save-On Drugs, Inc., supra.) His unwarranted belief, together with his unjustified opinion that Espino was a union representative (I: 84), explains the skittishness which caused him to leave early for Mexico to avoid being involved in the election. (I: 84.)

Analysis and Conclusion. Comments directed to the adverse employment consequences of failing to support unionization car. run the gamut from: "If you refuse to sign a card [or- vote for the Union], you'll be fired," through: "If you don't vote for the union and it wins, you'll lose your job," to: "If the union wins and you fail to become a member you'll be terminated." While none of those statements is legally accurate, the ALRB, the NLRB and the Courts have been tolerant of ones which approximate the situation which would obtain if the union won the election and succeeded in negotiating *a* union shop agreement; and this is especially so when they come from union supporters rather than union representatives[3] (Triple E Produce Corp. v. ALRB, supra; and

[3]This tolerance is understandable when one realizes how difficult it is to state simply and accurately the obligations of an employee under an NLRA union shop clause or an agricultural employee under an ALRA "good standing" clause. NLRB v. General Motors Corp. (1963) 373 U.S. 734; Pattern Makers League of North America v. NLRB (1985)___U.S.___, 105 S.Ct. 3064; Pasillas v. ALRB (1984) 156 C.A.3d 312; Beltran v. State of California (S.D. Cal. 1985) 617 F.Supp. 948 (Motion for reconsid. pndgs.)

compare Patterson Farms, Inc. (1976) 2 ALRB No. 59 [election upheld despite statement by union supporter that if the union won and employee did not join he would have no work] with Select Nursery (1978) 4 ALRB No. 61' [election set aside because of statement by union organizer that those who failed to sign authorization cards would lose their jobs]; see also, Central Photocolor (1972) 195 NLRB 839, and Jack or Marion Radovich (1976) 2 ALRB No. 12.[4] The statements found to have been made by Jose Mesa and Ladislao Echeverria are almost identical to that which passed muster in Patterson Farms and was described a permissible in Triple E Produce.

Moreover, those two statements, as well as the ones found to have been made to Juan Torres, all involved the assertion of sanctions to be imposed by the union. In T. Ito & Sons Farms, supra, the Board quoted and relied on the language of the NLRB in Westwood Horizons Hotel (1984) 270 NLRB 802, 803, that:

> In determining the seriousness of a threat, the Board evaluates not only the nature of the threat itself, but also ... whether the person making the threat was capable of carrying it out and whether it is likely that employees acted in fear of his capability of carrying out the threat.[5]

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[4]The Radovich decision was given a very limited reading in Triple E Produce. (See 35 Cal.2d at 51.)

[5]In Ito threats of loss of employment were coupled with threats to summon immigration authorities. In setting aside the election, the Board emphasized that both were "rejeventated during the voting itself" and confined its further analysis to the threats to summon the INS which "were not . . . outside the abilities of the speakers to carry out.") Id. at 15-16.)

It has already been determined that the UFW supporters were not union agents or representatives and therefore lacked the power to carry out such threats as were made. It has also been found that there was no reasonable basis for other employees to believe they spoke for the union and therefore possessed any such power. In the case of Juan Torres, I have found that prior to the election he fully understood that not even the union itself could put his job in jeopardy because of his failure to vote for it.

A threat which its maker has no power to effectuate and which its hearers recognize — or should recognize--as hollow is no threat at all. I therefore conclude that, taken either individually or together, the statements which were made did not create a general atmosphere of fear or reprisal rendering employee free choice impossible.[6] (Ace Tomato Company, Inc., supra)

D. Threats of Physical Violence and Intimidation (Issue No. 5)

Findings of Fact. This objection arises out of events which occurred at Johnny's Market the night before the

[6]At hearing the employer sought to introduce a declaration from employee Martin Rodriquez to corroborate the threatening conduct testified to by Torres, Escheverria and Mesa. The union objected, and I ruled the declaration inadmissible and placed it in the rejected evidence file. (II: 5-6; Employer Ex. No. 2.)
While hearsay testimony of a corroborative nature is admissible in an objections hearing, the Board has not permitted its introduction by means of declaration—probably because doing so would deprive the objecting party of even the limited cross-examination which is available when hearsay is offered through an actual witness. 0. P. Murphy & Sons (1977) 3 ALRB No. 26. Moreover, even it were admitted, the declaration would do no more than help establish that the comments were made as testified; it would not overcome the fact that the persons who made them lacked the capacity (or apparent capacity) to accomplish what they said.

election. To understand their significance it is best to begin earlier that day with the meeting Agri-Sun held shortly before the employees received their weekly paychecks and left work for the day. Beer was provided, and presumably the company did some campaigning. Among those present were Lupe Gonzales and Juan Torres. Gonzales was no longer working at Agri-Sun, but he was strongly anti-union and, like Raul Espino, *a.* belligerent sort. Torres had been an active union supporter. He was one of the original group who sought out the UFW; he was a member of the organizing committee; and he had been active in urging his fellow employees to vote for the UFW. He admitted drinking three or four beers during the gathering.

After leaving work, a number of employees—15, according to one estimate — went over to Chappa's Market where they usually gathered on Fridays. Torres was among them, and he admitted having two more beers. The others continued the drinking they had begun earlier. After a while Lupe Gonzales showed up to speak against the union, and there was some arguing back and forth. Eventually, UFW Representative Humberto Gomez arrived. He was concerned about the drinking and encouraged the workers to go home. A short time later, an officer or officers from the Sheriff's Department arrived and told them to leave. Instead of going home, a number of them went on to Johnny's Market where they continued talking and drinking.

Five witnesses described the events which occurred next. Each had a somewhat different version. Even so, by carefully reading the testimony and by making some allowances for perception problems due to drinking and emotional involvement, it is possible

to reconstruct the basic facts. I find them to be as follows:[7]

1. The workers present had all had been drinking, and two of the leading participants — Juan Torres and Aristeo Perez — were quite drunk.

2. Torres, a member of the organizing committee and an active union supporter, announced to a small group of workers that he no longer cared who won the election and wanted nothing more to do with it.

3. Perez challenged him as a "chicken" and eventually called him a "son-of-a-bitch."

4. During this exchange, the number of workers gathered around Torres increased to about six.

5. Torres was not physically abused or touched, and no threatening gestures were directed at him, but the discussion was conducted at close quarters and the exchanges were angry and heated.

6. Lupe Gonzales [the belligerent former employee who was strongly anti-union] came over and pushed one of the group

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[7]In making these findings, I have to some extent discounted Juan Torres' testimony for the reasons already explained (supra, p. 11) and because he was intoxicated and over-wrought. Lupe Gonzales' testimony suffered from an overblown perception of himself as Torres' rescuer and from his strong anti-union bias, but was for the most part accurate. Raul Espino's description of himself as only marginally involved in the campaign is not believable and casts doubt on his claim to have been elsewhere at the time, but no one who testified to having seen him there described him as an agressive participant. Jose Gomez' testimony about the incident was brief but, so far as it goes, does support the findngs I have made. Aristo Perez did hesitate in admitting that he called Torres a "son-of-a-bitch", but his testimony, better than anyone else's, conveys a coherent sense of the incoherent atmosphere of the evening. (See II: 91-92, 96-98.) Humberto Gomez had not been drinking, and his testimony was consistent and believable.

aside. Gonzales' cousin grabbed him and told him not to start any trouble.

7. Gonzales desisted, but he did exchange sharp words with employees Aristeo Perez and Beto Mesa, both of whom were union supporters.

8. As all of this was happening, Humberto Gomez of the UFW arrived and tried, by one means or another, to calm things down and get everyone to go home. Eventually, they did.

9. Raul Espino may or may not have been present; but, if he was, he did not take a belligerent role.

10. Torres may well have been crying during the encounter, but it is unclear whether it was because he was drunk and emotionally overwrought or because he was frightened. (Compare I: 99, with II: 92 & II: 25-26.)

Conclusion and Analysis. I conclude that the events which occurred at Johnny's did not create a general atmosphere of fear or reprisal rendering employee free choice impossible. In reaching this conclusion, I rely on the following considerations.

1. What occurred at Johnny's was a single incident in an otherwise peaceable campaign.[8] (See T. Ito & Sons Farms, supra.

2. The standards applied in judging the fairness of an election must take into account the realities of everyday life. People do at times drink too much; and, when they drink, they

[8]Testimony was introduced that Raul Espino was known to be belligerent. But there is no evidence directly tying his belligerence to the campaign. The only conceivable connection involved an incident which occurred far too long after the election to be of significance. (I: 47.)

often argue vehemently about things which matter to them. As long as it goes no further than that, it is fair to assume that, while emotions may be stirred and hard feelings may result, no one has been intimidated. (See, NLRB v. Sauk. Valley Manufacturing Co., supra.)

3. Those who participated in the incident were angry and upset, and they used strong language, but there were no threats of physical harm, no violent gestures and no physical contact.[9]

4. The overall impression left by the confrontation between Torres and Perez and the ensuing exchange between Perez and Gonzales is of a "stand-off" and not of intimidation of one group by another.

5. Torres — who was the focus of the alleged intimidation — must bear some responsibility for becoming intoxicated and failing to heed the good advice which Humberto Gomez had earlier given him (and others) to go on home.

6. Humberto Gomez' attempt to head off problems earlier at Chappa's by encouraging workers to go home and his actions later by Johnny's were enough to make it clear to all present that the union disapproved of their behavior and had no desire to profit by it.

IV. ALLEGED BOARD AGENT MISCONDUCT

The two remaining issues (No. 3 & No. 4) both concern possible misconduct on the part of the Board Agent who was in charge of the election. The employer contends that, in one

[9]Except by anti-union advocate Lupe Gonzales, but that, I find, was not particularly intimidating.

instance, the Agent told workers that Agri-Sun treated its employees like slaves and they should take the company to court, and, in the other, he gave voters the impression that he wanted them to vote for the union by telling them that seeing them vote made him feel good because there had been a time when there was no union to represent them.

The Board Agent alleged to have made these statements is Ed Perez. He was the Agent-in-charge of the election, and at the time of the hearing had been a Field Examiner with the ALRB for 10 1/2 years. During that period he had conducted between 70 and 100 elections, acting as Agent-in-charge in approximately 80% of them.

He recalled that during a slack period after one group had voted but before the next arrived, the company and union observers asked some questions about the ALRB and its function. As he was completing his explanation:

> I made the comment, I believe, and I used my father as an example because he was a farm worker, that it gave me pleasure that—that my job gave me pleasure because it was providing—something to the effect of it was—I was responsible for providing a procedure by which people can participate in the democratic process. That it made me feel good that some of these people were casting a vote for the first time. But never that they were casting a vote for the Union. I was pleased about the process itself. (II: 119; see also II: 125.)

I found Perez to be an honest and straight forward witness, and I am convinced that his testimony accurately describes what was said. It was corroborated by another Agent who was present. (I: 129-132.)

Jose Mesa was the only employer witness on the issue. He

did not deny the gist of Perez" testimony—that it was good to see workers vote, not that it was good to see workers vote for the union. (I: 124.) His testimony differs from that of Perez in only one particular: He has the Board Agent using the word "slavery" to describe the situation which existed before there was a law permitting representation elections. (I: 124.) But Mesa subsequently shifted his testimony and had the word being used in the context of the other alleged misstatement—concerning Agri-Sun's alleged mistreatment of its employees. (I: 130.1°) Because of this and because Perez, whose testimony I credit, denied ever using the word to describe the company (II: 118), I am unable to accept Mesa's version. That being so, there is nothing in Perez' comments which would indicate a pro-union bias on his part or give rise to an impression of bias in the mind of any reasonable listener. (Ace Tomato Company, Inc., supra.) If anything, he is to be complimented for impressing upon the observers the value and importance of the voting privilege.

The other misstatement attributed to him that morning is alleged to have come in response to a complaint from an employee that Agri-Sun had kept a number of its workers sitting for eight hours straight on the day before the election. Again, Jose Mesa was the one witness to describe what Perez is supposed to have said:

> Q (By Mr. Hipp.)....Do you know whether the statement about slaves was caused by anything that was said to the Board agent?

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[10]His original version had the two lumped together in a manner which makes no sense at all. (I: 115.)

A Yes.

Q What was that?

A That because they [Agri-Sun management] had had them [its workers] sitting down there I don't know how many hours without anything to do, and then he told them that that was against the law, because they could not keep them there sitting down. That is when he pronounced that regarding slaves, that those times had gone by...

...That's when he said that they could sue the company. He didn't say which company. He just said the company. (I: 130.)

Perez had no recollection of such an exchange (II: 120, 123-124), and the other Board Agent who was in the vicinity testified that he heard nothing of the sort. (II: 132.) Agri-Sun principal George Howard testified to *a* meeting with Perez after the election in which, "[H]e said that at the election one of the workers had complained to him that we had made them sit for eight hours the day before the election." (Ill: 55.)

On balance, I believe that the complaint was made and that Perez responded, but I do not believe that he told the worker that Agri-Sun had violated the law and should be sued. Had that been the case, his conversation with Howard would have been more accusatory in tone. But it was not; he simply said that he had received a complaint. Given Perez' long experience in matters of this kind, what he almost certainly told the worker was that <u>if</u> the company had mistreated its employees, <u>then</u> they had legal recourse with another governmental agency.[11] There is nothing

[11]Mesa's own grammar tends to bear this out; he has Perez using the permissive "could" rather than the necessitative "should" in his description of the advice which was given. His testimony concerning the use of the word "slavery" has already been discussed and found wanting. (<u>Supra</u>, p. 22.)

wrong in that.

I therefore conclude that the Board Agent engaged in no conduct during the election which would "create an atmosphere which renders impossible a free choice by the voters." (Bruce Church, Inc. (1977) 3 ALRB No. 90; Ace Tomato Company, Inc., supra.)

CONCLUSION

I recommend that the challenge to voter Carol Howard be denied and that her vote be counted. I further recommend the dismissal of all of the objections noticed for hearing. I cannot, at this time, recommend that the new tally form the basis for the certification of the election results. That will have to await final disposition of the two outstanding challenges involving discharged workers which, in turn, are the subject of an unfair labor practice proceeding presently pending before an Administrative Law Judge.

DATED: November 3, 1986

JAMES WOLPMAN
Investigative Hearing Examiner