Santa Maria, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

TANI FARMS, Employer, and TEAMSTER LOCAL No. 865, Petitioner, and UNITED FARM WORKERS Of AMERICA, AFL-CIO, Intervenor.	)	Case No. 86-RC-3-OX(SM) 13 ALRB No. 25

DECISION AND CERTIFICATION OF REPRESENTATIVE

Following *a* Petition for Certification filed by Teamster Local No. 865 (Teamsters or Union) on August 4, 1986, and a Petition for Intervention filed by the United Farm Workers of America, AFL-CIO (UFW) on August 6, 1986, a representation election was held among all agricultural employees of Tani Farms (Employer) on August 11, 1986. The official Tally of Ballots showed the following results:

Teamsters	26
UFW	8
No Union	23
Total	57

As no ballot choice received a majority of the votes cast, a runoff election was held on August 15, 1986 between the two ballot choices which had received the highest number of votes

in the initial election. The Tally for the runoff election showed the following results:

Teamsters	31
No Union	26
Unresolved Challenged Ballots	1
Void Ballots	1
Total	59

The Employer timely filed objections to the runoff election, two of which were set for an evidentiary hearing, as follows:

> 1. Whether the [Teamsters], by and through its agents Guillermo Godinez and Tim Rabara, violated the Board's access regulations both prior to and after the filing of the Notice of Intent to Take Access and, if so, whether such conduct affected the results of the election.
>
> 2. Whether ALRB agents misstated existing law regarding the Employer's right to decrease wages after a union victory and exhibited bias by telling employees prior to the election to vote for the [Teamsters] and, if so, whether such conduct affected the results of the election.

A hearing was conducted before Investigative Hearing Examiner (IHE) Barbara D. Moore who issued the attached Decision in which she recommended that the Board dismiss the Employer's objections to the election and certify the Teamsters as the exclusive collective bargaining representative of all agricultural employees of Tani Farms in the State of California. Thereafter, the Employer timely filed exceptions to the IHE's recommended Decision with a brief in support of exceptions.

The Agricultural Labor Relations Board (ALRB or Board) has considered the record and the IHE's recommended Decision in

light of the exceptions and brief and has decided to affirm the IHE's rulings, findings and conclusions and to certify the results of the runoff election.

The record indicates that, as a normal procedure, two Board agents met with two separate groups of Tani's employees on the day preceeding the runoff election for the express purpose of explaining the election process and answering questions employees might have concerning their rights under the Act as they pertain to representation matters. (Cal. Admin. Code, tit. 8, § 20350(c); Steak-Mate Inc. (1983) 9 ALRB No. 11.) The Employer asserts that when answering certain questions, the Board agents improperly aligned themselves against the Employer's no-union campaign. The employees who asked questions were not identified. Neither they nor the Board agents were called to testify. However, the Employer presented three other witnesses who testified without contradiction as to the general tenor of the pertinent question. Employee Eleazor Zepeda testified that the Board agents were asked “. . .if they [employees] signed for the union, would the salaries be lowered?" Employee Manuel Pinheiro recalled that the question was, ". . .if the Union win the election, the wage would drop?" Crew foreman Jorge Zepeda testified that he overheard an employee ask, ". . .if the Union won, were the salaries going to be lowered?"

Each of the witnesses also testified as to his recollection of the Board agent's response. According to Eleazor Zepeda, a Board agent responded, ". . . no, because that was against the law." Pinheiro was in exact agreement with Zepeda's recollection. Jorge Zepeda testified that the Board agent advised

employees that "... [the employer] could not lower [wages] because it was against the state law." He added that the same Board agent then said ". . .if you want to, you can vote for the Union" [and] "something" like, "... don't be like dumb."

The IHE found that while the witnesses may not have agreed as to the precise form of the question, she also found that, "[I]n essence, a worker asked an agent if wages would go down or be dropped if the union won the election [and the] agent replied that it would be illegal to drop the wages." She reasoned that the "literal impact of the questions" suggest general employee concern about the effects of their voting for the Union. Given that sense of the question, she concluded that the Board agent's response was a correct statement of law.

According to the Employer, however, neither the question, nor the response thereto, should be taken at face value. Rather, it asserts, the real meaning of the question can only be understood, as it must have been by the employees, in the context of the issues which permeated the pre-election campaign period. Both the Employer and Teamster representatives agree that the potential effect of unionization on existing wages was of paramount concern to employees. Accordingly, as the Employer points out in its brief in support of exceptions to the IHE's Decision, it (1) explained to employees that wages would be subject to negotiations, (2) negotiations did not always prove favorable to employees with regard to a final wage rate, and (3) negotiations between certain area employers and unions, particularly the Teamsters, had actually resulted in wage reductions.

Although the Employer concedes that the Board agents were probably not apprised of the unique background controversy which it contends prompted the particular question, it also asserts that their answer(s) was such as to be in direct contradiction to statements made by the Employer and thereby impaired the Employer's credibility with its employees. On that basis, the Employer contends that the answer affected employee free choice and warrants the setting aside of the election.[1/]

The Employer relies on National Labor Relations Board v. State Plating and Finishing Company (6th Cir. 1984) 738 F.2d 733 [116 LRRM 3053] (State Plating) to show that the Board agent's statement affected the outcome of the election by misleading the employees and destroying the neutrality of the ALRB. State Plating stands for the proposition that agency neutrality may be compromised when Board agents are on notice that a particular line of questioning arises from a uniquely local issue. Although the National Labor Relations Board (NLRB) dismissed the employer's objections to the election on the grounds that the Board agent's response constituted an accurate reflection of Board law, the Court of Appeal reversed, holding that the question and answer

[1/] As the Employer correctly observes, misconduct alleged to have tended to affect the results of the election must be tested by an objective standard. Thus, we disavow the dicta in the IHE's Decision regarding the alternative analysis that should apply if it were found that the Board agents made an inaccurate statement of law. The test in such a situation would not depend upon the subjective reaction of employees, but rather on the objective test of whether such a misstatement could be reasonably viewed as tending to interfere with employee free choice. (See, e.g., Don Moorhead Harvesting Co., Inc. (1983) 9 ALRB No. 58; Rancho Packing (1984) 10 ALRB No. 38.)

were outcome determinative because they clearly pertained to a local issue, rather than to a general matter of inquiry. A careful reading of the relevant testimony, as summarized by the court, revealed that a phone call was placed to an NLRB office by several employees who asked whether their employer, identified by name as Bill Waring, was correct in his assertions that he could not give them regularly scheduled raises while the union's petition for certification was pending. For example, one employee testified that she asked, ". . . if we were getting a regularly scheduled set of raises if Bill [Waring] could still give them." Another employee asked whether "... Bill [Waring] was entitled to give regularly scheduled raises." The Board agent testified that "it was possible for an employer to give a pay raise even though an election is coming." A number of employees testified that the Board agent had said that they could receive "regular" raises. The Court found that "the consistent references to their employer's name indicates that the employees were concerned with their specific situation . . . [they] were not asking for a general statement of the law." The Court concluded that the NLRB agent's comments had the effect of imposing a legal conclusion on a specific factual pattern and thereby misled the employees into believing that their employer had lied to them.

The instant case involves an election campaign which apparently focused, at least in part, on the issue of the effect that unionization would have on wages and working conditions through the negotiation process. However, the testimony reveals that the question asked was reasonably interpreted by the Board

agents as whether an employer could lower wages in retaliation for the employees voting for a union. The Board agents were not placed on notice that this question may have involved a specific campaign issue. In this context, the Board agent responded by providing a general, but accurate, statement of the law. Regardless of whether the question involved an issue specific to this particular election, the Board agent's response, under an objective standard, would not have misled the employees into believing that their Employer would not lower wages through the negotiation process. Specifically, we note that shortly before the election, the Employer circulated a letter to all employees explicitly promising not to reduce wages. (Employer's Exhibit No. 6.) Therefore, any possible misleading effect that the Board agent's statement may have had is negated by the Employer's own campaign material.

Neither the NLRB's decision nor that of the reviewing court in State Plating should be deemed dispositive. Our policy determinations are premised, as they must be, on somewhat unique statutory considerations. For example, the Agricultural Labor Relations Act (ALRA or Act) mandates that an election be held within seven days of the filing of a representation petition. Further, the date and time of the election may not be set until the pre-election conference between the parties, often only a day

or so prior to actual balloting.[2/] In order to adequately effectuate the purposes and policies of Chapter 5 of our Act, and to facilitate maximum participation by employees in the Board's election processes, ALRB field agents are required to go directly to the worksite immediately preceding an election in order to inform employees of the election, to explain election procedures, and, of course, to address general concerns they may express concerning their rights in that process. (Steak-Mate, Inc., supra, 9 ALRB No. 11.)

Under the circumstances of this case, the Board agents properly conducted themselves in answering the employees' questions. An accurate statement in response to what was reasonably perceived as a general legal issue does not impair the appearance of neutrality in the election process. Absent some showing that the Board agents aligned themselves with one of the parties, or allowed themelves to be used in a manner seriously affecting the neutrality of the Board's processes, the Board must dismiss the Employer's objection alleging Board agent bias. (Monterey Mushroom, Inc. (1979) 5 ALRB No. 2; Isaacson-Carrio Manufacturing Company (1972) 200 NLRB 788 [82 LRRM 1205];

[2/] On the other hand, in the industrial setting subject to NLRB jurisdiction, election information not only is more readily disseminated to employees but is also not constrained by the time limitations present under our Act. An NLRB Notice and Direction of election may issue as many as 90 days prior to the election. Industrial work patterns tend to be more stable than in agriculture, and employees generally have an established point of entry to the workplace, access to fixed bulletin boards, and perhaps even common eating and rest areas.

Provincial House, Inc. v. National Labor Relations Board (6th Cir. 1977) 568 F.2d 8 [97 LRRM 2307], revg. 222 NLRB 1300 [91 LRRM 1368].) For the reasons set forth in the IHE Decision, the Employer's remaining objection to the conduct of this election is also dismissed.

CERTIFICATION OF REPRESENTATIVE

It is hereby certified that a majority of the valid votes has been cast for the Teamster Local No. 865, and that, pursuant to Labor Code section 1156, the said labor organization is the exclusive representative of all agricultural employees of Tani Farms in the State of California for purposes of collective bargaining, as defined in section 1155.2(a) concerning employees' wages, hours and other terms and conditions of employment.

Dated: December 24, 1987

BEN DAVTDIAN, Chairman[3/]

JOHN P. McCARTHY, Member

GREGORY L. GONOT, Member

[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.

MEMBER HENNING, Concurring:

The Agricultural Labor Relations Board (ALRB or Board) agents here apparently[1/] gave a correct response regarding an issue of labor law to a question from a potential voter. This fact, no matter how the Employer seeks to raise an issue of misconduct (and no matter how cogently or copiously my colleagues seek to respond to that ethereal issue) cannot justify a failure to certify the results of an otherwise properly conducted election.

Accordingly, I agree that the results of this election

[1/] The hearsay nature of the testimony in this record, both of the purported questioner and purported response is an issue that deserves some comment. The Employer, who bears the burden of proof here, failed to present any evidence on which this Board could make a finding of fact (Title 8, Cal. Admin. Code, §20370(c)) and as such has failed of its burden of proof. (See, e.g., Don Moorhead (1984) 9 ALRB No. 58.)

must be certified and the Union designated the exclusive representative; however, I do so for the reasons given in the Investigative Hearing Examiner Decision.

Dated: December 24, 1987

PATRICK W. HENNING, Member

MEMBER RAMOS RICHARDSON, Dissenting:

The majority has affirmed the decision of the Investigative Hearing Examiner (hereinafter IHE) because they do not feel the Agricultural Labor Relations Board (hereinafter ALRB or Board) agents misled potential voters regarding an issue which Tani Farms (hereinafter referred to as Employer) alleged was of critical importance to the election. I respectfully dissent.

The question presented by this case is whether Board agent conduct which tends to affect the results of the election, should cause that election to be set aside even if said conduct is not per se wrongful, but tends to have a wrongful effect.

In Bruce Church, Inc. (1977) 3 ALRB No. 90, the Board announced the standard that an election should be set aside where an ALRB agent's misconduct is sufficient in nature to create an atmosphere which renders improbable a free choice of voters.

Review of the record indicates that this was a hotly contested election. During the election, Employer contended that

if the Teamster's Union (hereinafter referred to as Union) was voted in, wages might be lowered through the negotiations process because the Union had negotiated wage reductions in the past. The central issue that surfaced during the election campaign was the debate over wages.

My colleagues have decided that the question asked of the agents was a general question about wages rather than a specific question generated by the campaign of the Employer. I disagree. The question must be considered in the context of the campaign issues. When perceived in that light, it is clear that when the agent answered what he considered a general question, he also unwittingly answered the specific question about whether the Employer's campaign issue, that wages could be lowered through the negotiations process, was correct.

Assuming that the question related to a general question about wages, we must determine what a reasonable person hearing the question and answer reasonably understood from the exchange.[1/] It is apparent that the general answer of the ALRB agent could reasonably be interpreted as an answer to the specific question of whether wages could or would be lowered through the negotiations process. It would be reasonable to assume that if an employer is legally precluded from lowering wages, that wages could not be lowered through the negotiations process.

The failure of the ALRB agent to fully explain his answer could easily have misled voters into thinking that the Employer's

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[1/] The ALRB agent's statement was made to two separate groups of 16+ workers each on the day before the runoff election.

campaign statement, that wages could be lowered through the negotiations process, was false. The effect of the ALRB agent's statement was to create an atmosphere which rendered improbable a free choice of voters. Since the ALRB agent was viewed as a neutral party, his statement would carry more weight because he had no reason to support either the Union or Employer.

The majority takes the position that any possible misleading effect the Board agent's statements may have had was counteracted by the Employer's letter promising not to lower wages. The majority ignores the fact that this letter was dated October 8, 1986, one week prior to the runoff election and prior to the statements of the ALRB agent. The letter did not discuss what would happen to wages through the negotiations process. Also, it is apparent from the question to the agent that the employees still had concerns that wages would be lowered after the election.

The run-off election was a very close election; of the 58 ballots cast, 31 votes were cast for the Union and 26 for no union. In order to obtain a majority, the Union had to receive 30 votes. If, as a result of the statements of the agent, two persons changed their votes in favor of the Union, this would have been sufficient to change the outcome of the election.

The majority has attempted to distinguish this case from National Labor Relations Board v. State Plating and Finishing Company (6th Cir. 1984) 738 F.2d 733 [116 LRRM 3053] (State Plating). The majority emphasizes the fact that agents must be on notice that the question relates to a specific issue in the

campaign. However, a fair reading of the State Plating decision shows that the court decision turned on the effect of the NLRB agent's statement on the employees. It was clear in State Plating that the employees were misled by the general answer to a specific question.

In the instant case, it would be reasonable for an employee, upon hearing the statement of the agent, to be misled by the general answer. Since the statements of the agent were heard by approximately 35 of the 58 voters, the election should be overturned.

Dated: December 24, 1987

IVONNE RAMOS RICHARDSON, Member

CASE SUMMARY

Tani Farms
(Teamster Local No. 865/UFW)

13 ALRB No. 25
Case No. 86-RC-3-OX(SM)

IHE DECISION

Following a Petition for Certification filed by Teamster Local No. 865 (Teamsters) and a Petition for Intervention filed by the United Farm Workers of America, AFL-CIO, a representation election was held among all agricultural employees of Tani Farms (Employer). As no ballot choice received a majority of votes cast, a runoff election was held. The final tally of ballots showed 31 votes for the Teamsters, 26 votes for No Union, 1 unresolved challenged ballot, and 1 void ballot. Following an evidentiary hearing on the Employer's objections to the election, the Investigative Hearing Examiner (IHE) concluded that there was no access violation and that the ALRB agents had not misstated existing law nor had they exhibited bias. She recommended that the Board dismiss the Employer's objection to the election and certify the Teamsters as the exclusive collective bargaining representative of all agricultural employees of the Employer.

BOARD DECISION

The Agricultural Labor Relations Board (ALRB or Board), upon review of the IHE's Decision and in light of the Employer's exceptions thereto, affirmed the IHE's rulings, findings and conclusions and decided to certify the results of the runoff election. In its Decision, the Board concluded that, under an objective standard, the Board agent's response would not reasonably have misled the employees. Specifically, the Board found that the Board agent's response was a general, accurate statement of the law; the Board agent was not placed on notice that the question involved a specific local campaign issue; and that shortly before the election, the Employer circulated a letter to all employees explicitly promising not to reduce wages, which negated any possible misleading effect. Finally, the Board stated that neither the NLRB's decision nor that of the reviewing court in National Labor Relations Board v. State Plating and Finishing Company (6th Cir. 1984) 738 F.2d 733 [116 LRRM 3053] should be deemed dispositive as the ALRB's policy determinations are premised on unique statutory considerations.

CONCURRING OPINION

Member Henning concurred in the Board's Decision to certify the results of this election, but based his conclusion on the reasons given in the IHE Decision.

CASE SUMMARY

Tani Farms
(Teamsters Local No. 865/UFW)

13 ALRB No. 25
Case No. 86-RC-3-OX

DISSENT

Member Richardson would refuse to certify the results of the election.

After analyzing the Board agent statements and the context in which delivered, Member Richardson was persuaded that the statements could have misled voters into thinking that the Employer's campaign statement, that wages could be lowered through the negotiations process, was false. She was further persuaded that the effect of the statement was to create an atmosphere which rendered improbable a free choice of voters.

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CONCURRING OPINION

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STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of:	)	
TANI FARMS,	)	Case No. 86-RC-3-OXC SM)
Employer,	)	
and	)	
TEAMSTERS LOCAL 865,	)	
Petitioner,	)	
and	)	
UNITED FARM WORKERS OF AMERICA, AFL-CIO,	)	
Intervenor,	)	

Appearances :
Richard S. Quandt
for the Employer
245 Obispo Street,
P.O. Box 10
Guadalupe,
CA 93434

Freddy F. Sanchez
for the Petitioner
Teamsters Union Local 865
227 West Cypress Street
Santa Maria, CA 93454

Before: Barbara D. Moore
Investigative Hearing Examiner

DECISION OF THE INVESTIGATIVE HEARING EXAMINER

STATEMENT OF THE CASE

BARBARA D. MOORE, Investigative Hearing Examiner:

This case was heard by me on January 7, 1987, in Santa Maria, California, pursuant to the Amended Notice of Investigative Hearing dated December 16, 1986.[1]

A Petition for Certification (Er. Ex. 3),[2] a Notice of Intent to Organize (N/0) (Er. Ex. 2) and a Notice of Intent To Take Access (N/A) (Er. Ex. 1) (hereafter referred to collectively as the filings) were filed with the Agricultural Labor Relations Board (hereafter Board or ALRB) on August 4, by Teamsters Local 865 (hereafter 865). The United Farm Workers of America, AFL-CIO (hereafter UFW) filed a Petition for Intervention on August 6.

An election was held on August 11 among the tractor drivers, irrigators, sprinkler crew and hoe and thin crew of the employer, Tani Farms (hereafter Tani or Employer). Neither 865 nor UFW received a majority of the votes cast,[3] and a runoff election was held on August 15. The Tally of Ballots showed:

Teamsters 865	31
No Union	26
Challenged Ballots . . .	1
Void Ballots	1

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[1]All dates are 1986 unless otherwise stated.

[2]All exhibits are those of the Employer and will be referred to as Er. Ex. number.

[3]The Tally of Ballots showed 26 votes for 865; 8 for UFW and 23 for No Union.

Thereafter, the employer timely filed a petition pursuant to Labor Code section 1156.3(c) of the Agricultural Labor Relations Act (hereafter Act or ALRA) objecting to the certification of the election. Tani also filed a motion to deny access. The Executive Secretary set the motion and two objections for hearing:

(1) Whether 865 violated the Board's access regulations and, if so, whether such violations affected the results of the election, and

(2) Whether ALRB agents misstated the law, and, if so, whether such conduct affected the results of the election.

Both 865 and Tani were represented at the hearing and were given full opportunity to participate in the proceedings. Only Tani filed a post-hearing brief. Upon the entire record, including my observation of the demeanor of the witnesses, and after consideration of the parties' arguments and the Employer's brief, I make the following findings of fact and conclusions of law.

STATEMENT OF FACTS

I. Jurisdiction

Neither the Employer nor 865 challenged the Board's jurisdiction. Accordingly, I find that the Employer is an agricultural employer within the meaning of Labor Code section 1140.4(c), that 865 is a labor organization within the meaning of Labor Code section 1140.4(f) and that an election was conducted pursuant to Labor Code section 1156.3.

II. Board Agent Misconduct

The employer called numerous witnesses[4] to testify regarding this objection. Taken together, the testimony establishes that two men came to Tani the day before the election to talk to a group of tractor operators and irrigators about the election. There were approximately 16 employees present. (I: 38, 41) One witness, Mr. Pinheiro, testified that one of the men had papers that said "Labor Relations" and had a badge showing that he worked for the state.

Although none of the witnesses could identify the men, I find the testimony circumstantially establishes that the men who addressed the crew were ALRB agents.[5] No witness could recall exactly what question the Board agents were asked or what the one agent said, but each of them testified to the gist of the exchange. In essence, a worker asked an agent if wages would go down or be dropped if the union won the election. The agent replied that it was illegal to drop the wages.[6]

Only two witnesses were asked about their reaction to the agent's response. Mr. Escobar was asked whether after hearing the agent he thought it was illegal for wages to go down. Mr.

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[4]Manuel Ramirez ' s. testimony was hearsay, and I have considered it only as corrobative of other witnesses' testimony. 8 Cal Admin. Code section 20370(c).

[5]No one from the regional office appeared at the hearing.

[6]Each version indicates the import of the question was whether wages would go down if the union won the election not whether wages could go down. (I; 34, 38, 40, 42, 44, 52)

Escobar replied that he "....didn't know regarding that." (I: 45) When asked by the employer's counsel if the agent's remarks caused him to disbelieve the representatives of the employer who had been saying wages could go up or down, Mr. Escobar replied in the negative. He added that he believed what the employer representatives had said was true. (I: 45)

Mr. Feliciano was asked by the employer's counsel if he felt he could rely on the agent from the state and thus believed wages could not go down. Mr. Feliciano replied that he didn't know. (I: 53) Counsel followed up by asking if Mr. Feliciano believed he could rely more on the agent than on the unions or the Employer. Mr. Feliciano shook his head in the negative and again said he did not know. (I: 53)

Jorge Zepeda is in charge of the thin and hoe crew which has 16 employees. Two men who introduced themselves as being from the Board came the day before the election and spoke to his crew.[7] Although he acceded to their requests to move away from the crew, he overheard what was said.

An agent told the assembled workers, "Tomorrow, you ought to go vote." A worker asked if the union won were the workers' wages going to be lowered. The agent replied in essence that they (the Employer) could not lower them because it was against the state law. The agent went on to say, "If you want to, you can

[7]This apparently is a separate incident since only tractors drivers and irrigators were present at the exchange described above (I: 38, 41)

vote for the union." He then added something such as, "Don't be like dumb." (I: 35) Mr. Zepeda estimated 10 to 13 workers were present when the remark was made. No evidence was introduced to rebut Mr. Zepeda's testimony.

Mr. Agraz, who is a personnel consultant with Western Growers Association, assisted Tani in its campaign against 865. He noted that employees at Tani had not had wage increases in the preceding couple of years so that the issue of wages was especially important to the employees. (I: 19) As part of the campaign, the employer distributed materials such as a newspaper article (Ex. 9), a cartoon (Ex. 8) and letters from the employer (Exs. 6 and 7) telling its employees that voting union would not necessarily mean increased wages and citing instances where unions had negotiated lower wages. Tani also exhorted its employees to have union representatives sign a pledge that they personally would make up the difference in pay if the union negotiated a contract which lowered employees' wages. (Ex. 10, I: 27)

Tim Rabara, an organizer for 865, denied promising Tani employees there would be higher wages. He indicated he said only that everything is negotiable. (I: 92)

III. Access Violations

The employer contends 865 illegally took access before it filed the N/A and N/0. Tani further contends that after the filings, 865 took access beyond that provided for in the Board's regulations.

Guillermo Godines was a volunteer worker for 865 who helped in the election campaign at Tani. Tim Rabara was employed

by 865 as an organizer and began organizing Tani only after the petition and N/A and N/0 were filed. He was in charge of soliciting authorization cards from Tani employees in order to file the petition. He did not say how the cards were obtained or by whom. (I: 86) His instructions from 865 were to observe all laws, and he was told he was subject to termination if he failed this responsibility. (I: 88-89) Godines never received any instructions about access rules from 865. He learned about them from an ALRB handbook he was given.

Rabara admitted he did not always wear identification but said he is well-known in the area as a Teamster person since he has been organizing in the area for so long. (I: 90-91) In response to a leading question from the Teamsters' representative on redirect, Rabara indicated he always wore his Teamsters' hat. (I: 97) Godines never displayed any union identification at least prior to the filings.

A. Alleged Access Violations Prior to Filing of N/A and N/0

Godines formerly worked at Tani. He left there in 1983. It is uncontested that he came to Tani prior to the petition and notices being filed. Godines testified that his purpose was to visit his father. First he said he went there about 2 or 3 weeks before the election. (I: 70-71) On cross-examination, he indicated that from the time he left Tani in 1983 he visited his father at work 2 or 3 times a month. He would go into the crew and take the hoe from his father' hand and work for a while to give his father a break. At those times, his father would talk to him about family problems. (I: 77)

Jorge Zepeda testified he saw Godines visit his father months before the election. When Zepeda asked Godines why he was there, Godines said he was visiting his father. In response to a leading question, Zepeda indicated Godines visited more frequently as the time of the election neared. He estimated Godines came to see his father perhaps once a week and that he visited during lunch. (I: 33) Zepeda never really understood the questions asking whether Godinas also came to Tani during working time so he never gave a responsive answer on this issue. (I: 32-33)

Zepeda's testimony that he saw Godines during lunch undermines Godines credibility on that point. As Godines was testifying, I found that his story of taking the hoe from his father's hand sounded hollow and insincere. Nonetheless, no one testified that Godines talked to them or anyone else about the union before the N/A and N/0 were filed.[8] Godines denied going to Tani on 865 business prior to the N/A and N/0 being filed. (I: 75-76)

Henry Abadajos, the ranch manager at Tani, testified he saw Godines passing out leaflets at lunch time inside Tani property at Ranch 68 sometime in the first part of August. He circled the date on his calendar "for just some odd reason." (I:57) A few days later, 865 filed the N/A. Abadajos made a note of the filings. Abadajos said this incident occurred about one week before the election, thus before the filing of the petition

[8]Mr. Escobar testified Mr. Godines tried to give him some union papers one morning but was unclear on when that incident occurred. He also described a time when Mr. Godines talked to an employee, John Palomo. However, Escobar did not testify that the conversation related to the union nor did he say when the

and the N/A and N/0. He believed the filings occurred on August 7, and he learned about them a few days after they happened. (I: 56-57)

I discount his testimony about this incident. The employer had nine employee witnesses besides Mr. Abadajos. He is the only one who mentioned the episode. While one credible witness is sufficient to establish a fact, I find it most curious that not a single employee testified he saw the incident or received a leaflet.

Moreover, Abadajos said he circled the date on his calendar for "some odd reason." I too find it odd. There is no evidence he knew an organizing campaign was going on, and no evidence he saw what was on the leaflet.[9]

Thus, the incident sounds improbable because there is no other evidence to indicate any signs of organizing prior to this time. It is unlikely that 865 would shift from an exceedingly low profile organizing effort to passing out leaflets just prior to the filings when in a few days at most it would be able to organize legally and openly.

Although he supposedly circled the date, he did not indicate he told Tani or anyone else about the incident. I find

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(footnote 8 continued)
conversation occurred. (I: 46) Mr. Ramirez testified that, about one week before the filings, he was eating lunch on Tani property and he saw Godines talk to a crew member for approximately *5* minutes. Again, there was no evidence as to the topic of conversation.

[9]I note also that Abadajos did not say the leaflet related to union organizing.

his testimony not credible and, at the time he was testifying, I perceived his demeanor as insincere and unreliable.

Finally, although he insisted the incident occurred before the filings, he also said the incident occurred in the first part of August. He thought the filings were on August 7 (actually they were on August 4), and he learned about the filings a few days after they happened. Consequently, it is not clear that the leafletting, if it occurred at all, occurred before the filings. Unless the incident took place prior to the filings, it would be permissible since it occurred during lunch.

B. Access After the Filing of N/A and N/0

There are three alleged instances when 865 took access in excess of that allowed by the Board's regulations.

Abadajos testified to an incident which occurred about 3 days before the election. Godines and Rabara were on Ranch 29 at approximately 11:30, and the crew in the area did not break for lunch until noon. Abadajos told them they weren't supposed to be there yet. Godines replied they were within their rights, and Rabara told Abadajos to check with the state. (I: 57-58)

David Tani described two incidents of excess access during the campaign. One occurred about 4:45 p.m. on Ranch 9. Mr. Godines was in the shop area, and quitting time was not until 5:00 p.m.

The second incident occurred on Ranch 9, plot 9. Both Godines and Rabara were on company property about 11:50 and the crew broke for lunch about five minutes later. (I: 101)

On both occasions, Tani said it was too early. Godines told Tani to check with his lawyer. Rabara told him he had every right to be there. On both occasions Tani simply walked away when they did not leave. He acknowledged Rabara and Godines did not refuse to leave, but they did not do so and said they had every right to be there. (I: 101)

Godines recalled only one instance when he was told that he was improperly on company property. Godines was on Ranch 9 at approximately 4:55. He was outside a gate so he believed he was not on Tani property. When Tani objected to his presence, Godines turned around. By the time he drove back to a dirt road, workers began to leave work, and he turned around and went back.

Rabara recalled two incidents when he was told to leave Tani property. He and Godines were parked on Ranch 9 approximately one-quarter mile away from a crew of workers. Tani said they were not supposed to be there. Rabara replied they weren't talking to anyone but would leave if Tani wanted them to. They left, but the workers began leaving soon thereafter so he and Godines returned. He estimated Tani came up to them about 11:55.

The second time, Henry Abadajos told them they were too early. Rabara again estimated it was only a few minutes before lunch time. The workers were away from the highway so Rabara had to drive in and park in order to see where they were. He estimated they were about 1/4 mile from the property line. (I: 95-96)

I find that with regard to the afternoon incident Mr. Godines did not leave Tani property when asked to by Mr. Tani. He

was on the premises from between 5 to 15 minutes before work ended. There is no evidence he made any attempt to approach workers. I credit Godines testimony that he was waiting so he could see where the workers went and not miss an opportunity to talk to them.

I do not credit his testimony that he compliantly left. On cross-examination, he kept saying he was not an official representative of 865, that he was not at Tani on behalf of 865, and that he was helping to "[j]ust be around Mr. Rabara" and to "....get out of the house." (I: 79-80) Similarly, although he admitted helping obtain authorization cards, he said he did not get them when he went out to Tani and was exceedingly coy when counsel asked him how many cards he obtained. (I: 77-78) His demeanor was not that he was not answering because the information was confidential but that he "could not recall" whether it was 5, 10 or 20. His attitude was one of sparring with counsel. When asked if he talked to anyone about the union, he said he just answered a couple of questions that a couple of people "may have." (I: 80)

Despite his insistent position that as a volunteer he was not a representative of 865, he admitted on cross that he had participated in an election at another farm earlier in the year and wore a badge with his name and "Teamsters 865" on it. [I: 81-82) He also acknowledged driving *a* car belonging to 865 during the Tani campaign. (I: 80)

His stubborn refusal to admit he was working on behalf of 865 stressing instead that he was a volunteer and his quibbling

whether as a volunteer he was representing 865 showed a desire to pit himself against the Employer's counsel and to "best" him. I find that behavior consistent with the remarks ascribed to him by Tani.

Moreover, his evasiveness and reluctance in answering questions fully, and his disingenuousness exemplified by testimony such as that he only answered a couple of questions about the union that a couple of employees might have had cause me to doubt Mr. Godines' credibility generally.

Although Godines did not recall a second incident, I credit Tani and Rabara who described an instance when at approximately 5 minutes before workers broke for lunch, Tani approached Godines and Rabara and asked them to leave. Again, I credit Tani that they did not leave.

Rabara's demeanor at trial indicates that it is more likely he would have made the type of remarks attributed to him by Tani rather than simply turning around and leaving. He was very conscious of exactly when he could take access, and the tenor of his response to questions from counsel indicates he would have vigorously asserted those rights. Even by Tani's testimony, he was at most a few minutes early, and the workers were some distance away. Under these circumstances, it is more probable he would have chosen to wait rather than drive off only to almost immediately turn back. I have already commented on my reasons for disbelieving Mr. Godines.

I credit Rabara and Abadajos that there was a third incident. Abadajos told Godines and Rabara they were too early.

He estimated it was approximately 11:30. Rabara estimated it was only a few minutes before lunch. Godines did not recall the incident. I credit Rabara that it was shortly before lunch. That scenario is consistent with the other two incidents, and there is no reason evident why Rabara and Godines would arrive 30 minutes early just to sit and wait. There is no evidence they tried to talk to the workers before lunch.

ANALYSIS AND CONCLUSIONS

The burden of proof is on the party seeking to overturn an election to provide specific evidence showing that unlawful acts occurred and that these acts interfered with the employees' free choice to such an extent that they affected the results of the election. (TMY Farms (1976) 2 ALRB No. 58; Bruce Church, Inc. (1977) 3 ALRB No. 90)

The employer's counsel cites Athbro Precision Engineering Corp. (hereafter Athbro) (1967) 166 NLRB 966 [65 LRRM 1699] and Coachella Growers (hereafter Coachella) (1976) 2 ALRB No. 17 for the proposition that any conduct of ALRB or NLRB agents that "tends to impair the Board's neutrality is sufficient ground-for setting aside an election." (Employer's Brief, p. 6.)

In Athbro, the NLRB set aside an election because an employee who had already voted in the election saw a Board agent in a nearby cafe drinking beer with a union representative. There was no evidence the conduct affected the votes of the four employees who voted later. Although the NLRB set aside the election, the federal district court granted an injunction and

ordered the NLRB to certify the election since the NLRB had found the agent's conduct did not affect the votes of the employees. The NLRB accepted the court's judgment^ so it is not appropriate for counsel to cite Athbro for the proposition stated.

Counsel is incorrect in citing Coachella as well. That case embodies this Board's long-standing policy not to set aside an election based upon bias or appearance of bias of Board agents unless the conduct complained of affected the conduct of an election and impaired the balloting's validity as an expression of employees' free choice. (Coachella Growers, Inc. (1979) 2 ALRB No. 17; see also George A. Lucas and Sons (1982) 3 ALRB No. 61.)

Unlike industries regulated by the National Labor Relations Board (hereafter NLRB or National Board) where elections generally may be rerun relatively easily because the work force is permanent, in agriculture if an election is set aside, a new election generally cannot be held until the next peak employment period which may be a year away. (D'Arrigo Brothers of California (1977) 3 ALRB No. 37; Monterey Mushroom, Inc. (1979) 5 ALRB No. 2) Unless a challenged election did not reflect the employees' free choice, setting it aside delays implementing the employees' choice of whether or not to be represented which is the most fundamental element of the Act.

Although no one could identify either of the individuals who said they were from the Board, I have found Mr. Pinheiro's and

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[10]See Athbro Precision Engineering Corp. (1968) 171 NLRB 21 [68 LRRM 1001] On petition for enforcement of the NLRB's determination that the employer refused to bargain following certification, the court of appeals chided the NLRB for not appealing the district court's injunction indicating it believed the district court had

Mr. Zepeda's unrebutted testimony sufficiently specific to carry the Employer's burden of proof. The literal impact of the questions asked of the Board agents, as well as my interpretation of the significance of the questions when they were repeated at hearing, is that the workers wanted to know if they voted for the union would their wages go down. They did not ask if they could or might go down. The questions do not suggest the employees were asking about the negotiation process.

The Board agent was correct to respond as he did. He gave an accurate statement of the law, namely, that it would be illegal to lower wages because employees voted for the union. It would be unrealistic and impractical to require Board agents to never answer a question unless they gave a complete discussion of all applicable legal principles. Consequently, I find the Board agent was not required to fully explain the entire collective bargaining process in order to answer the question posed.

The employer has not established that the issue of whether voting for a union would bring better benefits including higher wages was an issue of local importance in the sense of the court's discussion in NLRB v. State Plating & Finishing Co. (hereafter State Printing) (6th Cir. 1984) 738 F.2d 733 [116 LRRM 3053]. Whether a union will improve the lot of the workers is an

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(footnote 10 continued).
exceeded its jurisdiction. See, NLRB v. Athbro Precision Engineering Corp. (1st Cir. 1970) 423 F.2d 573 [73 LRRM 2355), enforcing 173 NLRB 995 [69 LRRM 1512]. This does not alter the fact that Athbro cannot be cited for the proposition stated by Tani's counsel.

issue basic to union organizing campaigns, and wages are a central concern. There is nothing unusual or unique to this election in the employer's campaign representations that the workers would be better off without the union and that there was no guarantee that voting union would bring high wages.

The facts of State Plating, supra, are quite different from this case. There, the court overturned an NLRB finding that a Board agent had made an accurate statement of law because the court found the general statement of law was misleading in the context of issues in the particular election.

The employer had told employees he could not give any raises during the pre-election period. Workers brought their concern on this matter to the union.

A union representative stated the union had no objection to regularly scheduled pay raises and that it was legal for the employer to give those. Wanting to verify whether their employer could grant the raises, a group of employees phoned the NLRB. Their spokesperson asked, in effect, if their employer could continue giving regularly scheduled raises despite the pending election. The NLRB agent replied that normally if the raises are already due, employees should receive them as if there were no election coming. There was no discussion of the pattern or schedule of pay raises at the particular employer.

The NLRB agent's comments were widely discussed, and employees confronted the employer with the information from the NLRB. Employees testified at the hearing that because of the NLRB agent's comments many employees believed their employer had lied.

In deciding to set aside the election, the court looked at the employer's pattern of giving raises and examined in detail the relevant law. It concluded that "....it would have been well nigh impossible for [the employer] to rebut the presumption of illegal motive with respect to any raises it might have awarded before the election." (at 3060)

Thus, the court found that the NLRB agent had misrepresented the law and found further that even construed as a general statement of law it was incomplete and likely to be misleading. The court further focused on the fact that the employees relied on the agent's information causing them to believe their employer had lied.

In this case, the question presented to the Board agent was less specific than that posed in State Plating. The Board agent's response was not susceptible of misleading employees in the same way as the response in State Plating. The issue of permissible raises is a technical one, and the law is very detailed. Here, there was not the same sort of precise, technical point of law at issue. Tani acknowledges that it is illegal to lower wages because employees vote for a union but argues the Board agent should have amplified his- remarks to include a discussion of the process of collective bargaining.

Moreover, the employees here, unlike in State Printing, did not rely on the Board agent's response. Two witnesses were asked about the effect of the agent's remarks. One said he didn't know how he felt about the response, and the other flatly denied

that it caused him to think the employer was lying. In fact, he said he still believed and trusted the employer's pronouncements.

Thus, this case is distinguishable from State Plating. Even if the agent's description of the law were found to be inaccurate, the evidence fails to show that it had any effect on the election. Accordingly, I find no basis to set aside the election because of the Board agent's conduct.

The employer also objects to a Board agent saying that employees' could go ahead and vote for the union. In the context of the other question as to whether they would be penalized by a drop in their wages if a union came in, it was reasonable and appropriate for the agent to tell them the wages could not be lowered for that reason and that they were free to choose a union without fear that wages would be reduced as a result of their action.

I give no more significance to the agent's remark than that he was encouraging the employees' free expression. I note the NLRB has refused to set aside elections where agents have told employees they could "now vote for your union representative." Wabash Transformer Corporation (1973) 205 NLRB 148 [83 LRRM 1545])

Based on the foregoing, I find that it would be inappropriate to set aside the election because of these statements. The Board agent's remarks were not unlawful, and there is absolutely no evidence showing that they affected the election.

I turn now to an examination of the alleged access violations. Access violations do not automatically require setting 'aside elections. Rather an election will not be set aside unless access violations are of such a character as to affect the employees' free choice. (K. K. Ito Farms (1976) 2 ALRB No. 51)

With regard to excess access following the filings, there are three instances when Mr. Rabara, Mr. Godines or both together arrived approximately 15 minutes or less ahead of appropriate times for access.[11] There is no evidence that either Rabara or Godines made any attempt to talk to workers other than during appropriate time periods. Rather, they apparently arrived somewhat early in order to locate employees to ensure they would have an opportunity to speak with them.

On numerous occasions, this Board has refused to set aside elections where there were minor access violations. This is true even when the violations involve union organizers talking to employees who were working so long as any delays were minimal, the number of incidents were few, and there was no evidence the excess access created an atmosphere of intimidation or coercion which would inhibit the employees' expression of free choice. (Martori Brothers Distributing (1978) 4 ALRB No. 5; George Arakalian Farms, Inc. (1978) 4 ALRB No. 6; Sam Andrews' Sons (1978) 4 ALRB No. 59.

[11]The Board's regulations provide that access may be taken one hour before and one hour after work and during lunch. (8 Cal. Admin. Code section 20900(5))

The three incidents here involved no disruption of work at all. The excess access was minimal, there were only three incidents, and, in spite of 865's small margin of victory, there is no showing the extra access affected the outcome of the election. These minor incidents do not justify setting aside the election. The delay of running another election and the disenfranchisement of the employees who voted is not warranted since there is no evidence the extra access affected the employees' free choice.

With regard to the taking of access prior to the filings, I find the employer has not met its burden of proof that Mr. Godines took access for organizing purposes. Mr. Zepeda only saw Godines visiting his father. There is no concrete evidence Godines was engaged in union organizing.[12] NO employee witnesses testified that he discussed the union with them, and I have discounted the testimony of Mr. Abadajos regarding Mr. Godines passing out leaflets. Tani has failed to carry its burden on this point. Accordingly, I find no violation of the Board's access rules prior to filing the N/A and N/0.

Tani has filed a Motion to Deny Access based on the allegations of excess access. This Board's standard for granting

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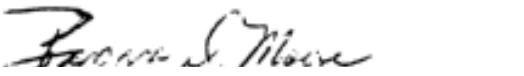
[12]Mr. Godines' testimony regarding his role in collecting authorization cards was less than candid and raises a suspicion that he may not only have been visiting his father, but there is no evidence that he was in fact engaging in union organizing. Mere suspicion does not satisfy the burden of proof. (Rod McLellan Company (1977) 3 ALRB No. 71)

such a motion is met if the evidence shows the access violations caused significant disruption of an employer's agricultural operation, were intended to harass the employees or employer or indicated reckless or intentional disregard of the limitations of time, place or number which qualify the right of access. (Ranch No. 1, Inc. and Spudco (1979) 5 ALRB No. 36; Sam Andrews' Sons (1979) 5 ALRB No. 38)

The evidence does not show that the excess access was designed to harass either the employer or employees and there was no disruption of the employer's operations. Although I have found that both Godines and Rabara insisted they had a right to take access when in fact they were not within the time periods specified in the Board's regulations, since the number of incidents and the time involved were quite minor, I do not conclude they reflect an intentional disregard of the restrictions set forth in the regulations. This is especially true since neither Rabara nor Godines made any attempt to talk to employees while they were working. Accordingly, I recommend the motion be denied.

Similarly, I recommend that the objections regarding Board agent misconduct and excess access be dismissed for the reasons set forth above. I therefore recommend that Teamsters Local 865 be certified as the collective bargaining representative of all agricultural employees of Tani Farms.

Dated: April 1, 1987



BARBARA D. MOORE
Investigative Hearing Examiner