Salinas, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

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| ARROW LETTUCE COMPANY,<br><br>Employer,<br><br>and<br><br>HECTOR JAVIER CONTRERAS,<br><br>Petitioner,<br><br>and<br><br>UNITED FARM WORKERS OF AMERICA, AFL-CIO,<br><br>Certified Bargaining Representative. | ) | Case No. 86-RD-5-SAL<br><br>14 ALRB No. 7 |

DECISION AND CERTIFICATION OF RESULTS OF ELECTION

On September 4, 1986, Petitioner Hector Javier Contreras filed a Petition for Decertification pursuant to Labor Code section 1156.7(c).[1/] On September 11, 1986, the Salinas Regional Director of the Agricultural Labor Relations Board (ALRB or Board) conducted a representation election among a unit comprised of all agricultural employees of Arrow Lettuce Company (Arrow or Employer) The official Tally of Ballots revealed the following results:

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| No Union . . . . . | 39 |
| UFW . . . . . | 18 |
| Challenged Ballots . . . . . | 9 |
| TOTAL . . . . . | 66 |

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

Thereafter, the United Farm Workers of America, AFL-CIO (UFW or Union), timely filed postelection objections, three of which were the subject of a full evidentiary hearing in which all parties participated. On May 1, 1987, Investigative Hearing Examiner (IHE) Matthew Goldberg issued the attached Decision in which he recommended, inter alia,[2/] that the election be set aside on the grounds that (1) the Employer had made a preelection promise of benefits which interfered with employee free choice and, (2) the presence of law enforcement personnel immediately prior to and/or during actual balloting created an atmosphere of fear and coercion which precluded the holding of a free and fair election. The Employer timely filed exceptions to the IHE's Decision with a brief in support of exceptions.

The Board has considered the IHE's Decision in light of the exceptions and brief and has decided to affirm the IHE's rulings, findings and conclusions, to the extent consistent herewith, but, contrary to his ultimate conclusion, to certify the results of the election.

Police Presence

The Employer excepts to the IHE's finding that the role of law enforcement personnel immediately prior to and during balloting warrants the setting aside of the election. We find merit in the exception.

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[2/] In the absence of exceptions thereto by any party, we adopt pro forma the IHE's dismissal of election objections insofar as they allege that the Employer: (1) failed to abide by a preelection agreement .regarding the transporting of employees to the polls; (2) failed to provide the Union with an adequate list of employees' names and addresses; and (3) promised employees more work if they decertified the Union.

On the advice of an ALRB Board agent who apparently feared that the election process could be disrupted as a result of an unfair labor practice charge filed by the Employer,[3/] the election site was moved from the Employer's fields to the ALRB's Salinas Regional Office. In addition the Monterey County Sheriff's Department was requested by an ALRB representative to have an officer available in the event of a disturbance. These arrangements were made known to the parties at the preelection conference where it was explained that the sheriff would be available on a "standby" basis. On the day of the election, manned patrol vehicles were dispatched by the Salinas Police Department as well as the sheriff's office. From two to four police vehicles were stationed in the parking area where employees boarded two buses provided by the Employer to transport them to the polls and, thereafter, they escorted the buses as far as Boronda Road in Salinas. At that point, the police vehicles dropped back and were replaced by an unspecified number of sheriff's patrol cars for the remainder of the trip to the Board's office. A short distance from their destination, passengers on the buses could observe a church parking lot where several UFW organizers had gathered to await the results of the election. One or more patrol cars were parked in the same area. No party disputes that the law enforcement personnel neither spoke to any employees nor involved themselves in the Board's election process in any manner.

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[3/] The Employer filed the charge two days prior to the election, alleging therein that a UFW organizer had "assaulted and battered" Lowry Backus, Arrow's co-owner and supervisor.

The IHE reasoned that since the evidence does not suggest a potential for violence or disruption during the course of the election, the extent of the police presence was inordinate and, more significantly, that it would serve to convey to employees the impression that they needed protection from the Union. On that basis, he concluded that the police presence, in the circumstances here, was such that it would tend to create a coercive atmosphere which would interfere with employee free choice.

The prevailing rule under the National Labor Relations Act (NLRA) is that "The mere 'appearance' of policemen immediately before and during a voting period does not warrant setting an election aside and a fortiori does not constitute an unfair labor practice. The case depends on the action taken by the police officer." (Pharmaseal Laboratories, Inc. (1965) 152 NLRB 1212, 1217 [59 LRRM 1350] (Pharmaseal).) Thus, in Pharmaseal, the employer's summoning, of police officers to eject from its premises members of the union's employee committee who were attempting to distribute election literature immediately prior to balloting was deemed a denial of the employees' right to distribute union literature on- company property oh their own time. The National Labor Relations Board (NLRB or national board) concluded that the conduct constituted interference with protected rights as well as grounds for setting aside the election.

Conversely, where the facts establish "mere presence" of police personnel absent a showing of coercion or interference, the election will not be set aside. In Louisville Cap Company

(1958) 120 NLRB 769 [42 LRRM 1064] (Louisville Cap), the employer summoned police for the purpose of quelling a disturbance created by pickets during the election. The NLRB declined to invalidate the election, finding that the "police did not inject themselves into election issues nor speak to any employees or voters during the election." Vita Food Products, Inc. (1956) 116 NLRB 1215 [38 LRRM 1437] (Vita Food) involved a situation in which a sheriff and a state policeman were stationed approximately 90 feet from the point where voters were being checked in and 100 feet from the voting booths. The officers were visible to voters but there was no evidence of any conversation between the officers and voters. While there was some conflict as to the reason for the police presence, the NLRB concluded that the question was immaterial inasmuch as the officers neither injected themselves into the election issues prior to the election nor spoke to any of the voters during the election. In Balfre Gear & Manufacturing Co. (1956) 115 NLRB 19 [37 LRRM 1223] (Balfre), the union alleged that the employer's request for police protection at the election was an attempt to discredit the union and thereby interfered with the holding of a free election. The NLRB found that the policemen, dressed in street clothes, were stationed outside the plant, away from and out of sight of the in-plant polling area, and concluded, "There was no evidence of coercion or interference with the election . . . by the police . . . [therefore] the mere presence of these plainclothes policemen did not interfere with the holding of a free election."

In his Decision in the instant case, the IHE discussed

the last three of the cases cited above, but found them distinguishable from the facts herein. For example, in Vita Food, only two officers were present, in Balfre, the officers were dressed in plain clothes while in Louisville Cap, the officers responded to a disturbance. However, in the instant case, the police presence was large in comparison to its presence in the NLRB case situations and there was no evidence of an election day "problem" that would warrant a police response in any form.

We believe, and so find, that the facts of this case are more analogous to Vita Food, Balfre and Louisville Cap than to Pharmaseal. Accordingly, we hold that the presence of police, under the circumstances here, was not such that it would tend to adversely affect the employees' freedom of choice in this election.

Alleged Promise of Benefits

The Employer excepts to the IHE's finding that the employees were promised an improved medical plan if they voted to decertify the incumbent Union. We find merit in the exception.

On the morning of September 4, 1986, having just been served with a copy of the decertification petition, Supervisor Lowry Backus separately addressed two crews comprised of about 20 to 30 employees each. Backus was accompanied by two labor consultants. Backus said he addressed the employees in Spanish and believes that both of the consultants also spoke to the employees. According to Backus, at each meeting:

> I [Backus] told them the company had been presented with a notice of a decert election and that was something that the people had done and it was entirely up to them one

> way or the other how they voted. And it was their business only. And no matter how they voted, there would be no problems as far as the company was concerned.

Backus testified further that during the first of the meetings, with Crew No. One, employees asked him about health insurance coverage. Backus testified that in response to this question, he "told them we had a health plan before we had the union. We would continue to have one that would be comparable to the better plans in the valley."[4/]

Three members of Crew No. One testified concerning this meeting. According to employee Martin Montenegro, employees asked, ". . . in case . . . no Union, what kind of insurance the workers would have." He said Backus replied, " . . . with or without the Union, Arrow has always had an insurance before there was a Union." Montenegro added that Backus also advised employees that "he couldn't promise anything, absolutely anything . . . that further on he could do something." Jose Hernandez testified that, in response to employees' concerns regarding insurance, the "persons" who were present with Backus, an apparent reference to the consultants, responded but he could not recall their answer(s).

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[4/] During the meeting with Crew No. Two later that same day, employees also asked about medical coverage. As Backus explained, "The same question came up about the medical plan and again I told them that we had it before and during and that we would continue to have a medical plan that would be comparable to the better plans in the valley." Joel Solis was the only member of Crew Two to testify about this meeting. According to Solis, Backus, as well as the consultants, spoke to the crew in Spanish. Asked, "What did they say," Solis replied, "Well, he said that if they voted for non-Union that the company would try to get - I guess he said the same benefits as with the Union . . . that they couldn't promise anything, but that the company would try and give the same benefits as they were with the Union."

He did remember, however, that Backus referred to statements by the Union to the effect that if the Union were decertified, the employees would not have a medical plan. Backus then explained that, "The company would not be left without a medical plan, whether we have a union or not." When Faustino Garcia was asked "What did the company say," Garcia replied "That we would have a better medical plan, that we would be covered in Mexico, that the Union's [plan] didn't cover us [in Mexico]." Upon further questioning, Garcia testified that employees were told "that we would have better benefits, medical insurance." He also testified that, although other matters were discussed during the meeting, he could not recall the subject of them.

Section 1155 provides the statutory language which protects the employer's right to express its opinion during an election campaign:

> The expressing of any views, arguments, or opinions or the dissemination thereof, whether in written, printed, graphic, or visual form shall not constitute evidence of an unfair labor practice under the provisions of this part, if such expression contains no threat of reprisal or force, or promise of benefit.

In National Labor Relations Board v. Gissel Packing Co. (1969) 395 U.S. 575 [71 LRRM 2481] (Gissel), the United States Supreme Court held that an employer is free to communicate to his employees any of his general views about unionism or any of his specific views about a particular union so long as the communications do not contain a "threat of reprisal . . . or promise of benefit." The NLRB, the ALRB and the courts have

expressly applied the Gissel standard to decertification elections. (See, e.g., Dow Chemical Company, Texas Division v. National Labor Relations Board (5th Cir. 1981) 660 F.2d 637 [108 LRRM 2924]; see also Jack or Marion Radovich (1983) 9 ALRB No. 45.)

When evaluating allegations of a preelection threat of reprisal or promise of benefits, the Board must examine the statements within the totality of the circumstances. (Ranco, Inc. (1979) 241 NLRB 685 [100 LRRM 1559].) A prohibited promise of benefit need not be explicit to constitute conduct affecting the results of an election. The Board must determine whether a promise of benefit may reasonably be inferred from the employer's statements. (See Jack or Marion Radovich, supra, 9 ALRB No. 45.)

In Dow Chemical Company, supra, the Court of Appeal stated:

> The [National Labor Relations] Act is violated by statements from which promises may reasonably be inferred. [Citations.] The inference, however, must be one reasonably makeable by the employee or employees to whom the statement is made. It is not sufficient that bits and pieces of statements may be later lifted out of context, that the facts and circumstances in which the statements were made and which were known to the employee or employees may be ignored, and that those bits and pieces may then be viewed in vacuo as either promises or non-promises. [Citations.]

The IHE, taking Backus' own testimony at face value, found that Backus' comments, when examined in light of a leaflet which the employer subsequently prepared and distributed to all employees, served to convey the message that Arrow intended to provide employees with medical coverage superior to that

currently provided by the Union.[5/] Thus, it was not necessary that the IHE resolve the conflict seemingly posed by Garcia's testimony, although the IHE observed that Garcia "displayed a somewhat imperfect recollection of events." Nor did the IHE determine credibility of the two employees who essentially corroborated Backus' testimony.

As a general rule, an IHE's demeanor-based credibility findings are entitled to affirmance on review absent clear error. (See, e.g., NLRB v. Pine Manor Nursing Home, Inc. (5th Cir. 1978) 578 F.2d 575 [99 LRRM 2156].) But where, as here, the IHE made no such demeanor-based resolutions, the Board may proceed to an independent evaluation of credibility based on the record as a whole. (J.H. Ceazan Co. (1979) 246 NLRB 637 [102 LRRM 1651].) To the extent that Backus' version of what he said was corroborated by two employees, we do not find a sufficient basis on this record to credit the testimony of Garcia over that of Backus. (Compare Limoneira Company (1987) 13 ALRB No. 13.) Thus, we conclude that the Union has not met its burden of proving either an explicit or implied promise of benefit.

The testimony on which the Board relies reveals that employees heard Backus state, in essence, that he could not promise anything; that the company would have a medical plan with

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[5/] The views expressed in the leaflet are self-explanatory. With explicit reference to the UFWs Kennedy Plan for medical coverage, the leaflet points out, among other things, that under the then-existing Plan: (1) no coverage is provided for the insured while in Mexico; (2) patients must pay their own doctor and hospital bills and then seek reimbursement from the Union; (3) while Company-paid contributions to the Plan have increased, benefits have been reduced; and, (4) benefits have been reduced while there has been a corresponding increase in the amount of the deductible.

or without the Union; and, that the company would try to maintain the same benefits as the Union. At no time during the Employer's campaign was a better medical plan offered to the employees. Backus' statements that Arrow would continue to have a medical plan that would be comparable to the better plans in the valley does not promise a better medical plan than that provided by the Union. Therefore, as this case does not involve an explicit promise of benefit, the Board must determine whether, in the totality of the circumstances, a promise of increased medical benefit could be inferred from Backus' statements to Crews Nos. One and Two.

In finding an unlawful promise of benefit, the IHE relied upon Backus' testimony and a leaflet prepared by Arrow and distributed to its employees listing certain limitations under the existing Union medical plan (Robert F. Kennedy Medical Plan). The IHE concluded that the leaflet, standing alone, was not objectionable under the standard set forth in Jack and Marion Radovich, supra, 9 ALRB No. 45, but nonetheless found an unlawful promise of benefit on the basis of the combined statement and leaflet.

The Board agrees with the IHE insofar as he found that the Employer's leaflet, listing certain limitations in the Union's medical plan, while not comparing specific union and nonunion plans, is not objectionable. In the agricultural setting, the Agricultural Labor Relations Act (ALRA) mandates that the appropriate bargaining unit shall be all the agricultural employees of the agricultural employer. Unlike the NLRA, where one employer may have union and nonunion plants, an agricultural employer's

employees will generally constitute one bargaining unit. Thus, in a decertification election situation, an agricultural employer will not have a specific nonunion medical plan to use as a comparison to the Union's medical plan. In this case, the Employer's leaflet simply listed certain "facts" about the Union's medical coverage which the Union apparently does not contest. The Employer never stated or promised that it would cure these limitations in the Union's medical plan. There is no promise, either explicit or implied, by the Employer that it can or will provide a medical plan superior to the Union's medical plan.[6/]

In Duo-Fast Corporation (1986) 278 NLRB No. 10 [121 LRRM 1163], a recent NLRB case involving a decertification election, the national board upheld the results of the election. The employer's campaign included a leaflet comparing benefits received by union-represented employees and those received by the employer's nonunion employees. Preceding the comparison, the leaflet had a disclaimer that the employer was not promising better medical benefits if the employees voted "no". While distributing the leaflet, a divison manager stated that "if the employees voted the Union out, they would receive 'basically this type of coverage.'" The national board based its finding on the same factors it relied upon in Viacom Cablevision (1983) 267 NLRB 1141 [114 LRRM 1132]. Specifically, the national board found no implied promise of benefits based on (1) explicit disclaimers of promises in the

[6/]As the Board cannot presume that an employer will always be able to precisely duplicate on the open market a medical plan product which has been developed, sponsored and administered by a union, we must broadly construe the requirement that an employer may promise no more than a continuation of the status quo.

leaflet and by the division manager in his meetings with the employees; (2) the fact that the division manager's oral comments concerning insurance were made in specific responses to employee questions; (3) the fact that the division manager's statements included other topics; and, (4) the absence of any other objectionable conduct.

In the instant case, virtually the same factors are present: (1) Backus explicitly stated that the company could not promise anything to the employees; (2) his statements regarding medical benefits were made in direct response to an employee question; (3) the Employer's campaign did involve other topics, including worker security and employer contributions, as indicated by the Employer's leaflets distributed to all its employees (see Union exhibits nos. 1, 2 and 3); and, (4) there is no evidence of other objectionable conduct that would tend to interfere with employee free choice and affect the results of the election.

The Board believes that there is a very fine line between permissible employer campaigning and impermissible promises, and although the Board finds that the Employer came very close to the line in this case, it did not cross it. Accordingly, we shall, and do hereby, certify the results of the election.

CERTIFICATION OF ELECTION RESULTS

It is hereby certified that a majority of the valid ballots were cast for "no union" in the representation election conducted on September 11, 1986, among the agricultural employees of Arrow Lettuce Company in the State of California and that the United Farm Workers of America, AFL-CIO, thereby lost its prior

status as the exclusive bargaining representative of said employees for the purpose of collective bargaining, as defined in section 1155.2(a).

Dated: May 31, 1988

BEN DAVIDIAN, Chairman[7/]

JOHN P. McCARTHY, Member

IVONNE RAMOS RICHARDSON, Member

WAYNE R. SMITH, Member

[7/] 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 GONOT, dissenting:[1/]

I agree with the majority that this case presents a very close question as to whether a promise of benefit is reasonably inferable from the written and oral statements made by the Employer during the decertification campaign. However, I must conclude, contrary to the majority's belief, that the line between permissible and impermissible forms of campaigning was crossed in this case.

The majority has accurately stated the relevant case law:

> When evaluating allegations of a threat of reprisal or promise of benefits, the Board must examine the statements in the totality of the circumstances. [Citations omitted.] A prohibited promise of benefit need not be explicit to constitute conduct affecting the results of an election. The Board must determine whether a promise of benefit may reasonably be inferred from the employer's statements.

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[1/] Given my position on the promise of benefits issue, it would not be necessary to reach the police presence issue. Nevertheless, I should note that while I am in agreement with the Investigative Hearing Examiner (IHE) on the former, I feel he was clearly in error as to the latter.

The totality of the circumstances in this case encompasses not only the statements that were initially made by supervisor and part-owner Lowry Backus to the work crews, but also the campaign literature which was handed out to all employees within a week of the time the initial remarks were made. The impact of that literature must be measured against the background of the statements which had already been made to the workers. Those statements included an explicit promise by the Employer to provide a medical plan which would be "comparable to the better ones in the valley." In and of itself, such a promise is innocuous because it cannot be read to imply that the replacement plan would be superior to the existing medical plan offered by the Union. As long as it appears that the Employer might consider the Union's plan to be among the better ones available, the net effect of the Employer's promise is simply a reassurance that the status quo as to the medical benefits would be maintained if decertification were to occur. In such circumstances, offering to maintain the status quo relative to wages and working conditions is an acceptable campaign tool because the Employer is "promis[ing] nothing more than the employees already enjoyed." (El Cid, Inc. (1976) 222 NLRB 1315 [91 LRRM 13941.)

However, the Employer, at best, seriously compromised the appearance of only intending to maintain the status quo when it subsequently issued a campaign flyer which caricatured one perceived drawback of the Union's plan and enumerated several

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others in no uncertain terms.[2/] Although the Employer had gone out of its way to denigrate the Union's plan, that act in and of itself was not the problem. An employer is statutorily entitled to express its views on any matter it chooses, but only so long as the expression of those views does not include a promise of benefit or threat of reprisal. Section 1155 of the Agricultural Labor Relations Act, which is identical in all relevant respects to section 8(c) of the National Labor Relations Act, provides:

> The expressing of any views, arguments, or opinions, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute evidence of an unfair labor practice under the provisions of this part, if such expression contains no threat of reprisal or force, or promise of benefit.

Here, the Employer's point by point attack on the Union's medical plan, when viewed in light of its still outstanding promise to provide a medical plan comparable to the better ones in the valley, gave rise to a strong inference that the Employer did not consider the Union's plan to be among the better ones in the valley and that it intended to provide a plan which did not contain the alleged disadvantages of the Union's plan. The appearance was

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[2/] The Employer's campaign flyer listed six "facts" regarding the Union's medical plan: (1) the majority of doctors and hospitals in the area do not accept the Kennedy plan; (2) the Kennedy plan has increased the deductible and reduced the benefits; (3) the Kennedy plan does not cover employees or their families in Mexico; (4) the Kennedy plan allows certain non-members to pay for the insurance themselves for less than half the price the Company pays for its employees; (5) the Company has increased the employees' contribution to the plan more than 65 percent in the last three years, and the Union has reduced the benefits; and (6) the Kennedy plan will have another reduction of benefits and increase in deductibles during the upcoming months.

thus given that, as an inducement to vote for decertification, the Employer was promising to provide a medical plan superior to that which the employees already had.

The Employer could have avoided the appearance of exceeding the status quo by simply noting in the flyer that, while it was promising to provide replacement coverage, it could not guarantee that such coverage would be more than comparable to the existing union medical plan.[3/] The addition of that simple proviso would have sufficiently tempered the impact of the flyer so that no promise, explicit or implicit, could be found. The Employer would thus have achieved the purpose of showing that the Union plan could be improved upon in certain respects but without raising the expectation that the replacement coverage would be superior, on an overall basis, to that which the employees already had.

I find it to be of no real consequence that the Employer had issued the stereotypical caveat at the very beginning of the campaign that it could not make any promises. The Employer immediately began to undercut the effect of that statement by then explicitly promising to provide a new medical plan "comparable to the better ones in the valley." It thus created an ambiguous situation which it later began to clarify to its advantage by making it appear that what it was talking about was

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[3/] Alternatively, no promise could have been inferred if the Employer had originally promised only to provide replacement medical coverage comparable to that afforded by the Union plan (rather than comparable to the better plans in the valley). (See El Cid, Inc., supra, 222 NLRB at 1315-1316.)

something beyond what the union plan could offer. One perfunctory opening remark about not being able to make promises cannot then permit the employer to make subsequent statements to its employees which are tantamount to a promise.[4/] (Albert C. Hansen dba Hansen Farms (1976) 2 ALRB No. 61; Mervyn's (1979) 240 NLRB 54 [100 LRRM 1225].)

I am also cognizant of the fact that the Employer had no current nonunion medical plan of its own which it could use for purposes of comparison with the existing union plan. However, this did not prevent the Employer from circulating a representative sampling of nonunion medical plans available with other employers, along with a proviso that no promise was being made that any one of those specific plans would be implemented if decertification were to occur. (See Jack or Marion Radovich (1983) 9 ALRB No. 45.) The employer is entitled to inform its employees as to what is available in the way of medical coverage, but it cannot create the impression, as the Employer here did, that specific defects in an existing union plan would be remedied in the nonunion replacement plan. (See Mervyn's, supra, 240 NLRB 54.)

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[4/] Duo-Fast Corporation (1986) 278 NLRB No. 10 [121 LRRM 1163], the principal case cited by the majority in support of its holding, is distinguishable in one very important respect. There, unlike the situation before us, an explicit disclaimer was included in the leaflet in question. The leaflet here was devoid of any indication by the Employer that, in pointing out alleged defects in the Union's plan, it was not promising to provide something better. Such a disclaimer was particularly needed in this case because of the preexisting promise to provide coverage comparable to that afforded by the better plans in the valley. The only disclaimer which the Employer ever issued was in oral form and apparently was not repeated since the beginning of the campaign.

I readily concede that, under my analysis and that of the IHE, the unlawful promise of benefit is an implied one and is based upon two separate campaign statements, neither one of which would constitute an unlawful promise by itself. However, a promise is reasonably inferred here because (1) the question of medical benefits was of central concern to the employees, as indicated by the employee questions and Employer's campaign literature; and (2) the two statements were made within a day of one another.[5/] Moreover, there was a significant disparity between the Employer's treatment of the union plan and its references to the replacement plan. Instead of being careful to give the appearance of wanting to maintain the status quo regarding medical benefits, the Employer went out of its way to denigrate the Union's medical plan, while at the same time it was extolling a promised replacement plan as being among the better ones in the valley.[6/]

It is indicative of the closeness of this case that I rely on the same language from Dow Chemical Company v. National Labor Relations Board (5th Cir. 1981) 660 F.2d 637 [108 LRRM 2927] as does the majority:

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[5/]The petition for decertification was filed on September 4, 1986, and the Employer began its campaign the same day. The election took place on September 11. The record reveals that the flyer in question was distributed on September 5. (R.T., Vol. I, p. 65.)

[6/]The Employer reinforced the notion that there would be something "better" about the replacement plan when, on September 9, it issued a letter to all employees in which it stated the following: "We can assure you that if we remain without a union, as we were before the union entered, we will have a good medical plan and other benefits." (Emphasis added.)

> The [National Labor Relations] Act is violated by statements from which promises may reasonably be inferred. Chromalloy Mining and Minerals v. N.L.R.B., 620 F.2d 1120, 1124-25 (5th Cir. 1980). The inference, however, must be one reasonably makeable by the employee or employees to whom the statement is made. It is not sufficient that bits and pieces of statements may be later lifted out of context, that the facts and circumstances in which the statements were made and which were known to the employee or employees may be ignored, and that those bits and pieces may then be viewed in vacuo as either promises or non-promises. [Citations.]

It is my belief that the majority has not given due weight to "the facts and circumstances in which the statements were made and which were known to the employees," and has chosen to view statements of the Employer in vacuo, as if they had no tendency to be read together by the employees.

If there is one lesson that National Labor Relations Board case law on decertification elections teaches us, it is that once an employer engages in campaigning and ventures into the realm of giving assurances to employees, it must tread very carefully. A myriad of such cases have found the employer to have crossed the line between permissible free speech and impermissible promises because it lost sight of what is meant by offering to preserve the status quo and wound up tantalizing the employees with the promise of something better. (See Ranco, Inc. (1979) 241 NLRB 685 [100 LRRM 1559] (decertification election set aside where employer's campaign emphasized that benefits were less than those received by nonunion employees, and statements had implied message that employees would receive increased benefits if they rejected union); Mervyn's, supra, 240 NLRB 54 (decertification election set aside where despite

disclaimers, employer's statements constituted a promise that if union lost election, then employer would institute its own benefit plan, which would cover pregnant employees even if they did not work the required number of hours under the union plan); Morgan Services, Inc. (1987) 284 NLRB No. 95 [125 LRRM 1301] (decertification election set aside where employer's oral and written statements constituted a promise of benefit that there would be a grievance procedure for nonunion employees in exchange for votes against the union).) Although the freely expressed choice of employees merits preservation in decertification situations just as much as it does in the context of petitions for representation, I am persuaded that the weight of the law supports a finding that the Employer exceeded its proper role in this campaign and thereby interfered with the exercise of free choice by its employees. Consequently, I agree with the IHE's recommendation that the election should be set aside.[7/]

Dated: May 31, 1988

GREGORY L. GONOT, Member

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[7/] Comparisons will undoubtedly be drawn between my position in this case and my dissenting opinion in Limoneira Company (1987) 13 ALRB No. 13, where I concluded that the decertification election there in question should be upheld. The essential difference between the two cases is that in Limoneira, I was unable to conclude that the remarks attributed to the employer were actually made, whereas in the instant case there is no question as to what the employer said or wrote and it remained only to determine whether the undisputed statements constituted a promise of benefit.

CASE SUMMARY

Arrow Lettuce Company (UFW)

14 ALRB No. 7
Case No. 86-RD-5-SAL

IHE DECISION

Following a Petition for Decertification filed by petitioner Hector Javier Contreras, a representation election was held, and the official Tally of Ballots showed 39 votes for No Union, 18 votes for the United Farm Workers of America, AFL-CIO (Union or UFW), and 9 challenged ballots. Following an evidentiary hearing on the Union's objections to the conduct of the election, the Investigative Hearing Examiner (IHE) recommended the election be set aside on the grounds that Arrow Lettuce Company (Employer or Arrow) had made a pre-election promise of benefits which interfered with employee free choice and the presence of law enforcement officers immediately prior to and/or during actual balloting created an atmosphere of fear and coercion which precluded the holding of a free and fair election. The Employer filed exceptions.

BOARD DECISION

The Agricultural Labor Relations Board (Board), upon review of the IHE's Decision and in light of the record and relevant case law, decided to certify the results of the election. In doing so, the Board adopted the prevailing National Labor Relations Board rule that the mere appearance of police officers immediately before and during the election does not warrant setting aside the election and a fortiori does not constitute an unfair labor practice. Rather, the case depends upon the action taken by the police officer. Thus, where the facts establish the mere presence of police personnel, absent a showing of coercion or interference, the election will not be set aside. No party disputes that the officers neither spoke to any employees nor involved themselves in the Board's processes in any manner. Thus, the facts in this election case are similar to those in Louisville Cap Company (1958) 120 NLRB 769 [42 LRRM 1064], Vita Food Products, Inc. (1956) 116 NLRB 1215 [38 LRRM 1407] and Balfre Gear & Mfg. Co. (1956) 115 NLRB 19 [37 LRRM 1223], where, despite the mere presence of police officers prior to or during an election, the national board declined to set aside the elections. Accordingly, the Board held that the police presence, under the present circumstances, was not such that it would tend to adversely affect the employees' freedom of choice in the instant election.

Concerning the Employer's alleged promise of increased medical benefits, the Board noted that the statements made by or attributed to Arrow part-owner and supervisor Lowry Backus were

made in the context of party campaigning before an impending decertification election. In evaluating the statements within this context and in relation to the standards set forth in NLRB v. Gissel Packing Co. (1969) 395 U.S. 575 [71 LRRM 2481], the Board ruled that the statements, including those set forth in leaflets distributed to the employees, did not contain a promise of increased benefits. The Board also ruled the statements did not contain a promise, explicit or implied, that it could or would provide a medical plan comparable to the Union's medical plan with better benefits than those in the Union plan. Finally, the Board applied the factors set forth in Viacom Cablevision (1983) 267 NLRB 1141 [114 LRRM 1132] and found no inferred promise of benefit based on (1) an explicit disclaimer by Backus that Arrow could not promise anything to the employees; (2) his statements were in response to employees' questions; (3) the Employer's campaign involved other topics; and, (4) there was no evidence of other objectionable conduct that would interfere with employee choice and affect the results of the election.

DISSENTING OPINION

Member Gonot would set aside the election based on his finding that the Employer's conduct -- including the oral statements to the work crews and campaign leaflets distributed to all employees within a week of the time the oral statements were made -- constituted an implied promise of benefit. The Employer's promise to provide a medical plan "comparable to the better ones in the valley" and its subsequent leaflet which denigrated the Union's medical plan gave rise to a strong inference that the Employer did not consider the Union plan to be among the better ones in the valley and that it intended to provide a plan which did not contain the alleged disadvantages of the Union plan.

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

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STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

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| In the Matter of:<br><br>UNITED FARM WORKERS OF AMERICA, AFL-CIO,<br><br>Labor Union,<br><br>and<br><br>JAVIER HECTOR CONTRERAS,<br><br>Petitioner,<br><br>and<br><br>ARROW LETTUCE COMPANY,<br><br>Employer. | Case No. 86-RD-5-SAL |

Appearances:

Terrence R. O'Connor, Esq.
for the Employer

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

Javier Hector Contreras,
in propria persona

Before: Matthew Goldberg
Administrative Law Judge

DECISION OF THE INVESTIGATIVE HEARING EXAMINER

I. Statement of the Case

On September 4, 1986,[1] Javier Hector Contreras ("petitioner" below) filed a decertification petition in case number 86-RD-5-SAL. The petition requested that an election be held among the employees of Arrow Lettuce Company (referred to as the "employer" or "Company" below) to ascertain whether the United Farm Workers of America, ALF-CIO, (referred to as the "Union" below) should continue as the certified bargaining representative of the Employer's employees, or whether the Union should be decertified.

That election was held on September 11, 1986. The Tally of Ballots revealed the following results:

Votes Cast for:

| | |
|---|---|
| The Union | 18 |
| No Union | 39 |
| Unresolved Challenged Ballots | 9 |
| Total | 66 |

On September 17, the Union duly filed a Petition to Set Aside [the] Election. After due consideration of the Petition, the Executive Secretary of the Board set the following objections for hearing:

1. Whether the employee list provided by the employer was complete and accurate as required by Title 8, California

[1]All dates refer to the year 1986 unless otherwise noted.

Administrative Code, section 20310, subdivision (a)(2), and if not, whether the results of the election were affected thereby.[2]

2. Whether the Employer's failure to abide by the pre-election agreement that the employees would provide their own transportation to the polls, and the subsequent exposure of the employees to law enforcement and immigration officials, either escorting the buses or en route to the polls, affected the results of the election.

3. Whether prior to the election the Employer promised to provide the employees with a better medical plan and more work in exchange for the decertification of their union, and if so, whether such promises affected the outcome of the election.

The hearing on these objections was noticed for and held before me Salinas, California commencing December 16. All parties appeared either personally or through their respective representatives, as noted above, and were given full opportunity to adduce both testimonial and documentary evidence, and to submit argument and post-hearing briefs. Based upon the entire record in the case, including my observations of the respective demeanors of each witness as he/she testified, and having read the briefs submitted to me following the close of the hearing, I make the following:

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[2] As originally worded, the objection inquired whether the employer's failure to supply a complete and accurate list "was the result of gross negligence or bad faith." After the Union filed a request for review of the language of this particular objection, the Executive Secretary revised the objection set for hearing as it appears above.

## II. Findings of Fact and Conclusions of Law

### A. Preliminary Statement

The Employer is a California corporation operating in the Salinas Valley. The Union was certified as the exclusive bargaining representative of its employees in September of 1984, and had a contract with the Employer which was due to expire within twelve months from the date of the election. At the time of the election itself, the Employer employed approximately seventy workers in two broccoli harvesting crews.

### B. The List Objection

Following the filing of the Petition, the Employer supplied the Regional Director with a list of its then-current employees, together with their addresses. This list was furnished to the Union on September 7.

A number of the addresses on this list were inaccurate. At the pre-election conference held on September 9, the Union provided the company with the names of sixteen of the workers on the original list for whom it maintained the addresses were incorrect.

The company directed the foremen of its two crews to contact the sixteen people in question and ascertain their current, correct addresses. The foremen found that four of the sixteen allegedly incorrect addresses were in fact correct, and furnished information regarding the remaining addresses which the company compiled on an amended list. This amended list was provided to the Union in the late afternoon on September 9.

Two of the addresses which the Union claimed to be incorrect belonged to two workers who were actively involved in the campaign on the Union's behalf (Luisa Mejia and Sergio Zagal). Thus, the ability of the Union to contact these employees is self-evident. While Union organizers Guadelupe Gastillo and Umberto Gomez testified that there were additional problems with the accuracy of the amended list, they were unable to state with certainty which particular addresses were incorrect. Castillo additionally asserted that three other workers, whom he named, had incorrect addresses set forth on the original list. However, the company was not notified of problems with their addresses at the pre-hearing conference, and one of the individuals Castillo named (Hector Gonzalez) testified that his address was in fact correct. One other address asserted by the Union as incorrect was used subsequently by the Union to contact the worker by mail.[3]

Four additional addresses which were found incorrect were for employees on disability leave. Their ballots were challenged at the election. Since these ballots were not outcome-determinative, however, they remained uncounted.

In sum, although twelve of the addresses on the original list were technically incorrect, the Union had no difficulty contacting two individuals incorrectly listed who campaigned on the Union's behalf. The Union should further have encountered no problem contacting the worker listed as living on Alisal Street,

[3]This address was listed as being on "Alisal Street," as opposed to its correct designation, "Alisal Road." However, there is only one "Alisal" in Salinas.

as opposed to Alisal Road. Therefore, only nine of the ostensibly "incorrect" addresses should have initially hindered the Union's ability to contact the workers at their homes. When the workers' correct addresses were furnished on September 9, the Union effectively lost two days to campaign among nine workers, and could theoretically have availed itself of the time remaining until the election to speak with these workers at their residences.

Employers are required under Labor Code section 1157.3 to maintain complete and accurate lists of the names and addresses of their employees currently on the payroll. Board Regulation section 20310 requires that an employer furnish said lists to the Regional Director within forty-eight hours from the filing of a representation petition.

The potential effects of an incomplete or inaccurate eligibility list on an election were first discussed by this Board in Yoder Brothers (1976) 2 ALRB No. 4. Noting the requirements by statute and Regulations to maintain a complete and accurate list of employees currently on the payroll, the Board recognized that the rationale for these requirements is so that the list may serve "as information to the union participating in the election for the purpose of enabling them to attempt to communicate with eligible voters...." (Id., p. 4). Rather than adopt a per se approach to cases involving inaccurate eligibility lists, the Board formulated a rule which focused on the purpose behind the requirements. "Where it appears that the employer has failed to exercise due diligence in obtaining and supplying the necessary information,

and the defects or discrepancies substantially impair the utility of the list in its informational function, the employer's conduct will be considered as grounds for setting the election aside." (Id., pp. 15 & 16, emphasis supplied.)

Similarly, in Ortego Brothers (1977) 3 ALRB No. 41, the Board stated that "if the eligibility list is so inaccurate that it impairs the union's ability to communicate with workers, the election will be set aside.. . . "

Later cases indicate that the objecting party, commensurate with the proper allocation of the burden of proof in election cases, must demonstrate that it was actually prejudiced by the defective list to such an extent that it tended to interfere with the free choice of employees so as to affect the results of the election. Thus, in Patterson Farms (1982) 8 ALRB No. 57, despite a finding that the employer had failed to exercise due diligence in preparing the eligibility list, the Board found that the list did not result in actual prejudice to the union. While the list contained post office box addresses for approximately one-third of the employees named, the objecting union, as the incumbent in the election, had knowledge of where most of these employees lived. In contrast, the Board held in Bettaravia Farms (1983) 9 ALRB No. 46 that an incumbent union had no obligation to remedy list deficiencies, and re-emphasized that the employer must exercise due diligence in preparing the list. Since about one-fourth of the employees on the list could not be contacted by the incumbent, actual prejudice was demonstrated, and

the outcome of the election was so affected that the results were set aside.

In Silva Harvesting (1985) 11 ALRB No. 12, the Board reiterated that it would apply an outcome-determinative test in analyzing whether a defective eligibility list could be utilized as grounds for setting an election aside. The Board specifically declined to adopt that NLRB rule which presumes that the failure of an employer to submit a substantially accurate list has a prejudicial effect on the election. (See Sonafarel Inc. (1971) 188 NLRB 969.) Nevertheless, in Silva, the list supplied was seriously deficient. Given the margin of victory in the election, and a finding that the ability of the incumbent union to communicate with voters was substantially impaired, resulting in actual prejudice to that union, the results of that election were set aside.

The election in Carl Dobler (1986) 11 ALRB No. 37 was set aside due to a "grossly inadequate" pre-petition list obtained by an intervening union. The union did not receive a corrected list, which itself contained errors, until twenty-four hours before the election. The employer made no attempt to explain the inaccuracies on the list. The Board noted that according to the IHE's findings, the intervening union had no other access to employee names and addresses, and that the defective list "presented a major impediment to organizing which deprived a substantial number of eligible voters of communication with UFW organizers." (Id., p. 6.)

The thrust of all of the foregoing cases is that a list

which is technically defective does not provide a per se reason to set an election aside. Problems with a list must effectively hinder the ability of a union to communicate with potential voters. The number of these voters needs to be significant enough to have affected the outcome of the election.

In the case under consideration, deficiencies in the list were corrected by the Employer, who used its best efforts to remedy them, and did so reasonably in advance of the election. The Union had potential problems contacting nine workers, out of a total of sixty-nine employees. Given the margin of the result, these voters could not have affected the outcome of the election, particularly since four of the nine voted challenged ballots. Furthermore, as the incumbent, and signatory of a collective bargaining agreement with the Employer, the Union should have had other access to employee names and addresses.

In sum, I find that the initially defective pre-petition list submitted by the Employer did not prejudice the Union to the extent that it was prevented from communicating with a significant number of voters. Problems with this list did not affect the outcome of the election.

C. The Presence of Law Enforcement Personnel

As worded, objection number two links exposure of the voters to law enforcement personnel to the failure to abide by a pre-election transportation agreement. However, the evidence, as discussed below, indicated that while certain arrangements for transportation were made at the pre-election conference, these

were subsequently modified. The Union assented to the change.[4]

Technically speaking, therefore, there was no "failure to abide by" the pre-election agreement, as all parties apparently consented to the transportation arrangements which were ultimately implemented. This element of the objection must be dismissed. Nevertheless, the use of company buses to bring the workers to the election site gave rise to the objectionable circumstances involving the presence of law enforcement personnel.

Both Schoenburg and Regional Field Examiner Jack Matalka testified that prior to the pre-election conference these two discussed "security matters" with Mr. O'Connor, the attorney for the Employer. The Union did not participate in these discussions. The Board employees felt that there was a "potential for violence,"[5] and that the election should be held in a controlled area, such as the Board's Regional Office, rather than at one of the company's work sites. Following the "security" discussion among Schoenburg, Matalka and 0'Connor, the Regional Attorney contacted the County Sheriff's Department and requested that an officer "be available," but "not make your presence known." At the pre-election conference, the Union was notified that the sheriff would be on "standby."

[4]Regional Attorney Robert Schoenburg testified that the Union did in fact agree to the modification. No Union witnesses stated affirmatively that the change was contrary to their wishes.

[5]As more fully discussed below, the reasons behind this notion were, for the most part, unexplained.

Also at the pre-election conference, it was decided that the workers would use their own cars to get to the election site, formally designated as the ALRB office on Boronda Road. The Union initially wanted the company to provide bus transportation for the workers. Customarily, the workers gather at a pick-up point at the airport and are taken to the fields in company buses. The Company, citing insurance problems, objected to the use of its buses, and suggested that the workers travel to the election site in their own cars. The Union agreed to this suggestion.

However, the Employer subsequently changed its position on the transportation issue, and decided to provide the buses after all. Employee Joel Solis, who was present at the pre-election conference, stated that following the meeting his wife and several other women employees expressed concern to him about the transportation arrangements, relating to Solis that "if they were going to be driving in cars there they didn't want to go, because the Union puts a lot of pressure."[6]

[6]Representation proceedings are not conducted "according to technical rules" of evidence (Regs, section 20370(c)). However, the obvious hearsay nature of the above statement renders it untrustworthy, as is well-recognized. (1 Jefferson, California Evidence Benchbook (1982) section 1.1.) Additionally, I find that Solis' testimony was generally unreliable as the result of his demeanor. He repeatedly demonstrated a dearth of recollection, and his responses to numerous questions were rambling and unintelligible. Consequently, I attach little or no probative weight to Solis' remark that the "women didn't want to go" to the election in their own cars because of the Union's conduct. (Parenthetically, the statement may be interpreted as indicating that several workers did not wish to be exposed to the Union's campaigning.) It is presented, however, to assist in explaining the subsequent conduct by the Company regarding worker transportation to the election.

Oscar Gardea, the Employer's harvesting superintendent, testified that as he left the pre-election conference, a group of employees, including Mr. Sblis, called him over to where they were gathered in the ALRB parking lot, and told him the concerns that they had with taking their own cars to the election. Gardea conveyed these in turn to company owner and superintendent Lowry Backus. Eventually, Board agents were contacted and it was decided that two buses would be used to transport the two crews. The Union was notified, and according to Schoenburg, agreed to the procedure.

Union witnesses Luisa Mejia, Faustino Garcia, and Armando Bernal each stated that four police cars were at the pick-up point when they arrived there on the day of the election. Umberto Gomez, Bernal, and Mejia also stated that the police escorted the company buses to the voting site, with two cars behind the bus and two cars in front. Garcia and Board agent Tom Nagel testified that their bus, which was the second and last one to leave the pick-up point, had one police car in front and one behind as it traveled to the election site. Law enforcement personnel were also seen enroute: a number of them had parked in a church parking lot, close to the election site, where Union organizers had gathered. Additionally, several patrol cars were parked at the election site itself.

In contrast, testimony of Employer witnesses tended to minimize the extent and impact of the election day police presence. Supervisor Gardea stated that he saw only one patrol car at the pick-up point, and only one car which followed the

first bus. This car dropped off before the bus arrived at the voting site, and Gardea, who was there only briefly prior to the voting, stated that he did not notice any law enforcement personnel at the ALRB office. Lowry Backus stated that he saw two police cars at the pick-up point, and that as he drove along with the second bus, one police car was in front of him. A number of employees witnesses called by the company stated that they did not "notice" any police officials at the pick-up point or escorting the buses, nor did they hear anyone making comments about their presence.[7]

Within a short distance from the voting site, along the route used by the buses, is a restaurant with a parking lot in which two Immigration and Naturalization Service Vehicles were parked. Backus stated that he saw INS officials in the restaurant having breakfast, and that he has seen them there on previous occasions. Worker Anna Castro, testifying for the Employer, stated that she lives nearby the restaurant in question and has seen INS officials having coffee in that same place nearly every day. Foreman Jesus Guzman testified similarly that he had seen INS officials previously at that location in the morning.

While particular worker-witnesses may have claimed not to have "noticed" the police cars, I cannot accept their accounts as proof of the absence of law enforcement personnel particularly in the face of testimony of several witnesses, including company

[7]These witnesses included Luz Maria Rodriguez, Yolanda Covarrubius, Anna Castro and Sebastiana Marquez.

supervisors and an ALRB agent,[8] that patrol cars were seen at the pick-up point, that they escorted the company buses to the polls, that they were along the route to the voting site, and that a number of the cars were parked at the site itself.

Two days before the election, on September 9, the Company filed charge number 86-CL-10-SAL alleging that a Union organizer "assaulted and battered" Mr. Backus. Backus testified that the charge was based on an incident involving his being shoved by an organizer, whom Backus claimed had followed him into the fields during working hours and whom the owner had told to leave.

I find that this election should be set aside as a result of the matters alleged in this objection. I specifically find that the presence of law enforcement personnel, as they escorted the buses transporting the voters, and their presence along the route and at the voting site, created an atmosphere of fear and coercion which precluded the holding of a free and fair election. I make these findings despite the fact that the evidence as to how the police presence actually arose is minimal, and the fact that

[8]Field Examiner Tom Nagel testified that he rode in one of the company buses which transported the workers that morning. It had been agreed that ALRB agents would be permitted to ride the buses in order to insure that there would be no campaigning aboard them on the way to the election. Nagel stated that Salinas police patrol cars, one in front and one behind, escorted the bus he was in from the pick-up point to Boronda Road. From there, the Salinas police cars were replaced by sheriffs cars, which accompanied the bus to the election site.

the appearance of law enforcement officers cannot be attributed, under any circumstances, to conduct by a party.[9]

As an initial observation, I do not include as a basis for this conclusion that the presence of INS vehicles or personnel enroute had a coercive impact on the election. As witnesses testified, their presence was usual and common at that location. The fact that buses carrying voters on their way to the election may have passed by a parking lot where INS officials were located was nothing more coincidental.[10]

As a general proposition, the ALRB considers misconduct by a party to have a more serious impact on destroying the appropriate election atmosphere than misconduct by a non-party. (See Takara - International, Inc. (1977) 3 ALRB No. 24; San Diego Nursery Co.', Inc. (1979) 5 ALRB No. 43; Pleasant Valley Vegetable Co-op (1982) 8 ALRB No. 82; S & J Ranch, Inc. (1986) 12 ALRB No. 32; T_. Ito & Sons Farms (1985) 11 ALRB No. 36. In order for non-party acts to provide the basis for setting an election aside, that

[9]Board Agent Matalka stated that during their "security discussion" O' Connor took no position regarding the police presence. Inexplicably, Schoenburg's purported instructions to law enforcement personnel to "be available, but not make [their] presence known" were somehow translated into a highly visible and active police presence.

[10]Alrbagent Nagel testified that as the bus in which he was riding passed this parking lot, the company attorney, also present there at the time, was "waving his arms," and the driver of the bus began to turn into the lot. Nagel instructed the driver not to stop, but to continue on to the election site. On the basis of these facts I cannot conclude that the bus driver's momentary stop at or near the parking lot would lead the workers inside the bus to reasonably believe that the INS presence was being emphasized to them, or that the bus was somehow delivering them up to the INS. Rather, it appears that the driver merely misunderstood 0' Connor's gestures.

conduct must be so aggravated, coercive or disruptive that it creates a general atmosphere of fear and coercion which renders impossible the expression of employee free choice. (Pleasant Valley Vegetable Co-op., supra; T. Ito & Sons Farms, supra; S & J Ranch, Inc., supra; see also NLRB v. Aaron Brother Corp. (9th Cir. 1977) 563 F.2d 409.

From the evidence presented, it cannot be concluded that there was a reasonable possibility that violence or disruption would occur during the course of the election. Accordingly, the number of law enforcement personnel involved in the election process was totally inordinate.[11]

In this free society, the appearance of law enforcement in any but casual numbers is an indication that something is wrong, that trouble is expected, that someone or something needs protection. It cannot be viewed as benign. In the context of these facts, what were the police intending to prevent? An outbreak of violence? Harm to persons or property? There was not the slightest indication that such would take place. Disruption of the election process? Surely an ordinary representation

[11]I do not construe the mere filing of an unfair labor practice charge based on an isolated alleged shoving incident to be indicative that the election would be interfered with, or that the Union displayed a propensity to resort to violent behavior. There was no evidence of any other objectionable Union conduct such as would prompt a request for injunctive relief. Nor was there evidence that a labor dispute was in progress at the time, with its attendant charged atmosphere and conflict. Similarly, the statement by Mr. Solis, even if taken at face value, that the "Union puts a lot of pressure," does not in and of itself evince a reasonable apprehension of violence.

election does not demand that police oversee it, as attested by the countless elections held under this law where a police presence was not noteworthy. Surely an election which requires police "protection" is one held in an already existing atmosphere of coercion.

The inference is inescapable that in certain quarters trouble was expected, and the source of that trouble would be the Union. The voters were made to be fearful, as if they needed protection from the Union and its entreaties for support. All of this was done in the absence of any overt acts on the part of the Union.

Imagine the ordinary course of a work day for these employees. They gather at the airport, where they are picked up by company buses and driven to work. On election day, however, there are numbers of police at the pickup point. After the workers board the buses that day, the buses are "escorted" by patrol cars. Added patrol cars are sighted along the route, and at the buses' destination. What is the problem? Are the workers under arrest? Are they in some sort of danger? Neither. They are simply going to vote.

In Anderson Farms Company (1977) 3 ALRB No. 67, the Board found that the employer violated Act section 1153(a) when it summoned sheriff's deputies to its property while union organizers were lawfully availing themselves of access under the Board's regulations. When organizers attempted to engage in organizational activities, the sheriffs entered the fields with them, and remained in close proximity while the organizers tried

to speak with workers. The Board stated: "the presence of sheriff's deputies on the property when workers are engaging in protected organizational activity has an intimidating and chilling effect upon the full exercise of their rights. Calling the sheriff when organizers appeared five minutes before the beginning of an unestablished lunch break resulted in an unwarranted interference with employee rights, and is a violation of section 1153(a)." (Id., p. ll.)[12]

Similarly, in Giannini & Del Chiaro (1980) 6 ALRB No. 38, the Board found a violation of the Act when sheriff's deputies were summoned to the employer's property in response to a peaceful gathering of its employees who assembled to discuss the recent unlawful discharge of one of their number, employee Hernandez. The Board noted that "[w]hen Respondent called in the sheriffs, the workers were gathered peacefully, before work, to discuss Hernandez' discharge and their possible courses of action. There was no indication that the presence of Hernandez at the camp and the meeting of the employees were in violation of the law or that the meeting was anything other then peaceful....We find that Respondent's summoning the deputies to the camp during the meeting of employees, and the deputies' subsequent conduct toward Hernandez

[12]It is noteworthy that in Anderson the employer engaged in numerous unfair labor practices and was virulently anti-union, to the point of engaging organizers in confrontations when they attempted to gain access to employees. Arguably, law enforcement personnel might have been necessary to protect the organizers and enforce their rights. Nonetheless, the Board's holding implies that the police presence was in furtherance of the employer's scheme to deny access rights, as it had done on a prior occasion when organizers lawfully on its property were arrested.

[which included going though his wallet and ordering him off the premises], tended to have a chilling effect on the exercise of the employees' section 1152 rights and that Respondent's conduct violated section 1153(a)."

Although the Employer here was not responsible for the presence of law enforcement personnel,[13] I find that such presence had an intimidating and chilling effect on the workers' ultimate exercise of their section 1152 rights, their right to express a free and uncoerced choice in a representation election.

The Employer cites several NLRB cases in his brief which stand for the broad proposition that the presence of police officers at an election will not provide a basis for setting that election aside where the police did not inject themselves into the election issues before the election nor did they speak with voters during it. (Halfre Gear and Manufacturing Co. (1956) 115 NLRB 19; Vita Food Products, Inc. (1956) 116 NLRB 1215; Louisville Cap Company (1958) 120 NLRB No. 103); cf. Utica-Herbrand Tool Division (1964) 145 NLRB 1717; Great Atlantic and Pacific Tea Company (1958) 120 NLRB 765. These cases are distinguishable from the instant situation. In Balfre, the police, who were summoned by the employer, were dressed in plain clothes and "were stationed outside the plant away from and out of sight of the polling area,. . . .located inside the plant." In Vita, even though they

[13]Notably, however, "security" arrangements were discussed by its counsel and regional office personnel without consulting the Union.

were seen by voters about to cast their ballots, only two law enforcement officers were present near the voting site. In Louisville Cap, there was evidence that police were summoned in response to pickets at the plant who were creating a disturbance. The police officers here were in large numbers and plainly visible. They were not called as a result of a disturbance; there was no evidence of any problem occurring on election day.

In sum, it is found that the presence of large numbers of law enforcement personnel en route to and at the election site created an atmosphere of fear and coercion, that their presence prejudiced the voters against the Union as a result of the implication that the workers needed protection from the Union in the absence of any actions by the Union warranting same, and that the workers could not freely exercise their right to vote. Accordingly, it is recommended that this election should be set aside.

D. Promises of Benefits

Lowry Backus, testified that on the day that the company was served with the decertification petition, he went out to speak to the two broccoli crews. Accompanied by labor relations consultants Steven Highfill and Jose Ybarra, Backus assembled the first crew at the edge of a field at approximately eleven a.m. He provided the following account of his remarks to that crew:

> I told them that we had been presented with a notice of a decert election and that was something that the people had done and it was as entirely up to them one way or the other how they voted. And no matter how they voted, there would be no problems as far as the company was concerned.. . . [T]hey had asked me about a health plan

> and I told them we had a health plan before we had a union, during the time with the union. We would continue to have one that would be comparable to the better plans in the valley.

Backus further stated that he was also asked whether the company's seniority system would remain in effect regardless of the election results. He replied that the system had been in place before the union had arrived and during its tenure as representative, and would continue in effect. Workers asked other questions, but Backus told them "at this point we could not get into discussions concerning the contract." Backus specifically denied that during this discussion with the crew he talked about the Union's medical plan, and further denied that the company would provide a "better" medical plan or more work if the employees voted against the Union.

Shortly thereafter, Backus visited the other crew at another field and essentially repeated the remarks he had made to the first crew, again stating in response to a worker's question that the company would continue a medical plan in effect that was "comparable to the better plans in the valley."

On the Friday before the election, workers received a leaflet with their paychecks which described what the employer perceived as inadequacies with the Union's Robert F. Kennedy medical plan, available to employees under the then-current collective bargaining agreement. The leaflet states that the Union plan is not accepted by the "majority of doctors and hospitals in the area"; that it does not permit employees to go to any doctor; that the plan does not cover the worker or his/her

family in Mexico; that the plan had reduced benefits and raised its deductible; that the plan permits non-members to have the insurance at less than half the amount paid by the company for 'its employees, thereby increasing their costs and reducing their benefits; and that in the coming months, another reduction in benefits and another increase in the deductible was anticipated.

Worker Faustino Garcia testified that Backus told his crew that morning that "we would have a better medical plan, that we would be covered in Mexico, that the Union's didn't cover us." It is unnecessary to resolve the apparent conflict between his and Backus' recitations, since I base the findings below solely on Mr. Backus' testimony.[14]

Section 1155 of the Act permits employers to discuss unionization with employees, and to express attitudes or preferences regarding same, as long as the employer refrains from making any "threat or reprisal of force, or promise of benefit." (See generally, NLRB v. Gissel Packing Co. (1969) 395 U.S. 575). Conversely, employer campaign speech which contains a promise of benefit or other inducement for voting against the union may constitute grounds for setting an election aside. (NLRB v. Exchange Parts Co. (1964) 375 U.S. 405; Jack or Marion Radovich (1983) 9 ALRB No. 45; Royal Packing Co. (1979) 5 ALRB No. 31.)

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[14]Parenthetically, Backus provided a fuller account of the discussions underlying this objection, whereas Garcia displayed a somewhat imperfect recollection of events.

It is not necessary to find that explicit promises are made or that benefits will be granted in exchange for a vote against the union. The grounds for setting an election aside, or for finding a violation of Act section 1153(a) based on restraint or coercion of employee rights, "may be found in a statement in which promises may reasonably be inferred." (Jack or Marion Radovich (1983) 9 ALRB No. 16, slip op. p. 3).

The employer's brief correctly cites 9 ALRB No. 45 as standing for the proposition that an election will not be set aside "on the tenuous possibility that a comparison of existing benefits....might be perceived by potential voters as an implicit promise to pay them more favorable benefits if they vote against the union. We find that the employee's interest in full disclosure and maximum information concerning the advantages and disadvantages of unionization outweighs any arguable or possible coercive effect of the statements." (Id., slip op. p. 6, emphasis supplied.) In that case, the employer during a decertification campaign issued a written statement comparing benefit levels under a union contract with those available at non-union farms. The Board held such acts to be a permissible exercise of employer free speech rights.

Similarly, the employer also correctly cites NLRB cases which stand for the proposition that employer promises to maintain what is, in effect, *a* benefit status quo, cannot be utilized as grounds for setting a decertification election aside; i.e., it is not objectionable pre-election conduct for an employer to assure

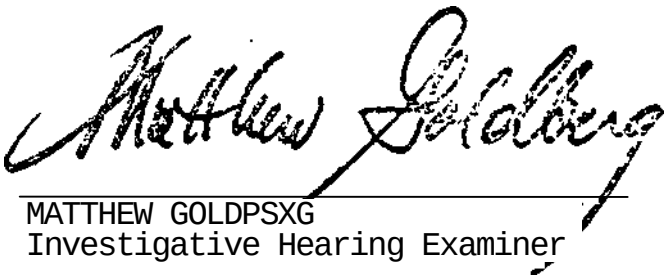
employees that certain benefits will continue even though the union contract which provides them may no longer be in effect as the result of the union losing its representative status. (El Cid (1976) 222 NLRB 1315; Ellex Transportation, Inc. (1975) 217 NLRB No. 120. The thrust of these cases is that an employer who promises to continue benefits in effect at their current levels in the event that the union loses the election is not offering or promising any new or increased benefits.

The problem with a strict reliance on the aforementioned authorities as a basis for dismissing the objection under consideration is that they do not fully conform to the facts of this case. Here, the employer went beyond promising employees a maintenance of the status quo regarding health benefits. Mr. Backus specifically stated that the employees would receive medical benefits "comparable to the better plans in the valley." This statement, coupled with the leaflet which was distributed to all employees,[15] carried with it the implication that the current Union-sponored medical plan contained many purported and serious deficiencies, and that a "better plan" which would not contain these problems would be available once the Union was out. Workers could reasonably infer that if the Union was gone, they would get better medical insurance. In short, the Employer did not merely express that current benefit levels would be maintained in the event that the workers voted the Union out.

[15]The leaflet, in and of itself, was not objectionable under Radovich 9 ALRB No. 45, as it merely expressed the employer's views concerning the inadequacies of the Union's current plan,

Accordingly, it is found that the employer promised to provide employees with increased medical benefits in the event that the Union was decertified, and that such promise interfered with employee free choice in the election. It is therefore recommended that for this additional reason the results of this election be set aside.

DATED: May 1, 1987



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