

STATE OF CALIFORNIA
AGRICULTURAL LABOR RELATIONS BOARD

WILLIAM BUAK FRUIT COMPANY, INC..)	
)	
Employer,)	Case No. 85-RC-13-SAL
)	
and)	
)	
UNITED FARM WORKERS)	13 ALRB No. 2
OF AMERICA, AFL-CIO,)	
)	
Petitioner.)	
)	

DECISION AND CERTIFICATION OF REPRESENTATIVE

On September 13, 1985, the United Farm Workers of America, AFL-CIO (UFW or Union) filed an election petition seeking to represent a bargaining unit of all agricultural workers employed by William Buak Fruit Company, Inc., in California. The Salinas Regional Office of the Agricultural Labor Relations Board (ALRB or Board) conducted an election on September 19, 1985. The initial results were:

No Union	26
UFW	37
Challenged Ballots	<u>24</u>
Total87

Twenty-two of the twenty-four challenged ballots were challenged on the basis that they were cast by employees of a labor contractor who allegedly were hired for the sole purpose of voting in the election. The Salinas Regional Director investigated the UFW's claim and determined that it lacked merit. Her investigation revealed that the labor contractor had been employed

since May 28, 1985, many months prior to any union activity.

The Regional Director determined that the remaining two challenged voters, one a picker and the other a full-time farm equipment mechanic, were both agricultural employees eligible to vote in the election and she accordingly counted the remaining two challenged ballots. The amended tally did not change the outcome:

No Union	33
UFW	54
Total.	87
Total Eligible	96

The Employer timely filed three election objections. The Board's Executive Secretary dismissed one of the objections and set the following two for hearing:^{1/}

1. Whether Board Agent Ben Romo made pro-union statements to the members of the labor contractor's crew while he was explaining the reasons for the Union's challenge to their ballots; and, if so, whether his statements affected the results of the election.

2. Whether the Union's permanent observer, Anarbol Garcia, stated to voters in the polling area, "[p]ut your 'X' under the union eagle;" and, if so, whether his statement affected the results of the election.

Investigative Hearing Examiner (IHE) Arie Schoorl conducted a hearing on the objections in Salinas on March 25, 26

^{1/}The dismissed objection sought to set aside the result because Board Agent Charlie Atilano allegedly improperly accepted the UFW's eleventh-hour voter challenges, thereby affecting the outcome of the election.

and on April 10 and 15, 1986. Both the Union and Employer participated and presented evidence. Board agents Atilano and Romo were called as witnesses. A major portion of the proceedings revolved around the proper role of regional counsel when representing Board agents called to testify at election hearings. After objection and argument, the IHE ruled that, pursuant to Board regulation 20250(g), a regional counsel's role is limited to issues relating to subpoena matters. The Regional Director filed an interim appeal and the Board subsequently overruled the IHE on April 9, 1986, holding that the Regional Director may intervene in election objection proceedings as a matter of right where the integrity of the Board's processes has been placed in issue. The Board also ruled that the participation of the Regional Director designee was not strictly limited to issues relating to a subpoena.^{2/}

After the hearing, the IHE issued the attached Decision on June 27, 1986, in which he concluded that neither Board Agent Ben Rome's alleged comment nor the statement of the Union's election observer, Anarbol Garcia, affected the election. The IHE recommended that the Union be certified. The Employer excepted to

^{2/}In its exceptions brief the Employer renewed its challenge to the participation of ALRB regional personnel in election proceedings beyond the matters relating to subpoena. We note that this issue is not properly before the Board. Title 8, California Administrative Code, section 20393(c) requires that a "... motion for reconsideration of any decision or order of the Board must be filed with the Board within five days of the service of the decision, or order, upon the party making the request...." Member Gonot agrees with the IHE's ruling that the role of regional counsel is limited to issues concerning subpoena matters, per Title 8, California Administrative Code section 20250(g).

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

Union Observer Misconduct

The election was conducted at four sites on September 19, 1985; the incident involving the statement by the Union's permanent observer occurred at the second site, the Cosky Ranch. While the Board agents were preparing the polling site, voter Enrique Torres approached the polling area and asked union observer Anarbol Garcia about the election. Garcia responded, "[p]ut your mark under the union eagle." Board Agent Charlie Atilano immediately informed Garcia not to speak to any voters, and that his job was to assist the agents and observe the election. Atilano further advised Garcia that in the future he was to direct all inquiries to an ALRB agent.

The promptness and severity of Atilano's rebuke of Garcia was corroborated by management's permanent observer Angel Hernandez, who testified that he did not protest his counterpart's statement because "[t]he Board agent jumped on him right away." Immediately after the rebuke, Atilano turned to Torres and advised him to vote his conscience. The incident and rebuke occurred about five minutes before voting began and within the hearing range of the members of the entire crew, who were approximately 10 to 20 feet away.

The IHE's Determination

The IHE concluded that Garcia did in fact utter the

objectionable statement, a clear violation of his instructions as an observer. The IHE went on to analyze the effect of the observer's statement on the conduct of the election in light of our holding in Perez Packing, Inc. (1976) 2 ALRB No. 13. The Perez Board held that a union observer's conversations with prospective voters constituted serious misconduct, especially when combined with other misconduct that transformed the election environment into a carnival-like atmosphere. In his analysis, the IHE noted that Perez, supra, had been modified by Kawano Farms, Inc. (1977) 3 ALRB No. 25. In Kawano Farms, the Board stated that it

... has applied the Milchem rule to varying fact situations in earlier opinions. Our decisions hold that conversations between union or management observers and prospective voters fall within the scope of the rule, but that where an observer is involved we may inquire into the substance of the conversation and consider whether it is of such character as to affect the free choice of voters in the election. Perez Packing, Inc., 2 ALRB No. 13 (1976); Harden Farms, 2 ALRB No. 30 (1976).^{3/}

After his review of Board precedent, the IHE established his own balancing test which measured the actual effect of the objectionable conduct against the IHE's hesitancy to set aside the results of an otherwise fairly conducted election. Based on this reasoning, the IHE concluded that the impact on the voters of Garcia's electioneering was effectively countered by the Board agent's immediate reprimand. Therefore, the IHE recommended that

^{3/} Under the Milchem rule, the National Labor Relations Board will set aside an election, without inquiring into the substance of the communication, when the parties engage voters in sustained conversation. (Milchem, Inc. (1968) 170 NLRB 362 [67 LRRM 1395].)

the objection be dismissed.

The Employer challenges the IHE's determination, characterizing Garcia's statement as a flagrant violation of the election process. Moreover, the Employer, while agreeing that the IHE made the correct factual determination, questions the legal analysis underlying the IHE's recommendation that the Board dismiss this election objection. The Employer argues that Garcia's remark, coming from an "official member of the election party," could only have been construed by them as the State sanctioning the speaker's statement, thereby diminishing not only voter free choice, but also the integrity of the Board's processes. Therefore, according to the Employer, the election must be set aside.

Analysis and Discussion

It is undisputed that Anarbol Garcia uttered an objectionable statement encouraging Enrique Torres and the other crew members to vote for the UFW. Therefore, we must examine the effect of his electioneering on the election. We agree with the IHE that the offending remark provides an insufficient basis for overturning the results of the election, but we base our conclusion on a somewhat different analysis.

In Superior Farming Company (1977) 3 ALRB No. 35, a decision which issued one month after Kawano Farms, supra, 3 ALRB No. 25, the ALRB rejected a strict application of the Milchem rule as being inappropriate to the agricultural setting. Subsequently, the Board declined an opportunity to adopt a per se Milchem rule and clarified the focus of its analysis concerning observer

conversation in S.A. Gerrard Farming Corp. (1980) 6 ALRB No. 49, pp. 2-3/

fn. 1:

In situations involving observers speaking to voters during voting we will follow NLRA precedent and rather than apply the Milchem rule we will inquire into the substance of the statement. See General Dynamics Corp. (1970) 181 NLRB 874 [73 LRRM 1535]; see also Harden Farms of California, Inc. (Feb. 23, 1976) 2 ALRB No. 30.

In Vessey Foods, Inc. (1982) 8 ALRB No. 28, the ALRB reiterated its belief that a strict application of the Milchem rule is inappropriate in the agricultural context. There we examined the substance of the union observer's objectionable conversations and found that "those conversations did not tend to affect the results of the election." (Id. at p. 3.)

Given the development of the law in the area of election observer misconduct, we decline to adopt the IHE's Milchem/Kawano Farms analysis wherein he determined whether the union observer's comment actually affected the voters' free choice in the election. Rather, when confronted with a union observer's alleged improper polling place conversation, we will inquire into the substance of the observer's statements and determine if it can reasonably be said that those statements would tend to affect the results of the election. (Vessey Foods, Inc., supra, 8 ALRB No. 28.)

Here, Mr. Garcia's one sentence pro-union exhortation to "[p]ut your 'X'¹ under the union eagle" is clearly objectionable electioneering which, if left unreprimanded, might have conveyed to the voters that the Agricultural Labor Relations Board had sanctioned the comment, thereby affecting voter free choice. However, Board Agent Atilano's action in promptly and effectively

reprimanding the union observer, coupled with his instructions to the workers to vote their consciences, nullified the effect that the objectionable statement would tend to have on the results of the election.

CERTIFICATION OF REPRESENTATION

It is hereby certified that a majority of valid votes has been cast for the United Farm Workers of America, AFL-CIO and that pursuant to Labor Code section 1156, the said labor organization is the exclusive representative of all agricultural employees of William Buak Fruit Company, Inc., in the State of California for purposes of collective bargaining as defined in section 1155.2(a) concerning employees' wages, hours and working conditions. Dated: February 11, 1987

JOHN P. McCARTHY, Acting Chairperson^{4/}

GREGORY L. GONOT, Member

^{4/} The signatures of Board Members in all Board decisions appear with the signature of the Chairperson first, if participating, followed by the signatures of the participating Board Members in order of their seniority.

Member Henning, Concurring:

I concur in the decision reached in this matter and agree that the Employer's objections to this election lack merit. I, however, would not find it necessary either to comment on the objections dismissed by the Executive Secretary or to reiterate the nature of the previous ruling regarding the Regional Director's role in election objection proceedings. Neither issue is properly raised by the Employer's exceptions. I would confine our decision solely to the two issues set for hearing and would affirm the conclusions of the IHE for the reasons given in the majority opinion.

DATED: February 11, 1987

PATRICK W. HENNING, Member

CASE SUMMARY

William Buak Fruit Company, Inc.
(UFW)

13 ALRB No. 2
Case No. 85-RC-13-SAL

IHE DECISION

On September 19, 1985 a representation election was conducted among the agricultural employees of the Employer. The UFW received a majority of the votes cast. Two election objections were set for hearing.

The incident giving rise to the first election objection occurred when an ALRB agent allegedly made a pro-union statement while explaining the Board's challenged ballot procedure to members of a labor contractor's crew who the Union believed were hired to vote in the election. During his discourse the Board agent was asked by a prospective voter if after the election the contractor's crew would be terminated. The Board agent supposedly responded that it was possible. Afterwards a few crew members left the polling area without voting.

The IHE recommended that this objection be dismissed because the Employer failed to present evidence of a pro-union statement attributable to the Board agent.

The second objection pertained to union election observer misconduct. While the Board agents were preparing the second election site some voters approached the polling area and inquired about the election. The union observer responded by declaring "[p]ut your mark under the union eagle." A Board agent immediately rebuked the observer and advised the inquiring individual to vote his conscience. The incident and rebuke occurred about five minutes before voting began and within hearing range of the prospective voters who were approximately 10 to 20 feet away.

The IHE concluded that the election observer uttered the objectionable statement, a clear violation of his instructions as an observer. The IHE determined that the union observer's comment should be analyzed by the NLRB's Milchem rule as it was modified in Kawano Farms, Inc. (1977) 3 ALRB No. 25.

The IHE recommended dismissal after balancing the effect of the objectionable misconduct against his hesitancy to set aside the results of an otherwise fairly conducted election.

BOARD DECISION

The Board affirmed the IHE's recommendations and certified the Union, but based its conclusion regarding union observer misconduct on a slightly different analysis. The Board declined to adopt the IHE's Milchem/Kawano Farms theory wherein he determined whether the union observer's comment actually affected voter free choice. Rather, the Board inquired into the substance

of the observer's comment to determine if it could reasonably be said that the statement would tend to affect the results of the election. The Board concluded that the observer's comment was objectionable but that its tendency to affect the results of the election was nullified by the prompt and effective action of the Board agent. (Vessey Foods, Inc. (1982) 8 ALRB 28.)

CONCURRENCE

Member Henning concurred with the decision. However, he would not comment on issues improperly raised in the Employer's exceptions, namely the election objection dismissed by the Executive Secretary or the nature of the Board's previous ruling regarding the Regional Director's role in election objection proceedings.

* * *

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:)
)
WILLIAM BUAK FRUIT)
COMPANY, INC.)
Employer,)
)
and)
)
)
UNITED FARM WORKERS OF)
AMERICA, AFL-CIO.)
Petitioner.)

Case No. 85-RC-13-SAL



Appearances:

Howard D. Silver, Esq.
Dressier, Quesenberg & Silver
for the Employer

Henry Avila
for the Petitioner

Before: Arie Schoorl
Investigative Hearing Officer

DECISION OF THE INVESTIGATIVE HEARING EXAMINER

STATEMENT OF THE CASE

ARIE SCHOORL, Investigative Hearing Examiner: This case was heard by me on March 25, 26 and April 10 and 15, 1986, in Salinas. The parties participated fully in the hearing. Post-hearing briefs were timely submitted by each of the parties.

On September 13, 1985, the United Farm Workers of America, AFL-CIO (hereinafter called the UFW), filed an election petition for all agricultural employees employed by William Buak Fruit Company, Inc. in the State of California (hereinafter called Employer). Thereafter, the Agricultural Labor Relations Board (hereinafter called the ALRB or the Board) conducted an election on September 19, 1985 with the following results:

No Union:	26
UFW	37
Challenged Ballots	<u>24</u>
	87

There were 22 employees who were challenged by the UFW on the grounds that the labor contractor employees were hired for the purpose of voting in the election. The Regional Director, after conducting an investigation, determined that the UFW was incorrect in its allegation that the Employer had hired the twenty two employees for that purpose.

Furthermore, the Regional Director determined that there was no evidence to substantiate the challenge to the remaining two employees who had voted challenged ballots. The

twenty four challenged ballots were counted and the Regional Director issued an Amended Tally of Ballots with the following results:

United Farm Workers	54
No Union	33

The Employer timely filed objections to the election. On February 14, 1986, the Executive Secretary dismissed a number of these objections and set the following for hearing:

(1) Whether Board Agent Ben Romo made pro-union statements to the members of the labor contractor's crew while he was explaining the reasons for the union's challenge to their ballots and, if so, whether his statements affected the result of the election.

(2) Whether the UFW's permanent observer, Anarbal Garcia, told voters in the polling area, "Put your "x" under the union eagle," and, if so, whether his statement affected the results of the election.

I. BOARD AGENT ROMP'S COMMENTS TO THE LABOR CONTRACTOR'S CREW MEMBERS

A. Facts

There were four election sites and the election was held at 8, 9, 10, 11 a.m. respectively.

The members of the labor contractor's crew voted at the fourth election site at 11:00 a.m.

Just before 11:00 a.m., Board Agent Ben Romo went into the orchard and announced to the crew members that they should stop the harvesting of apples and come to the polling place

which was a short distance away. Because crew members were working at a piece rate, they were reluctant to leave their work. Some complied with Romo's request sooner than others. After a few minutes the crew members arrived at the voting site, and Mr. Romo began to explain to them the voting procedures. He also told them that the union had challenged their right to vote since it contended that the Employer had employed them for the purpose of voting in the election. He explained that because of the union challenge that the board agents would have to take declarations about the circumstances of their being hired by a labor contractor, etc. He further explained that their vote might not count if the Board decided that the union allegation about the employer's motive in hiring them was true.

Crew members Serrano and Ramirez testified that Board Agent Romo stated to the voters that the employer had employed the crew for the purpose of their voting in the election. However, both Serrano and Ramirez testified that Romo commented that it was possible that they would continue work with the employer after the election. Moreover, Serrano testified that Romo had stated that the Board would review the challenge and he [Romo] did not know whether their votes would be accepted or not. Ramirez testified that Romo said, "It was possible that after the election, that they might let him [the labor contractor] go."

This testimony by employer's employee witnesses is not consistent with their assertion that Romo had stated as a fact that the employer had hired the labor contractor for the purpose

of his employees to vote in the election. It is consistent though with Romo's testimony that he explained only that the union had alleged that the employer had contracted the labor contractor for the purpose of the election. Serrano and Ramirez testified that the crew members were discouraged from voting. However every crew member voted with the exception of 3, 4, or 5. Serrano and Ramirez testified that 4 or 5 crew members walked away from the voting site without voting. Romo testified that 3 failed to vote. According to Romo's testimony, one crew member appeared to be upset and walked away while two other crew members informed him that they had only worked for a few days and did not consider themselves eligible.

During the time that Romo was explaining the voting procedures, the reason for the challenge etc. the workers were talking among themselves and appeared to be ill at ease. Romo made an effort to persuade them to act in a more orderly manner but was unsuccessful.

B. Analysis and Conclusion

The employer claimed that Board Agent Romo made pro-union statements and because of such statements the workers felt that Romo was representing the union. However, the employer failed to present any evidence of any pro-union statements by Board Agent Romo to the workers.

The employer did present evidence that Board Agent Romo had informed the employees that the employer had hired them for the purpose of voting in the election and, therefore, after the

election was held they would not longer work for the employer. The employer argues that the workers were discouraged from voting because they through that they would no longer be working for the employer and that in fact 4 or 5 workers left the polling area and did not vote.¹

However, I have determined that the employer has failed to prove its allegations in respect to Board Agent Romo's statements. As I explained in Section A above, the employer's witnesses themselves substantiated Romo's testimony that he had informed the voters that the union had alleged that the employer had hired the employees for the purpose of the election.

In no way can Romo's statements that the union had made such allegations in challenging the crew members' ballots be interpreted as a pro-union statement by Board Agent Romo.

Since the employer has failed to prove that Board Agent Romo was guilty of any misconduct I recommend that its objection be dismissed.

II. UNION OBSERVER ANARBAL GARCIA CAMPAIGNS AT ELECTION SITE

At the second election site at approximately 9 a.m. Board Agent Ben Romo went into the orchard where the crew was harvesting apples and announced to the crew members that the election was about to start and that they should stop working and come to the polling area. The crew members complied and once they arrived at the voting site, Board Agent Charlie Atilano

¹The Board has already determined (when the Executive Secretary dismissed such an objection) that the failure of 4 to 5 employees to vote was not outcome determinative.

began to explain to them the voting procedures.

Anarbol Garcia, the unions permanent observer spoke up and said "Put your 'x' under the union eagle."² Board Agent Charlie Atilano immediately told the UPW observer, Anarbol Garcia, to be quiet. Garcia replied that he was only answering a question of one of the voters. Atilano replied that if any voter asked him a question that he should refer the voter to one of the board agents. Atilano warned Garcia that that his remark was a very serious offense and could result in setting aside the election. Atilano made his warning to Garcia in presence of all the voters.

The employer's permanent observer Angel Hernandez credibly testified that Garcia made the remark while all the workers were grouped around Atilano listening to his instructions. Moreover Garcia when asked on cross-examination whether he had made the remark before or after the voting started answered, "Just before the voting started," and that was when all the voters had arrived at the polling place. Hernandez was a convincing witness. Not only did he answer questions in a straightforward and sincere manner but he readily admitted that Board Agent Atilano "jumped on" union observer Garcia when he made the remark about where to mark the ballot.

²Anarbal Garcia and Board Agent Atilano testified that when Garcia made his remark only one worker was at the polling place (the one Garcia claims asked him a question about how to vote) and that 4 to 5 other workers were about 20 feet away approaching the voting site.

The employer objects to the conduct of the election on the grounds that the UFW permanent observer campaigned at one of the four election sites by informing the voters to place their "x" under the union eagle.

It is true that the union observer made such a comment and all the crew members heard it.

Generally speaking the party objecting to certifying the results of an election has the burden of proving that specific misconduct tended to affect employee free choice to the extent that it had an ultimate impact on the results of that election.

Admittedly, union observer Garcia's comment to voters constitutes a clear cut violation of the Board agent's instructions to observers regarding the election.

In Perez Packing, Inc. (1976) 2 ALRB No. 13 the Board found that a union observer's conversations with voters during the election was serious misconduct and concluded that such conversations along with other objectionable conduct such as an improper designation of an election observer and a "carnival-like atmosphere" due to the drinking and noise-making nearly undermined the integrity of the election to such an extent that the Board set aside the election.

Despite the Perez case, the Board has noted:

Our decisions hold that conversations between union or management observers and prospective voters fall within the scope of the [Milchem] rule, but that where an observer is involved we may inquire into the substance

of the conversation and consider whether it is of such character as to affect the free choice of voters in the election. (Kawano Farms, Inc. 3 ALRB No. 25.)

It is true that Garcia's comment amounted to a clear violation of the instructions given to him as an observer, but there are countervailing considerations which must be weighed.

For, while one must be wary to arrive at a conclusion that would condone the kind of conduct engaged in by the UFW observer, one must also be hesitant in setting aside the results of an election, otherwise fairly conducted, which could lead to a serious frustration of employee rights under the Act. In striking the balance in the instant case between those two contending policies, it is important to evaluate whether the union observer's remark, taken together with the Board Agent's instant reprimand actually affected the free choice of voters in the election.

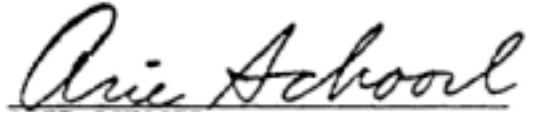
I conclude that the Board Agent's immediate reaction in informing the union observer in the presence of all who had heard the latter's remark that he should not have made such a remark, not to do it again, and that it was a serious transgression effectively counteracted whatever impact the remark may have had on the voters.

CONCLUSION

Based on the foregoing considerations, it is recommended that the results of the election herein be certified

and that the employer's election objections be dismissed.

DATED: June 27, 1986

A handwritten signature in cursive script that reads "Arie Schoorl". The signature is written in black ink and is positioned above a horizontal line.

ARIE SCHOORL
Investigating Hearing Examiner