El Centre, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

ARCO SEED COMPANY, Employer, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Petitioner.	)	Case No. 77-RC-23-E 14 ALRB No. 6

DECISION AND ORDER

On December 9, 1977, 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 Dessert Seed Company[1/] (Dessert). An election was conducted by the Agricultural Labor Relations Board (ALRB or Board) on December 16, 1977, with the Tally of Ballots showing the following results:

UFW.	38
No Union	21
Unresolved Challenged Ballots. . . .	2
Total.	61

Dessert filed a number of election objections, all of which the Executive Secretary dismissed without a hearing on January 12, 1978. After Dessert's request for review and request for reconsideration were denied, the Board, on April 3, 1978,

[1/]Respondent's name before a change of ownership in November 1980

certified the UFW as the exclusive representative of all agricultural employees of Dessert Seed Company in the State of California.

Dessert then filed a petition for writ of mandate in superior court seeking an order prohibiting the Board from certifying the Union until Dessert's election objections were adjudicated. The writ was denied, Dessert appealed, and on August 16, 1979, the Fourth District Court of Appeal upheld the denial of the writ on the basis that the only method of obtaining judicial review of the dismissal of election objections was for the employer to engage in a technical refusal to bargain.

Between Dessert's filing of the writ and the Court of Appeal's issuance of its decision, Dessert and the UFW entered into negotiations and, as company owner Archie Dessert conceded, came "very close" to reaching a contract. However, one month after issuance of the Court of Appeal decision -- in which the court indicated in dictum that the Board should have granted a hearing on the election objections -- Dessert told the Union that it would no longer continue bargaining.

In January 1980 Archie Dessert began negotiating for the sale of his company to Atlantic Richfield Corporation. The sale took place November 1, 1980, whereupon Dessert Seed Company became a division of Atlantic Richfield operating under the name ARCO Seed Company (ARCO or Employer).

During October and November 1980 the UFW requested a resumption of negotiations, but on January 16, 1981, ARCO sent the Union a letter confirming that it would not bargain. When ARCO

instituted a new medical plan for its employees in August 1981, the UFW filed an unfair labor practice (ULP) charge. After the Employer reiterated its refusal to bargain in February 1982, the Union filed another ULP charge in May 1982. A hearing was thereafter held on the charges, and in December 1983 the Board affirmed the Administrative Law Judge's (ALJ) finding that ARCO had unlawfully refused to bargain as of January 1981, and imposed a makewhole remedy.

On June 12, 1985, the Fourth District Court of Appeal, in an unpublished decision, reversed the Board's Decision and remanded the case to the Board for a hearing on the Employer's election objections. The Board's petition for hearing before the California Supreme Court was denied on September 11, 1985. On October 15, 1986, the Board set for hearing the following objections:

1. That the UFW interfered with employee free choice in the election by intimidating, interrogating and harassing employees through its organizers in November and December 1977;

2. That the UFW violated a preelection agreement which prohibited campaigning on the morning of the election and campaigning on the bus carrying workers to the voting site, and thereby interfered with voters' free choice;

3. That UFW observers interfered with free choice by engaging in conversations with voters as they came up to cast their ballots;

4. That prior to the election, UFW organizers violated access regulations, thereby interfering with voter free choice;

5. That Board agents failed to conduct the election properly by failing to enforce the no-campaigning agreement and by allowing workers to wear union materials during the voting.

A hearing was held before Investigative Hearing Examiner (IHE) Matthew Goldberg on January 20, 21 and February 10, 1987. The IHE issued his recommended Decision on June 29, 1987.

Before the hearing closed, the IHE, upon motion of the UFW, dismissed Objections Nos. 1, 3 and 4 for lack of proof. No party excepted to the dismissal of those three objections.

In his decision, the IHE recommended that the Employer's two remaining election objections be dismissed, but recommended that the UFW not be certified because of the long passage of time since the election, as well as fundamental changes in the Employer's operations. The UFW filed exceptions, and the Employer filed a reply brief.

The Board has considered the record and the IHE's Decision in light of the exceptions and briefs, and has decided to affirm the IHE's rulings, findings and conclusions only to the extent they are consistent with this decision.

The Election Objections

The IHE found there was credible evidence that the bus transporting employees to the election site had UFW bumper stickers attached to its windows when it arrived at the site, and that the bus may have been visible to employees waiting in line to vote. The IHE also found that bumper stickers were posted on a fence surrounding the shop area where the election was held, as well as on the exterior of the shop building which

contained the voting booth and observers' table. However, he found that the evidence did not establish who was responsible for placing the stickers on the fence, bus or shop, and that most, if not all, of the stickers were removed upon Board agent instructions prior to the commencement of voting. He also found that the evidence did not establish that union organizers had engaged in electioneering at the voting site.

The IHE concluded that the evidence did not support the allegation that the UFW or its agents were responsible for violating the preelection agreement to refrain from engaging in campaigning on the morning of the election. He further concluded that the evidence did not support a finding that any of the individuals responsible for the display of bumper stickers or other UFW insignia were acting as agents of the Union. Thus, the IHE dismissed Objection No. 2, which alleged that the Union had violated the no-campaigning preelection agreement. We affirm his dismissal of this objection, as his findings and conclusions are well supported by the evidence.

Regarding the alleged misconduct of Board agents in failing to prohibit campaigning in the election area, the IHE found that Board agents did seek to curtail the campaigning activities by ordering employees to remove the bumper stickers from display, and that their orders were carried out. As to the evidence that some voters wore union emblems on their clothing when they went to vote, the IHE noted that under ALRB and National Labor Relations Board (NLRB) precedent the mere display of campaign symbols within the polling area is not a basis for

setting aside an election in the absence of evidence that the material caused a disruption of polling or otherwise interfered with the election. (George A. Lucas &' Sons (1981) 8 ALRB No. 61; Foremost Dairies of the South (1968) 172 NLRB 1242 [68 LRRM 1479]; Western Electric Company, Inc. (1949) 87 NLRB 183 [25 LRRM 1099].) He found no evidence that the union emblems displayed at the election site herein caused any disruption or otherwise interfered with the orderly process of voting. We affirm the IHE's findings and conclusions regarding Board agent conduct, and conclude that he has correctly applied the relevant case law. Consequently, we affirm his dismissal of Objection No. 5.

The Employer's Changed Circumstances

During the course of the hearing, counsel for ARCO sought to present evidence describing fundamental changes in the company's operations which had taken place since the December 1977 election. In particular, the Employer sought to show that the unit of employees which voted in the election no longer existed per se. While ARCO previously employed agricultural workers in its farming department for cultivating and harvesting crops for seed, the Employer alleged that it no longer maintained a farming operation but rather obtained its seed from outside sources. The company asserted that it currently employed only four agricultural employees. Those employees worked in the research department and performed very different tasks from those performed by the former agricultural employees.

The UFW argued that the hearing should be limited to the matters framed by the election objections set for hearing and that

the IHE had no jurisdiction to expand the scope of the hearing. The IHE ruled that the evidence regarding changed circumstances should be admitted. The Union filed an interim appeal, but the appeal was not received by the Board until after the evidence had been taken and the hearing had closed. The Board thus declined to review the interim appeal and noted that the Union would have an opportunity to argue its contentions by way of post-hearing brief and exceptions.[2/]

The evidence admitted by the IHE indicated that the employees who voted in the 1977 election were all employed in the farming department of Dessert Seed. After ARCO acquired Dessert in November 1980, it continued the seed farming operation until the middle of 1985, when it decided for economic reasons to discontinue farming.[3/] Before it was dissolved, the farming department had approximately 8,000 acres under cultivation, of which about 2,000 acres were owned and 6,000 were leased. At its peak, ARCO had 60 to 80 employees working the land. In July 1985, most of the company's agricultural employees were laid off and ARCO divested itself of its interests in the farming land.

[2/]Under Labor Code section 1156.3(c), a party may file a petition objecting to an election only on the basis that allegations made in the petition for certification were incorrect, that the Board improperly determined the geographical scope of the bargaining unit, or that misconduct affecting the results or the election occurred. The Employer's alleged changed circumstances should properly have been brought to the Board's attention by way of a petition for unit clarification under California Code of Regulations, title 8, section 20385 rather than during an election objections hearing.

[3/]On December 29, 1986, ARCO Seed Company was purchased from Atlantic Richfield Corporation by Sun Seed Company, an independent entity.

Employer witnesses testified that the job classifications that existed within the farming department no longer exist, and that management has no future plans to resume farming operations.

Since the company ceased its farming operations, its research department has been increased tenfold. The research department is responsible for developing marketable, high-yield crop varieties which are disease resistant and climatically suited to the particular geographical regions where they will be grown. The Employer alleged that four "breeder's aides" are the only agricultural employees it currently employs, and the UFW did not contest that claim. Breeder's aides assist scientists (called "breeders") in conducting pathology experiments by cutting, cleaning and drying seeds and counting them out into packages. They also work with the breeders in taking readings in the field, as well as performing duties such as plant pollination, fertilization, plant thinning, mixing potting soil and watering.

On the basis of the Employer's evidence, the IHE found that there was no continuity between ARCO's current agricultural work force and the work force that voted in the 1977 election, that the Employer no longer conducted a farming operation, and that the work performed by ARCO's current agricultural employees was more like that of laboratory assistants than that of field workers.[4/] Moreover, he observed, nine years had passed since the

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[4/] Neither the Employer's characterization of only the "breeder's aides" as agricultural employees nor the IHE's finding that the Employer no longer conducts a farming operation is binding upon

(fn. 4 cont. on p. 9.)

election was held. In the IHE's estimation, all of those factors demonstrate that one cannot logically presume that a majority of the Employer's current agricultural employees continue to support the UPW and wish it to be their representative. Under the IHE's reading of Labor Code section 1156.3(c),[5/] the Board is empowered to certify an election unless it determines that there are sufficient grounds not to do so, and he found that the unique circumstances of this case provide such sufficient grounds.

We do not agree that section 1156.3(c) permits us to refuse to certify the Union in these circumstances. Nor do we believe that the NLRB cases cited in the IHE Decision and in the Employer's brief are applicable precedent under our statutory scheme.

Under section 9(c)(l)(B) of the National Labor Relations Act (NLRA), an employer is permitted to file an election petition. (29 U.S.C. § 159(c)(1)(B).) Moreover, an employer under the NLRA may voluntarily recognize and bargain with a labor union that has demonstrated its majority status by means other than an election.

(fn. 4 cont.)

the Board. Labor Code section 1140.4(b) requires that we define agriculture in conformity with the Fair Labor Standards Act of 1938, 29 U.S.C. section 203(f). (See e.g., 29 C.F.R. § 780.112 (1987); Waldo Rohnert Co. v. NLRB (9th Cir. 1963) 322 F.2d 46 [54 LRRM 2100); Seattle Wholesale Florist Association (1951) 92 NLRB 1186 [27 LRRM 1221].) Should any party have concerns as to the nature and/or scope of the unit with respect to whether the employees in the Employer's seed research operation are engaged in agriculture within the meaning of Labor Code section 1140.4(b), the issues may be properly joined before the Board by means of a Unit Clarification Petition pursuant to California Code of Regulations, title 8, section 20385. (See fn. 2, supra.)

[5/] All code sections referred to herein are to the California Labor Code unless otherwise specified.

(NLRB v. Gissel Packing Co. (1969) 395 U.S. 575 [71 LRRM 2481].)

Once an employer has recognized a union under the NLRA, the employer may withdraw recognition and refuse to bargain if the union in fact loses majority support or if the employer has a reasonable, good faith belief that the incumbent union no longer enjoys the support of a majority of the employees in the bargaining unit. (Dayton Motels (1974) 212 NLRB 553 [87 LRRM 1341]; Orion Corp. v. NLRB (7th Cir. 1975) 515 F.2d 31 [89 LRRM 2135].)

By contrast, the Agricultural Labor Relations Act (ALRA or Act) permits only employees or labor unions to petition for a certification election (§ 1156.3), and permits only employees to file a petition for decertification of a union (§ 1156.7). Under the ALRA, an employer may not voluntarily recognize or bargain with an uncertified union (§ 1153.(f)). Majority support or an employer's good faith belief in such support is not controlling, since the only means by which a union can be recognized is through the election process and being certified by the Board.

Because of the statutory differences between the NLRA and the ALRA, as well as the unique characteristics of the' agricultural industry, the Board has determined, that a reasonable, good faith belief in the loss of majority support is not a valid defense in a refusal to bargain case under our Act.. (F & P Growers Association (1983) 9 ALRB No. 22 (F&P).) In F&P, the Board reasoned that application of the loss of majority defense would be anomalous in an industry such as agriculture, where seasonal operations require radical employee changes and create

inevitable fluctuations in the number or proportion of employees who support the union. The high rata of turnover in agricultural work would make it virtually impossible to prove whether a union actually enjoyed majority support at the time of an employer's refusal to bargain, and thus impossible either to prove or rebut the employer's good faith belief defense. (9 ALRB No. 22 at p. 6.) On appeal, the California District Court of Appeal agreed that because of the evident California legislative purpose of prohibiting an agricultural employer from actively participating in the determination of which union it shall bargain with, as well as the differences between the two statutory schemes, the NLRA precedent regarding loss of majority support is inapplicable to cases arising under the ALRA. (F & P Growers Assn. v. ALRS (1985) 168 Cal.App.3d 667.)

The NLRA cases cited by the Employer herein to support its argument against certifying the UFW, are all cases based on the loss of majority support doctrine. For example, in arguing that the 100 percent turnover in ARCO employees makes certification inappropriate, the Employer cites NLRB v. Katz (7th Cir. 1983) 701 F.2d 703 [112 LRRM 3024]. In that case, the court, after holding that the employer had been erroneously denied a hearing on its election objections, held that a remand for a hearing was not necessary because, due to substantial employee turnover, there was a serious question as to whether a majority of current employees desired representation by the union.

The Employer also argues that a bargaining order would be inappropriate here because of the fundamental changes in ARCO's

operations. Again, however, the Employer supports its argument with citations to loss of majority cases, such as NLRB v. St. Reqis Paper Co. (1st Cir. 1982) 674 F.2d 104 [109 LRRM 3317], in which a fundamental change in the employer's organizational structure was held to have removed the basis for assuming continued majority support among employees at the company's new location.

Similarly, in arguing that the nine-year delay since the election herein is enough by itself to justify denying certification, the Employer cites NLRA cases such as NLRB v. Nixon Gear, Inc. (2d Cir. 1981) 649 F.2d 906 [107 LRRM 2529]. In Nixon Gear, Inc., the court refused to remand the case for a hearing on the employer's election objections because, inter alia, after a five year delay there was no way of knowing whether a current majority of employees supported the union.

We find that ARCO's arguments against certification of the UFW, based as they are on inapplicable NLRA precedent, are not persuasive.

In his discussion of the certification issue, the IHE states that a union should not be routinely certified where certification would defeat the purpose of designating a representative of the employees' own choosing. However, section 1156.3(c) clearly states that the Board may not refuse to certify an election except on the basis of one or more of the grounds enumerated in the statute. The section provides that within five days after an election,

> . . . any person may file with the board a signed petition asserting that allegations made in the petition [for election] were incorrect, that the board improperly

> determined the geographical scope of the bargaining unit, or objecting to the conduct of the election or conduct affecting the results of the election.

After conducting a hearing, the Board may refuse to certify the election if it finds

> . . . that any of the assertions made in the petition filed pursuant to this subdivision are correct, or that the election was not conducted properly, or misconduct affecting the results of the election occurred . . . . (§ 1156.3(c).)

The Board is required to certify the election unless it " . . . determines that there are sufficient grounds to refuse to do so . . . . " In the language of the statute, "sufficient grounds" clearly means sufficient grounds within the parameters of section 1156.3(c) . Thus, the Board is required to certify the .election herein unless it finds that the election was not properly conducted or that misconduct affecting the results of the election occurred.[6/]

The IHE observes that the thrust of the NLRB loss of majority support doctrine (which we have found inapplicable to ALRB cases) is that representation decisions are not immutable -- that at some point the Board must allow the current desires of unit employees to assume paramount importance over the desires of unit employees expressed years previously. However, we find his analysis faulty since we cannot simply assume that the representational desires of current employees are different from

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[6/] Since the Employer herein asserted neither that allegations in the election petition were incorrect, nor that the geographical scope of the bargaining unit was improperly determined, those grounds for denying a certification are not at issue here.

those of the employees who voted in the election ten years ago. The Employer has asserted that if current employees desire union representation they can petition for it. However, in view of the above-discussed statutory constraints contained in section 1156.3(c), we conclude that if current employees choose not to be represented by the Union, they should properly avail themselves of the statutory means of petitioning to decertify the UFW.

As we have determined that there are no statutory grounds to refuse to certify the results of the election herein, we will certify the UFW as the exclusive representative of all agricultural employees of ARCO Seed Company, its agents, successors and assigns.[7/]

CERTIFICATION OF REPRESENTATIVE

It is hereby certified that a majority of the 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 ARCO Seed Company, its agents, successors and assigns, in the State of California, for purposes of collective

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[7/] As Sun Seed Company was not made a party to these proceedings and no evidence was taken on the issue, we do not here decide whether Sun Seed Company is a successor to ARCO Seed Company and to its bargaining obligation.

bargaining as defined in section 1155.2(a) concerning employees' wages, hours and working conditions.

Dated: May 25, 1988

BEN DAVIDIAN, Chairman[8/]

JOHN P. McCARTHY, Member

GREGORY L. GONOT, Member

IVONNE RAMOS RICHARDSON, Member

WAYNE SMITH, Member

[8/] 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.

CASE SUMMARY

ARCO SEED COMPANY
(UFW)

14 ALRB No. 6
Case No. 77-RC-23-E

IHE DECISION

On December 16, 1977, a representation election was conducted among the agricultural employees of Dessert Seed Company (Dessert). The tally of ballots showed 38 votes for the United Farm Workers of America, AFL-CIO (UFW or Union), 21 votes for no union, and 2 unresolved challenged ballots. Dessert filed a number of election objections, all of which the Executive Secretary dismissed without a hearing. In November 1980 Dessert was sold to Atlantic Richfield Corporation, whereupon the company became a division of Atlantic Richfield operating under the name ARCO Seed Company (ARCO or Employer). The UFW requested negotiations, but in January 1981 ARCO sent the Union a letter stating that it would not bargain. The Union filed unfair labor practice charges in 1981 and 1982. A hearing was held on the charges, and in December 1983 the Board affirmed the ALJ's finding that ARCO had unlawfully refused to bargain as of January 1981. On June 12, 1985, the Fourth District Court of Appeal, in an unpublished decision, reversed the Board's Decision and remanded the case to the Board for a hearing on the Employer's election objections.

An evidentiary hearing was thereafter held on the Employer's five election objections. During the hearing, the Investigative Hearing Examiner (IHE) granted the UFW's motion to dismiss three of the objections for lack of proof. No party excepted to the dismissal of those three objections. Following the hearing, the IHE concluded that the evidence did not support the allegation that the UFW or its agents were responsible for violating the pre-election agreement to refrain from engaging in campaigning on the morning of the election. The IHE also concluded that the evidence did not support the allegation that Board agents failed to conduct the election properly by failing to enforce the no-campaigning agreement and by allowing workers to wear union materials during voting. Thus, the IHE recommended dismissal of all of the Employer's election objections. However, after allowing the Employer to present evidence of significant changes in its operations, the IHE found that there was no continuity between ARCO's current agricultural work force and the work force that voted in the 1977 election, that the Employer no longer conducted a farming operation, and that the work performed by ARCO's current agricultural employees was more like that of laboratory assistants than that of field workers. The IHE concluded that because of the long passage of time since the election, as well as the fundamental changes in the Employer's operations, one could no longer presume that a majority of the Employer's current agricultural employees continued to support the

UFW. He concluded that under Labor Code section 1156.3(c), the Board is empowered to certify an election unless it determines that there are sufficient grounds not to do so, and he found that the unique circumstances of this case provided such sufficient grounds. He therefore recommended that the UFW not be certified.

BOARD DECISION

The Board affirmed the IHE's findings and conclusions regarding the Employer's election objections, and therefore affirmed his dismissal of the objections. However, the Board overruled the IHE's recommendation that the election results not be certified. The Board concluded that Labor Code section 1156.3 He) does not permit the Board to refuse to certify an election except on the basis of one or more of the grounds enumerated in the statute. Thus, the Board found, the statute required the Board to certify the election unless it found that the election was not properly conducted or that misconduct affecting the results of the election occurred. The Board concluded that the Employer's alleged changed circumstances should properly have been brought to the Board's attention by way of a petition for unit clarification under the Board's Regulations rather than during an election objections hearing. The Board also concluded that the National Labor Relations Act precedent cited by the Employer in support of its arguments that the Union should be denied certification because of a loss of majority support among the Employer's agricultural employees, was inapplicable under the Board's statutory scheme. Having determined that there were no statutory grounds to refuse to certify the results of the election, the Board certified the UFW as the exclusive bargaining representative of all agricultural employees of ARCO Seed Company, its agents, successors and assigns.

* * *

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of:	)	
	)	
ARCO SEED COMPANY	)	Case No. 77-RC-23-E
	)	
Employer,	)	
	)	
and	)	
	)	
UNITED FARM WORKERS OF AMERICA AFL-CIO,	)	
	)	
Petitioner.	)	
	)	

Appearances:

David D. Kadue, of Seyfarth, Shaw, Fairweather & Geraldson, for Employer

Jose Morales, for the United Farm Workers of America, AFL-CIO, Petitioner

Before: Matthew Goldberg, Administrative Law Judge

DECISION OF THE INVESTIGATIVE HEARING EXAMINER

I. STATEMENT OF THE CASE

On December 9, 1977, the United Farm Workers of America, AFL-CIO ("Petitioner", "UFW" or "Union" below), filed Representation Petition in case #77-RC-23-E, in order that an election be conducted among the employees of Dessert Seed Company to determine whether they wished to be represented by the Petitioner. This election was held on December 16, 1977. The results of the election, as shown by the Tally of Ballots, were as follows:

UFW	38
No Union	21
Unresolved Challenged Ballots:	2
Total:	61

On December 21, 1977, Dessert Seed duly filed a "Petition for Hearing on Certification for Election," which set forth its objections to the conduct of the election. On January 12, 1978, the Executive Secretary for the Board dismissed Dessert Seed's petition. After Dessert filed a request for review of the dismissal, dated January 19, 1978, the Executive Secretary denied the request on March 1, 1978. On March 8, 1978, Desert sought reconsideration of the dismissal and a stay of the certification, which was likewise denied by the Executive Secretary on March 29, 1978. The Board certified the Union as the exclusive collective bargaining representative of Dessert Seed's employees on April 3, 1978.

Dessert Seed then attempted to obtain judicial review of the Board's dismissal of its election objections. It filed a petition for writ of mandate in Superior Court on June 16, 1978, seeking an order from that court which, in essence, would compel the Board to refrain from certifying the Union until Dessert's election objections were adjudicated. After the writ was denied in August, 1978, Dessert appealed. One year later, on August 16, 1979, in Dessert Seed v. Brown (1979) 96 Cal. App. 3d 69, the Fourth District Court of Appeals, Division One, affirmed the denial of the writ, holding that the only method available to an employer to obtain judicial review of the Board's dismissal of its election objections was for that employer to engage in a "technical" refusal to bargain.[1]

Between the date when the writ petition was filed, and the decision of the Court of Appeals, Dessert Seed negotiated in good faith with the Union. One month after the Court of Appeals decision issued, Dessert Seed announced to the Union that they would no longer continue bargaining, despite the fact that, as its owner conceded, a contract was "very close." The rationale behind the shift in Dessert's negotiating posture was undoubtedly supplied by the Court of Appeals opinion, which indicated in dictum that the ALRB should have granted a hearing on Dessert

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[1]The dismissal of election objections, and the certification which ordinarily ensues therefrom, is not a "final order" of the Board under Labor Code §1160.8, and therefore not subject to direct judicial review. A party may obtain judicial review of a certification indirectly by technically refusing to bargain and having the appellate court examine the underlying certification as part of its review of a final Board order that an unfair labor practice (i.e., a refusal to bargain with a certified

Seed's election objections.[2] Dessert Seed's legal representative and negotiator wrote the Union on September 16, 1979 that an impasse had been reached in the negotiations, and that "the Company is not obligated to bargain with the Union because of the ALRB's improper denial of a hearing." Nevertheless, the letter also states that while the Company was prepared to implement its latest proposal, the Union was asked to "advise [the negotiator] immediately if [it] had anything further to discuss." (Dessert Seed Company (1982) 9 ALRB No. 72, ALJD p. 29.)

Beginning in January, 1980, the owner of Dessert Seed, Archie Dessert, entered into negotiations for the sale of his company to Atlantic Richfield Corporation. These negotiations culminated in the actual sale of the business to the corporation on November 1, 1980, when Dessert Seed formally became a division of Atlantic Richfield, operating under the name "ARCO Seed Company."[3]

Fn. 1 (cont'd)
representative) has been committed. (Nishikawa v. Mahoney (1977) 66 Cal. App. 3d 781.

[2]The decision states: "We do not agree with the decision of the ALRB to dismiss the election objections here without a hearing. Given Dessert had but five days to prepare them following the election. . . the declarations are, in our view, sufficiently detailed to warrant a reversal in Dessert's favor, were this an appeal from a trial court order sustaining a demurrer to Dessert's pleading. Here, however, we are bound to abstain from intervention because the legislatively mandated scheme insulates the agency from judicial interference before final order." (96 Cal App. 3d 69, 74.)

[3]Arco Seed Company will be variously referred to below as "ARCO," the "Employer," or the "Company."

The Union did not actually request another bargaining session until October of 1980. Despite the pendency of the sale of the business, and its eventual realization, various letters were exchanged in October and November of 1980 between representatives of Dessert Seed and representatives of the Union regarding requests from the Union that negotiations resume. By letter dated January 16, 1981, the negotiator for Dessert Seed "confirmed in writing that Dessert Seed would not bargain with the UFW." (9 ALRB No. 72, ALJD p. 30.)

In August of that year, ARCO implemented a new medical plan for its employees, which prompted the Union to file an unfair labor practice charge in September alleging that the company had refused to bargain over this change in benefits. On February 3, 1982, company representatives reiterated that the Employer would not bargain with the Union. The UFW subsequently, on May 5, 1982, filed another refusal to bargain charge.

The two aforementioned charges were consolidated with others, and, after various amendments, a "Third Amended Complaint" was issued on September 17, 1982. A hearing on these charges was held commencing October 19, 1982. On December 12, 1983, the Board, in 9 ALRB No 72, affirmed the Administrative Law Judge's findings that ARCO.Seed had unlawfully refused to bargain with the Union as of January, 1981. A makewhole remedy was imposed, dating six months prior to the filing of the first refusal to bargain charge, or March 16, 1981.

The Company appealed the Board's determination and on June 12, 1985, the Fourth Appellate District issued its opinion in the matter in an unpublished decision, ARCO Seed Company v. ALRB 4 Civ. No. 31552. That opinion reversed the Board's decision and held that the Company was erroneously deprived of the opportunity, in the unfair labor practice proceeding, of presenting evidence pertaining to its election objections. Accordingly, the case was remanded to the Board in order that the election objections might be litigated and considered.[4]

The Board sought further review of this determination, and-petitioned the California Supreme Court for a hearing. The Board's petition was denied on September 11, 1985. More than one year later, the Board, pursuant to the Court of Appeals remand order, issued a notice of hearing in the instant matter on October 15, 1986. The following objections were set to be heard:

1. That the United Farm Workers of America, AFL-CIO (UFW) in its organizing efforts during November and December 1977, through its organizers, intimidated, interrogated and harassed the Employer's workers, and thereby interfered with the workers' right of free choice in the election.

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[4]Much of the aforementioned procedural background is supplied by the ALJ's decision in Dessert Seed Company (1983) 9 ALRB No. 72. (See, particularly, id.,, ALJD, at p. 28 and p. 32.) Administrative notice is naturally taken of that decision, as well as the above-cited Fourth District published opinion, and the subsequent ruling from that same District on the appeal of 9 ALRB No. 72, Arco Seed Company v. ALRB (1985) 4 Civ. No. 31552 (unpub. opinion).

2. That the UFW violated agreements at the pre-election conference which prohibited campaigning on the morning of the election and campaigning on the bus carrying workers to the voting site, and thereby interfered with the voters' free choice in the election.

3. That during the election process, UFW election observers engaged in conversations with eligible voters as they came up to cast their ballots, and thereby interfered with voter free choice.

4. That prior to the election, UFW organizers violated Board access regulations by exceeding allowable time periods for organizing and exceeding the allowable number of organizers in the Employer's fields, thereby interfering with voters' free choice in the election.

5. That the Board, through its agents, failed to conduct the election properly by (a) failing to enforce the parties' agreement prohibiting campaigning by the parties at the polling site on the morning of the election, and (b) allowing workers to wear union materials during the voting and in front of other eligible voters, and thereby failed to exercise its duty to ensure the fairness and impartiality of the election process.

The hearing was held before me in El Centre on January 20, 21 and February 10, 1987. All parties appeared through their respective representatives, and were afforded full opportunity to adduce testimonial and documentary evidence, to present argument

and submit post-hearing briefs. Based upon the entire record in the case, including my observations of the demeanor of each witness as he/she testified, and having read and considered the briefs submitted after the close of the hearing, I make the following findings of fact and conclusions of law:

II. THE ELECTION OBJECTIONS

A. The Facts Presented

As more fully discussed below, the procedural history of this case, the span of time which it took to unfold, the events which have taken place in this period, and the issues which these circumstances raise, loom large enough to dwarf the events of a representation election which occurred more than nine years ago involving a work force which, in reality, no longer exists. The dimming of memory which naturally flows from the passage of time renders the credibility of any witness testifying about these events open to question. Yet, despite these considerations, pursuant to my responsibilities, I will make findings concerning them, although in all probability many more "events" have occurred in the interim, doubtless as significant or more so.

The Employer was unable to substantiate any of the allegations noted in Objections 1, 3[5] and 4, as set forth above. Upon motion of the Union, these objections were dismissed before the hearing, closed. Accordingly, the only objections remaining under consideration and which will be discussed are Objections 2 and 5, as set forth above.

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[5]Despite the dismissal, for lack of proof, of this objection involving conversations by UFW observers, counsel for the Employer

Although the objections to be considered were delineated in two separate allegations, the conduct complained of focuses on the same series of events occurring at the election site prior to and during the voting. It concerns the purported violation of an agreement made at the pre-election conference prohibiting any campaigning following the adjournment of that conference.

At the time of the election, William Macklin had been working for the attorneys who represented Dessert Seed. He was present at the pre-election conference in question. He testified that the Union representative at the conference insisted[6] that an agreement be made that there would be no electioneering on the bus transporting the workers to the election site, nor would there be any campaigning at the election site itself. (I: 125).[7]

Fn. 5 (cont'd)
relies on "evidence" of same in his brief in arguing that the election should be set aside. Such "evidence" consists of the bare assertion by two declarants, Hector Garcia and Luis Padilla, that "the Union's observers talked with the workers as they came to vote." Apart from the fact that the contents of the conversations were not noted in the declarations themselves (thus demonstrating their relevance), when both of these declarants were called to testify, no mention was made of this aspect of their declarations. A hearsay statement contained in a declaration which is not later substantiated on the presentation of testimony by the declarants themselves does not constitute reliable proof of the matter asserted. (See Ev, Code §412).

[6]Concerns were expressed by the Union representative as a result of his previous experience with another election during which campaign materials were found on the crew bus prior to the election. The materials, soliciting a non-union vote, gave rise to post-election objections. The UFW representative apparently wished to avoid any such potential problems.

[7]Citations to the transcript refer to the volume in Roman numerals, followed by the page number.

Archie Dessert, the former owner of Dessert Seed, testified in greater detail regarding the pre-election conference no-campaigning agreement. Dessert maintained that there would be no campaigning after the conference; that "we weren't to display any advertisement or talk to the workers anymore"; and that there would be no campaigning on the bus which picked the workers up in the morning and drove them to the election site. In order to insure that there be no campaigning on the bus, it was further agreed that an ALRB agent be permitted to ride on it that morning.[8] Dessert additionally asserted that "it was well discussed . . . that there would be no buttons, no signs on their part and that our driver [a supervisor] would do nothing but drive the bus. . . [There would be] no talking to the crew." (III: 5, 6).

Nearly every witness who testified about events on the morning of the election stated that when the bus arrived that morning, Union bumper stickers were pasted all over its windows, both inside and out. (I: 38, 40; I: 84.) Union bumper stickers were also placed on the fence surrounding the shop area where the election was held, and also on the exterior of the shop enclosure which contained the voting booth and the observer's table. No one was able to establish, however, who it was that placed the stickers on any of these particular locations.

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[8]Dessert stated that the agent was in fact picked up by the bus on the morning of the election, and rode with the crew to the election site.

The stickers remained on the bus throughout the course of the voting. However, the bus was parked outside of the shop area, and was not visible from the voting booth,[9] although Hector Garcia, a tractor driver at the time[10] and a company observer, asserted that the bus could be seen by workers waiting in line to vote.

There was a conflict in the evidence, however, as to whether the stickers on the fence and on the shop structure remained there during the course of the balloting. Hector Garcia testified that the stickers on the fence could been seen throughout the voting period (I: 41), and were still there when the election was finished (I: 46). However, Luis Padilla stated that he did not notice any bumper stickers on the fence following the election (I: 68). Archie Dessert complained to ALRB agents about the presence of the stickers within the election area and other activities he considered objectionable.[11] Although he testified that the agents did nothing to halt the activities, he stated that when he returned to the election area after the balloting, most of the stickers had been removed, except for one remaining on the fence and one on the shop structure, fifteen feet

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[9]Testimony of Luis Padilla, company observer (I: 62).

[10]Garcia was promoted to supervisor in 1981, and was one of the last individuals in the Farming Department remaining employed following its closure, as discussed below, in July, 1985.

[11]These will be discussed in greater detail below.

away from the voting table and visible to the voters as they went in to vote.[12] (II: 18 and 33).

By contrast, all witnesses called by the Union testified that the stickers on the fence and the shop were all removed and not evident during the voting. (Carlos Gonzalez (II: 14); Guadelupe Areliano (III: 37); and Francisco Oceguera (III: 43.)) Carlos Gonzalez stated that the workers were ordered to remove them by the "state representative" (II: 14).

Several witnesses noted the presence of Union organizers in the election area. Company witness Garcia stated that he saw the organizers handing out "something" before the election outside the shop (I: 27), but that he did not know what it was (I: 43.) Archie Dessert testified that he saw the bumper stickers in the hands of the organizers (III: 12.) Macklin stated that prior to the election "there were individuals milling around wearing union buttons handing out leaflets." (I: 124.) On cross-examination, Macklin modified this assertion somewhat by saying that organizers were handing out "material" at the voting site, but that he "didn't read them." (I: 129.) However, company witness Luis Padilla, who also served as an observer for the company, stated that he did not see the organizers handing out any materials (I: 53.) Union witness Guadelupe Areliano testified that the

[12]Dessert first replied in the negative when asked if anything remained on the shop building, then immediately changed his testimony to state that that a sticker was still on the building when he returned. (III: 18.)

organizers did not have printed materials with them (III: 38.) Union witness Francisco Oceguera did not recall whether the organizers distributed anything that morning (III: 43).[13]

Witnesses also related that numbers of workers were wearing Union buttons as they assembled to vote, and some had bumper stickers affixed to their clothing. (Garcia (1:28); Gonzalez (II: 15 and 21); Dessert (III: 9, 12, and 18); Areliano (III: 40).[14]

Archie Dessert's account of events at the election site depicted behavior of certain workers which was in the nature of a pro-UFW demonstration. He testified that workers disembarked from the crew bus "chanting and singing," with "about sixty per cent of them" wearing "UFW signs." (III: 9.) After getting off the bus, the workers gathered in a group and began chanting "UFW sI, Dessert Seed, no," "and putting their hand up in a . . . clenched

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[13]The Employer's brief, citing the testimony and declaration of Albert Sanchez, asserts that an organizer named "Chuchy" "campaigned among the employees who were waiting for the Company bus to escort them to the polling site. . . . " This is a severe misreading of the record. Sanchez actually testified that an organizer named "Chuy" "was talking to the men. . . but I didn't listen to what he was telling them." (I: 80.) Sanchez' testimony also conflicts with his declaration, wherein he states that "Chuy" was at the election site when the bus arrived, and "campaigned among the workers" as they got off the bus. Sanchez neglected to substantiate this conclusionary statement in his testimony at the hearing, when he stated that he "didn't recall anything" about what happened when the workers arrived to vote, except that the bus was covered with UFW stickers.

[14]Areliano denied seeing workers in the voting line with the bumper stickers on their clothing.

fist," saying "You're either for us or against us!" They formed a line and did a "snake dance" "in and around the yard for about five minutes." The workers also gestured toward the management representatives present: "They came right up and stood right in our faces, and we backed away, and they kept coming and they put their hand right in front of us." Dessert reported that while all this was happening some of the workers "looked scared," and that one woman was "crying and looking bewildered." (III: 10, 11.)

Dessert's foregoing recitation was wholly uncorroborated. Witnesses called by the company failed to substantiate any of these assertions. Garcia stated that before the election, the workers merely stood in line conversing, laughing and telling jokes. (I: 27.) Padilla did not remember any shouting before the election, although he testified that after the voting some workers shouted "Viva Chavez." (I: 54.) Neither Albert Sanchez nor William Macklin mentioned any of these purported activities in their respective accounts. Union witnesses Gonzalez and Oceguera denied that there was any yelling, singing or dancing that morning at the election site (III: 16, 21 & 42.) Areliano stated that "everything was normal" "and peaceful" on the morning of the election. (III: 27).

Declarations filed by Garcia, Padilla, Sanchez and Macklin within one week from the date of the election neglected to mention anything about workers shouting, gesturing or dancing before the election. (Employer Exhs. 4, 5, 6 & 8.) Even

Dessert's own declaration filed at that time fails to note any of these activities. (Employer Exh. 9 .) [15] Furthermore, and of perhaps greater significance, the election objections filed by Dessert Seed contain no reference to this specific conduct. As will be made apparent below, evidence of disruptive behavior is critical in assessing the impact of election site campaigning.

In the face of denials by the Union's witnesses, and the total lack of testimonial or declaratory corroboration by any of the company's witnesses, that any of these particular acts asserted by Dessert as having occurred at the election site actually took place, I am unable to credit his assertions in this regard. I specifically find that Dessert's testimony concerning these activities should be wholly discounted.[16]

B. Analysis & Conclusions

Once all of the testimony regarding election site activities is distilled to its barest essence, what remains is

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[15]The Employer declarations, filed in support of its objections to the election, dealt primarily with campaigning activities and leafleting at the election site. Many of the details in the declarations, including the participation of Union organizers in the election morning campaigning, were wholly omitted from the declarants' testimonies. I cannot attach probative weight to the hearsay statements in the declarations that organizers "campaigned" or distributed leaflets, particularly in the absence of references to same in the sworn testimony of the declarants themselves at the hearing.

[16]Given Dessert's thus demonstrated proclivity to embellish his testimony with details which appear more imagined than real, I additionally discredit Dessert's specific assertion that a Union bumper sticker remained on the shop structure within sight of the voters throughout the course of the balloting. This assertion, as reflected above, was also uncorroborated, and was controverted by other witnesses.

credible evidence that on the morning of the election, the crew bus carrying workers to the election site was plastered with Union bumper stickers; that the bus may have been visible to workers waiting in line to vote; that additional Union bumper stickers were pasted on the fence surrounding the shop area and on the shop structure itself prior to the voting, but that most, if not all, of these were removed upon Board Agent instructions before the voting commenced; that no one was able to establish who was responsible for placing the stickers on the bus, the fence, or the shop; that Union organizers were present at the election site, but the specific activities they engaged in at the time are unclear from the record; and that numbers of workers who voted in the election wore Union insignia, either buttons or bumper stickers, on their clothing when they went to cast their ballots.

As can be readily ascertained from the foregoing, or even from a thorough review of all the evidence, scant support can be found for the allegation in the objections that the Union or its agents was responsible for failing to abide by the pre-election agreement regarding election day campaigning.[17] No Union representative or organizer was directly linked to any incident involving the display of Union insignia at the election site,[18]

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[17]Aspreviously noted, unsubstantiated statements to that effect in declarations are not credited.

[18]Archie Dessert's statement that he saw bumper stickers in the hands of the organizers was uncorroborated and like the bulk of his testimony, is viewed with skepticism. Additionally, even if one were to lend full credence to this statement, it does not naturally follow from this evidence that the organizers distributed the bumper stickers to workers, or directed that they be displayed.

apart from the inconclusive assertions that the organizers "had something in their hand(s)" that morning, or that they distributed "material" to workers the contents of which was unknown.[19]

Given the fact that Union representatives cannot be held directly responsible for the election day activities, the appearance of the buttons and bumper stickers may only reasonably be attributed to unidentified individuals or workers. However, these activities by various unnamed employees or others cannot automatically be imputed to the Union. In order for the Union to be held accountable for these acts, there must be some manifestation by the Union that it conferred agent status upon the individuals who performed them, under the doctrine of apparent authority.[20] (See, generally, San Diego Nursery (1979) 5 ALRB No. 43.) Given the absence of any such "manifestation" by the Union, the Union cannot be deemed responsible for the display of Union emblems by workers or others. Even assuming for the sake of argument that such displays constituted "campaigning," there is insufficient evidence to support the allegation that the Union somehow "violated" a no-campaigning pre-election agreement.[21]

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[19]Macklin asserted that the "material" was a "leaflet with a black eagle on it," but as noted, he did not read it. (I: 129.)

[20] "Apparent authority is the power to affect the legal relations of another person by transactions with third persons, professedly as agent for the other, arising from and in accordance with the other's manifestations to such third persons." Restatement of Agency, Second §§8, 27 (1957).

[21]As a review of the evidence demonstrates, it is only the presence of Union buttons and bumper stickers which might arguably fall within the definition of "campaigning," as stated in the objections. There was no evidence that Union organizers spoke to

Accordingly, it is recommended that objection number two be dismissed.

In determining whether sufficient grounds exist under objection number 5, as worded, to set the election aside, the circumstances which arose at the election site on election day must be examined according to the following standard: "where it is alleged that the acts or conduct of the voting unit employees, or other third parties, before or during the election, warrant setting aside the election, it must be determined whether these acts, or the failure of Board agents to control them, 'created a situation so coercive or disruptive, or so aggravated, that a free expression of employee choice with respect to representation was impossible.'" S & J Ranch (1986) 12 ALRB No. 32, slip op. p. 13; Pleasant Valley Vegetable Co-op (1982) 8 ALRB No. 82; NLRB v. Aaron Brothers Corp. (9th Cir. 1977) 563 F.2d 409.

Additionally, misconduct by a party is considered to .be potentially more destructive of an appropriate election atmosphere than misconduct engaged in a non-party. (Takara International, Inc. (1977) 3 ALRB No. 24; S & J Ranch Inc. (1986) 12 ALRB No. 32; see also NLRB v. Georgetown Dress Corp. (4th Cir. 1976) 537 F.2d 1239; NLRB v. Monroe Auto Equipment Co. (5th Cir. 1972) 470 F.2d

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Fn. 21 (cont'd)
workers at the site that morning about the election, or that they somehow directed the display of Union insignia. Insufficient proof was offered to definitively establish that pamphlets or pro-Union literature was distributed that morning, or that appeals for support, in any form, were made by the Union, other than the mere presence of organizers at the election site.

1329. As I have found that the election day conduct here cannot be attributed to the Union, that conduct is measured according to this more lenient standard.

This Board, following well-established NLRB precedent, has long held that the mere display or presence of campaign insignia within the polling area is not a ground for setting aside an election in the absence of evidence that the insignia caused some disruption of polling or otherwise interfered with election. Harden Farms (1976) 2 ALRB No. 30, slip op. p. 30, citing Foremost Dairies of the South (1968) 172 NLRB 1242 and Western Electric Company, Inc. (1949) 87 NLRB 183; Veq-Pak, Inc. (1976) 2 ALRB No. 50;[22] John Elmore Farms (1977) 3 ALRB No. 16; P.P. Murphy & Sons (1977) 3 ALRB No. 26;[23] George A. Lucas & Sons (1981) 8 ALRB No. 61; see also S & J Ranch, Inc., supra. The Lucas case is particularly apposite since there had been an agreement reached there at the pre-election conference that no campaign signs be displayed in the polling area.[24] In apparent violation of that

[22]In Veg-Pak, like the instant case, company buses carrying workers to the polls had pro-UFW bumper stickers on them, and there was evidence that employees carried UFW bumper stickers with them or wore UFW buttons when they went to vote.

[23]O.P. Murphy also involved evidence that voters were wearing UFW buttons and insignia while waiting to vote, but unlike the instant case, there was an inference that they had received such materials while in the polling area. Even under those circumstances the facts were insufficient to overturn the election.

[24]Interestingly, the parties in Lucas discussed a twenty-four hour pre-election ban on campaigning, but were unable to agree on it.

agreement, some employees were present at the polling site with UPW buttons, bumper stickers and leaflets, but there was no evidence that such materials were distributed by Union representatives at or near the time of the election. These circumstances were also insufficient to overturn the results of the election.

The facts of the case presently under consideration likewise do not warrant that the election be set aside. Although there is no dispute that Union insignia were openly displayed in and around the polling area, and were visible on the persons of numbers of workers, there was no evidence that the appearance of such emblems caused any disruption or otherwise interfered with the orderly process of the voting. Under the authorities cited above, such displays, standing alone, are not sufficiently distructive of an appropriate election atmosphere to warrant setting this election aside. Accordingly, it is recommended that Objection 5 be dismissed.[25]

III. THE EMPLOYER'S CHANGED CIRCUMSTANCES

A. The Facts Presented

Those who voted in the 1977 election were all employed in the Farming Department of Dessert Seed. Prior to July 1985, ARCO

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[25]If particular conduct is an insufficient ground to overturn an election it follows a fortiori that the ostensible "failure" to control such conduct, as stated in Objection 5, likewise cannot be used as a basis to set the election aside. Notwithstanding this consideration, credible evidence established that Board agents did in fact seek to curtail the "campaigning," as they ordered employees to remove the bumper stickers from the company premises, and that such orders were acted upon.

Seed also maintained a Farming Department which then employed between sixty and eighty agricultural workers. These employees cultivated the crops which ARCO and its predecessor, Dessert, grew for seed to sell to its customers. Operations were conducted over some 8,000 acres, 6,000 of which were leased and 2,000 owned by ARCO.

Based upon the prior's years financial reports, ARCO determined in early 1985 to discontinue its farming operations. According to ARCO's controller, Larry Ringwelski, the department was then losing between two and three million dollars per year.[26]

In July of 1985, most of the employees in the Farming Department were laid off. A skeleton force, consisting mainly of supervisors, was retained through early 1986 to perform maintenance and to assist in the sale of the department's equipment.[27]

ARCO also divested itself of its interests in the land on which Farming Department operations were performed, either sub-leasing or terminating leases for that land, or selling it outright.

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[26]Ringwelski provided the testimonial evidence regarding the demise of the Farming Department in 1985 and part of the structural transition which the company has undergone since that time. (I: 69-76 and 85-92.)

[27]ARCO possessed over two million dollars' worth of farming equipment, which was disposed of following the closure of the department.

As noted, prior to 1985, ARCO and Dessert grew their own seed. The Company presently acquires eighty per cent of the seed which it markets from farmers or cooperatives with which it contracts. Risk of crop loss is borne by those farmers, and not by the Company, as had been the case previously when the Farming Department operated. The remaining twenty per cent of the seed sold by ARCO to customers is acquired from other seed companies.

From a work force of some 220 individuals in 1983, the company now employs approximately seventy. The job classifications extent in the erstwhile Farming Department no longer exist within the company. The company has no present plans to resume farming operations in the near future.

In addition to the closure of ARCO's Farming Department, and its discontinuing of farming operations in general, significant changes have also occurred in recent years regarding the Company's research capabilities. Mark Larson, the man in charge of ARCO Seed's research facility, described in detail the changes which have taken place in that facility since he first began working there in June of 1981.

Larson has a bachelor's degree in agronomy, the study of field crops. The department which he heads is responsible for developing high yielding crop varieties which are disease resistant in and climatically suited to the particular geographical regions where they will potentially be grown. Larson supervises a staff of eight in the research department,

consisting of two doctors ("breeders"), two technicians, and four "breeder's aides." The company maintains that the breeder's aide job classification is the sole "agricultural employee" classification within its current operations.[28]

When Larson came to ARCO Seed in 1981, its research "facility" consisted of a wood frame greenhouse with holes, and with plastic draped over the top. The "facility" contained some primitive equipment such as fifty-five gallon drums and pieces of wood used to smash vegetables in order to extract their seed. There were also two storage rooms with tin roofs and chicken wire walls to keep animals out.

Larson stated that following his arrival ARCO "developed a real commitment to expanding their research facility and put a lot of money into it." Before Larson was employed there had been no pathology program (i.e., development of disease-resistant plants). It is currently one of the most highly emphasized areas in the Company's operations, utilizing the latest equipment and technology.

Larson stated that there is no real comparison between the lab facilities existing before he became employed at ARCO Seed and their present condition. The previous seed lab was in Dessert Seed's main office and was for all intents and purposes, unusable

[28]The Union offered no evidence to the contrary. In fact, the Union did not controvert any of the Company's evidence regarding current operations.

when he arrived. Subsequently, the company acquired a tract of land and erected an office building containing a laboratory. Within the laboratory are facilities for a pathologist, a physiologist, and a breeder's lab.

Other substantial improvements to the Company's physical plant have taken place since Larson has been hired. The seed vault used for seed storage prior to Larson's arrival consisted of a room in the main facility which was often vermin infested. Construction on a more sophisticated vault was begun shortly before Larson became employed. This vault contains air conditioning and a dehumidifier, as well as being fireproof. Additionally, ARCO Seed presently has five updated greenhouses on its premises, two of which are devoted to the pathology program.

ARCO's emphasis on research has also had a significant impact on the nature of the work done by its present complement of agricultural employees. In the beginning of 1982, the job classification of breeder's aide was established within the Company. There are three or four sub-classifications within the breeder's aide job title. After a certain number of years' experience as a breeder's aide, an employee may advance to the job classification of technician. Breeder's aides are required to read, write and understand English, and to work under the breeders, who are English-speaking. In Larson's estimation, none of the employees employed by ARCO Seed in 1982 possessed the qualifications for the job.

The primary function of the breeder is to develop marketable plant hybrids. As part of the regular duties of breeder's aides, they assist the breeders in conducting pathology experiments. They must be able to follow written or diagrammed instructions from the breeder and at times work without supervision, since the pathologist, may not always be present when certain phases of the experiment are in progress.

Among the other tasks performed by breeder's aides are the cutting, cleaning, drying and counting of seeds, and the placing of these seeds in packages. They also do readings with the breeder in the field, and the information which is thus gathered is stored in computers to be later retrieved. Prior to Larson's arrival at ARCO, there were no computerized operations at the company.

Breeder's aides also have duties in conjunction with plant pollination, fertilization using a drip irrigation system (as opposed to the dry fertilizing techniques previously in use), plant thinning, mixing potting soil, and watering.

In sum, the transition that the Company has undergone since the election in question was held is substantial, not only in terms of its physical attributes and the character of its workforce, but also in terms of the very nature of its business. From a commodity producing entity employing nearly a hundred field workers, it has become primarily a sales and marketing organization equipped with an extensive research facility. The

jobs held by the election participants no longer exist. What agricultural employees remain employed by the Company are basically laboratory assistants having additional duties in the cultivation of experimental greenhouse plants.

On December 29, 1986, ARCO Seed Company was purchased from Atlantic Richfield by Sun Seed Company, an independent entity. Management's highest level is currently occupied by Sun Seed personnel, although it appears that the remainder of the employee complement consists of individuals who worked for ARCO before the sale.

B. Analysis and Conclusions

I have found that the proof offered in support of the objections to the election was insufficient to establish that misconduct occurred which affected the outcome of the election. The objections to the election thus dismissed, "there would ordinarily be no impediment to certifying the results of the election. Yet to do so in this case, given the changes in the Employer's operations which have taken place since the election, would squarely conflict with one of the fundamental principles of the Act, that "individual workers in the state shall have full freedom of association, self-organization, and designation of representative of their own choosing." (ALRA, preamble; see also ALRB §§1152 & 1159.)

Unlike the NLRA, an employer under the ALRA may only recognize and bargain with a collective bargaining representative

which has been duly certified by the Board. (ALRA §§1153(f) & 1159.) Also unlike the NLRA, case law under the ALRA has developed a "certified until decertified" rule: employers may not decline to recognize and bargain with their employees' representative even when an employer has a resonable, good faith belief that that representative no longer continues to enjoy the support of a majority of its workers. The certification issued to the workers' representative remains viable in the absence of a "no-union" majority vote in a decertification election, or a rival union victory in a subsequent election. The employer's obligation to bargain with a certified union continues notwithstanding the passage of time since the certification election, extensive employee turnover in that period, inaction by the union in its pursuit of a collective bargaining agreement, or even the expressed desires of employees, without a Board-conducted election, that they no longer wish to be represented by the duly certified union. (Nish Noroian Farms (1982) 8 ALRB No. 25, aff'd Nish Norian Farms v. ALRB (2983) 141 Cal. App. 3d 935; F & P Growers Assn (1983) 9 ALRB No. 22, aff'd F & P Growers Assn v. ALRB (1985) 168 Cal. App. 3d 667. In short, a certification, once issued, remains effective in perpetuity absent a result adverse to the certified union in a subsequent election, and assuming the continued vitality of the employer and the union.

Its importance and permanence thus made manifest, a certification should not issue routinely where to do so would run

counter to the underlying purpose for its issuance: to give force and effect to the designation of an employee representative of their own choosing. Certifications are not issued pro forma, even where a union has received a majority of the votes cast in a representation election. The Board is empowered to exercise discretion in issuing a certification: "[u]nless the board determines that there are sufficient grounds to refuse to do so, it shall certify the election." (ALRA §1156.3(c).)[29]

Those "sufficient grounds" are present under the unique circumstances of this case. Whatever presumptions of continued majority support continued for an elected representative that might exist in the ordinary case[30] have all but been obliterated

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[29]This discretion is rarely exercised in the absence of misconduct affecting the results of the election. In fact, research discloses only one case where the Board declined to certify the results of an election where no objectionable conduct had been established. In that case, A. Caratan & Sons (1976) 2 ALRB No. 62, an election was held involving two competing unions. A runoff election was necessary; however, the number of challenged ballots was sufficient to require the resolution of the challenges before the parties to the run-off might be determined. After the election, but before it could be resolved, the Board temporarily suspended operations due to lack of funding, delaying the processing of the case. Additional delays were anticipated from the projected challenged ballot investigation, the re-run election, and possible objections litigation. This excessive period between election and potential certification, as noted by the Board, would run counter to the policy inherent in the Act "geared to a speedy resolution of questions of employee representation." The election petition was accordingly dismissed. While the holding in Caratan was expressly limited to its facts, it does provide an example of the Board's discretionary prerogatives in election matters.

[30]For example, employee turnover, owing to the seasonal nature of most agricultural concerns, is not sufficient, in and of itself, to indicate that support for the union has diminished. (See Harry Carian Sales v. ALRB (1985) 39 Cal. 3d 209; see also Kaplan's Fruit and Produce (1977) 3 ALRB No. 28; Montebello Rose v. ALRB (1981) 119 Cal. App. 3d 1.)

by the fundamental changes the Employer has undergone since this election was held.

There is no continuity between its present-day agricultural work force and the work force that voted in the election. The field workers who occupied those jobs, the evidence demonstrated, did not posses the qualifications for the work of the Employer's current agricultural employees. The Employer no longer maintains the farming operation which the Union organized and the jobs which were performed in that operation no longer exist. The work performed by the Employer's present agricultural employees is not field work, but is more akin to the work of a laboratory assistant. In terms of sheer numbers, an agricultural employee unit of sixty has been reduced to a unit of four. None of the workers who voted in the election are presently employed by the Company. Couple all of these factors with the passage of over nine years' time,[31] it cannot logically be presumed that a majority of the Employer's current agricultural employees continue to support the Union and wish for it to be their representative. Secret ballot elections are the preferred procedure under the ALRA for gauging employee union sentiment.

It would therefore be wholly inappropriate, and contrary to the principle of self-determination imbodied in the act, to

[31]The delay in resolving these election issues also runs counter to the Board policy, expressed above, to obtain a "speedy resolution of representation matters."

impose Union representations on these workers, based on the nine year old choice of a group of employees whose numbers, skills, job duties and indentities were totally different. (See, e.g., F & P Growers Assn v. ALRB, supra; Montebello Rose v. ALRB, supra at p. 26; cf. Harry Carian Sales v. ALRB, supra.) In the event that the Employer's present employees desire union representation, it would be a simple matter for them to petition for it.

In a number of cases arising under the NLRA, reviewing courts have declined to enforce bargaining orders against employers which have undergone substantial changes in the character of their work forces between the time that the election or demand for recognition took place, and when enforcement is eventually sought. Or when the representative has or should have taken place, or when that representative had been elected. In denying enforcement, the courts have relied upon fundamental policy of the NLRA to protect the right of employees to determine representatives of their own choosing.

Analogies may be drawn between these cases and the instant one. The issuance of a certification is not unlike the issuance of an order to bargain, in that the certification compels an employer to recognize and bargain with *a* certified union.

The Employer cites a spate of these NLRB cases in arguing that the issuance of a certification is not appropriate in this case. As I find their reasoning persuasive, a brief synopsis of these situations, is presented below.

In Jamaica Towing v. NLRB (2d Cir. 1980) 632 F.2d 208, changed circumstances, extensive employee turnover, and the passage of five years' time rendered the Board's bargaining order "obsolete and unnecessary." Despite the Union's obtaining authorization cards from seven of eight unit members, the union lost the election six to two. The Court held that although the employer's unfair labor practices necessitated setting the election aside, owing to the passage of time, employee sentiment was better determined in an election rather than by giving effect to a union card majority which was five years' old.

In NLRB v. Katz, d/b/a/ Triplex Manufacturing Company (7th Cir. 1983) 701 F 2.d 703, the appellate court declined to remand a technical refusal to bargain case to the Board for the purposes of litigating objections to an election which had taken place three years before. Although the Court found that affidavits in support of the election established a prima facie case of misconduct affecting the election, and that the Board should have granted a hearing on these objections when they were filed, little purpose would be served by the remand. Due to the passage of time and substantial employee turnover in a relatively small unit, "there is a serious question whether the majority of current employees desire representation by the union." Thus, the Board's petition for enforcement of its bargaining order was denied, and a remand of the case was deemed inappropriate. In essence, the Court seemed to require a more current expression of

employee support for the union before it would enforce an order which might run counter to the desires of employees in designating a representative of their own choosing.

The Court of Appeals found, in NLRB v. Western Drug (9th Cir. 1979) 600 F.2d 1324, that the Board's issuance of a bargaining order failed to take into account changing circumstances and employee turnover. Despite the commission of serious and extensive unfair labor practices by the employer, the Court held that the Board's conclusion to issue a bargaining order denied to current employees their freedom of choice of a representative: "Because a primary objective of the Act is to guarantee employees [the right to choose a bargaining representative], the Board must not routinely place a premium on deterring employer misconduct." [101 LRRM 3023, at 3025.]

To similar effect, where Circuit Courts have declined to enforce NLRB bargaining orders, see NLRB v. Eanet (D.C. Cir. 1949) 179 F.2d 15 (petition for enforcement sought two years after events; only one of the original employees remained in the unit); NLRB v. Globe Automatic Sprinkler Co. (3rd Cir. 1952) 199 F.2d 64 (union lost all its members, and loss not attributable to employer acts); NLRB v. Globe Security Service, Inc. (3rd. Cir. 1953) 199 F. 2d 64 (unit no longer existed); NLRB v. National Shirt Shops (5th Cir. 1954) 212 F.2d 491 (every employee in unit revoked union membership); NLRB v. Nixon Gear (2d Cir. 1981) 649 F.2d 906 (hearing should have been granted on employer

objections; remand inappropriate due to delay); Connecticut Foundry Co. v. NLRB (2d Cir. 1982) 688 F.2d 871 (petition sought four years after election; impossible to determine whether union had majority support); NLRB v. St. Regis Paper Co. (1st Cir. 1982) 674 F.2d 104 (Board order outdated; petition sought five years after events; case remanded to the Board to reconsider its order "in light of present realities"); NLRB v. Pace Oldsmobile, Inc. (2d Cir. 1984) 739 P.2d 108 (changed circumstances and employee turnover; petition sought four and one-half years after events); See, also, Ne-Mac Product Corp. (1946) 70 NLRB 298 ("radical" changes in work performed; elimination of departments; unit reduced more than one-half); Concourse Village (1985) 276 NLRB No. 4 (unit no longer existed).

The thrust of all the foregoing cases is that representational decisions are not immutable. At some point, usually following an extended period after a representation election or demand for recognition has taken place, the current desires of unit employees for representation assume paramount importance over the wishes of unit employees expressed years previous. This consideration is central in order to give effect to employee rights codified in both the NLRA and the ALRA, to have "full freedom of association, self-organization, and designation of representatives of their own choosing."

I am mindful of the fact that by declining to issue a certification in this case in recognition of the rights of the

current employees to choose their own representative, I am also treating the rights of Dessert Seed's erstwhile employees, who voted for the Union over nine years ago, as a nullity. I am also placing a premium, at least from an employer's standpoint, on protracted litigation over representation issues: employee desires for union representation, as expressed in a duly conducted Board election, have effectively been thwarted, as this case has wended its way through hearings, Board decisions and appeals. A difficult balance has been struck in favor of current realities in order to avoid "locking the parties in a lengthy [and perhaps unwarranted] [bargaining] relationship on the basis of ancient events," (NLRB v. St Regis Paper Co., supra, 109 LRRM at 3330, quoting NLRB v. H.P. Hood, Inc. (1st Cir. 1974) 496 F.2d 515, 520) and in recognition of the stated policy of the ALRA to insure employee freedom of association and self-determination.[32]

RECOMMENDATION

It is accordingly recommended that the Petition for Certification be dismissed.

DATED: June 29, 1987.

MATTHEW GOLDBE
Investigative/Hearing Examine

[32]As previously noted, these rights are best expressed in a recently conducted representation election.