Firebaugh, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

PEREZ PACKING COMPANY, INC. Employer, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Petitioner.	)	Case No. 88-RC-6-VI 15 ALRB No. 19

DECISION AND CERTIFICATION OF REPRESENTATIVE

On July 28, 1988, the United Farm Workers of America, AFL-CIO (UFW or Union) filed a Petition for Certification seeking to represent all the agricultural employees of Perez Packing Company, Inc. (Employer). Finding that a majority of the Employer's employees were engaged in a strike, the Regional Director (RD) of our Visalia Regional Office directed an expedited election pursuant to Labor Code section 1156.3(a),[1/] which states in pertinent part:

> If at the time the election petition is filed a majority of the employees in a bargaining unit are engaged in a strike, the board shall, with all due diligence, attempt to hold a secret ballot election within 48 hours of the filing of such petition. The holding of elections under strike circumstances shall take precedence over the holding of other secret ballot elections.

The election was conducted on July 30, 1988, by the Agricultural Labor Relations Board (ALRB or Board), and the

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

Official Tally of Ballots indicated the following results:

UFW 108

No Union 47

Challenged Ballots 1

Total 156

The Employer timely filed an objection to the election and an investigative hearing was held on December 19, 1988. On March 20, 1989, Investigative Hearing Examiner (IHE) Thomas Sobel issued the attached Decision in which he recommended that the Employer's objection to the election be dismissed and that the UFW be certified as the exclusive representative of all the agricultural employees of the Employer in the State of California. The Employer filed exceptions to the IHE's recommended Decision with a brief in support thereof, and the UFW filed a brief in response.

The Board has considered the IHE's recommended Decision in light of the record and the exceptions and briefs of the parties and has decided to affirm the rulings, findings and conclusions of the IHE, except as modified herein, and to adopt his recommendation that the results of the election be certified.

Factual Background

A strike commenced on Wednesday, July 27, 1988, among the Employer's agricultural employees. The following day, the UFW filed a representation petition, alleging therein that a majority of the unit employees were engaged in a strike. The RD, through his Board agent, investigated the allegations of strike conditions, and determined therefrom that a majority of the

workers were indeed on strike and that they were striking for the following reasons: (1) the workers disputed the manner in which their wages were calculated; and (2) they wanted an election. On July 28, 1988, the RD directed an expedited election and notified the parties of his decision that same day.

Pursuant to Title 8, California Code of Regulations (hereafter "regulations"), section 20350(d), a pre-election conference was held at the Employer's premises on Friday, July 29, 1988. At that time the Union, on behalf of the striking employees, made an unconditional offer to return to work. Concluding therefrom that the strike was over and that, therefore, an expedited election was no longer necessary, the Employer objected to the 48-hour election, contending that it was improper to proceed with the election when it was evident that the strike had ended. The RD took the matter under submission, and, several hours after the pre-election conference, he notified the Employer of his decision to proceed with the expedited election and to dismiss the Employer's objection for the following reasons:
(1) the Notices and Direction of Election had already been posted;
(2) picketing was still taking place; and (3) the Employer had not been prejudiced.

Later in the evening of July 29, 1988, the Employer, accompanied by a labor consultant, went to the labor camp to campaign in connection with the upcoming election.[2/] The Employer conducted an employee meeting which was attended by approximately

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[2/] The Employer campaigned primarily at the labor camp since the striking employees continued to reside in the camp along with the nonstriking employees.

20 workers. A larger number of workers were seen milling around in the labor camp. Two leaflets were handed out during this meeting, and two additional leaflets were placed on every bunk in the camp.

The election was then held the following day, Saturday, July 30, 1988.

Employer's Exceptions

As in its objection to the election, the primary thrust of the Employer's exceptions is that it was an abuse of discretion for the RD to proceed with an expedited election when it was evident the strike was over the day before the election.[3/] The Employer contends that the RD's failure to postpone the expedited election interfered with employee free choice, in that the Employer was effectively denied the opportunity to disseminate among its employees information about its own views on

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[3/] Because the Employer, through its election objection contends that the 48-hour election was improper, the Executive Secretary had also asked the parties to brief the effect, if any, of regulations section 20377, which limits the availability of Board review of a regional director's decision to direct an expedited election.

We are in agreement with the IHE's determination that regulation section 20377 does not foreclose Board review of the Employer's election objections. Section 20377(c) is clearly designed to address objections to the RD's initial determination that the election be expedited. Here, as we have indicated, the Employer contests the RD's decision to proceed with the expedited election when a change in circumstances occurs after that initial decision has been made.

unionization and the current labor dispute.[4/]

The parties are in agreement that at the time the Petition was filed, a majority of the Employer's employees were engaged in a strike and that it was proper for the RD to direct an election within 48 hours of the filing of said Petition. The parties differ, however, as to the application of the Act's expedited election provision when the strike ends on the day before the election. The Employer contends that the termination of the strike constitutes sufficient cause for the RD to postpone the election for a few days so as to avoid undue prejudice to the Employer. The Union, on the other hand, argues that the Act's expedited election provision is not tolled or rendered

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[4/] The Employer argues alternatively that the strike was conducted solely for the purpose of obtaining an expedited election, which the Employer contends is prohibited by the Agricultural Labor Relations Act (ALRA or Act). However, the record clearly demonstrates that one of the reasons the employees were striking was the existence of a bona fide labor dispute concerning the calculation of their wages. The Employer admits as much in its pleadings. Hence, we do not reach in this case the question of the legality of a strike which is initiated for the sole purpose of obtaining an expedited election.

We also note, and are particularly concerned about, certain gratuitous statements made by the Board agent to the Employer in which he offered the opinion that the Union wanted the election to occur within 48 hours because it did not want to give the Employer an opportunity to campaign. The Board agent's conduct in this regard is contrary to section 2-9200 of our Case Handling Manual where we advise our agents that a strike is a volatile situation, and when they deal with an expedited election, that they must perform their duties in such a way that no one can misinterpret their actions. Agents are advised to be particularly careful about maintaining the appearance of neutrality during an expedited election. (Case Handling Manual § 2-9200.) While we note that the Board agent's conduct in this matter was inappropriate and ill-advised, we do not find the conduct to be of such magnitude that it would tend to interfere with employee free choice and thus constitute grounds sufficient to set aside the election.

inapplicable solely because the Union, on behalf of the striking employees, made an unconditional offer to return to work.

Analysis

In order to determine whether the Employer's exceptions have merit, we must ascertain whether the record establishes a cessation of strike circumstances. As was observed by the Board in Muranaka Farms (1983) 9 ALRB No. 20, the legislature, in enacting the expedited election provision, recognized the inherently volatile nature of a strike and the potential for violence and/or the loss of perishable crops. It therefore directed the Board to conduct elections in an expedited fashion in order to alleviate such situations. Hence, we must be reasonably certain that strike circumstances have indeed ended before we can say that an expedited election is no longer appropriate.

Upon our review of the record, we find uncontroverted evidence that strike circumstances had not ceased, and that strike activity was in fact continuing at the time the RD made his decision to proceed with the expedited election. The RD's stipulated testimony demonstrated that his decision to proceed with the election was based in part on his uncontroverted observation that picketing was still taking place. The unconditional offer to return to work made by the Union on behalf of the striking employees was not sufficient to demonstrate that strike circumstances had ended, particularly in view of the fact that there was still some picketing taking place several hours after the offer was made. Our finding herein is not unlike that reached by the National Labor Relations Board (NLRB or national

board) where its application of certain provisions of the National Labor Relations Act (NLRA or national act) turned on a determination as to whether a strike had been abandoned. (See, for example, American Metal Products Co. (1962) 139 NLRB 601 [51 LRRM 1338] where the national board refused to find abandonment of a strike when there was evidence of ongoing strike activity despite an unconditional offer to return to work made by the Union on behalf of striking employees. See also Bright Foods, Inc. (1960) 126 NLRB 553 [45 LRRM 1343]; Portland Willamette Company (1974) 212 NLRB 272 [86 LRRM 1677] revd. on other grounds (9th Cir. 1976) 534 F.2d 1331 [92 LRRM 2113]; and Stevens Ready-Mix Concrete Corporation (1982) 263 NLRB 1280 [111 LRRM 1221], where the national board maintained that even if picketing had temporarily ceased, the strike was not considered to have been abandoned as picketing need not be continuous in order to establish the continuing nature of a strike.) Therefore, on the basis of the evidence before the RD, we cannot say that he abused his discretion in refusing to postpone the election since the Act's mandate is clear that elections under strike circumstances are to be held in an expedited fashion wherever possible.

The Employer's assertion of prejudice suffered as a result of its abbreviated opportunity to campaign during an expedited election is equally unavailing. As the IHE pointed out in his Decision at pages 18-20, the legislature specifically rejected this argument in enacting the expedited election process.

CERTIFICATION OF RESULTS OF ELECTION

It is hereby certified that a majority of the valid ballots were cast for the United Farm Workers of America, AFL-CIO in the representation election conducted on July 30, 1988, among the agricultural employees of Perez Packing Company, Inc., and that, pursuant to Labor Code section 1156, the said labor organization is the exclusive representative of all agricultural employees of Perez Packing Company, Inc. in the State of California for purposes of collective bargaining, as defined in Labor Code section 1155.2(a) concerning employees' hours, wages and other terms and conditions of their employment.

DATED: December 5, 1989

GREGORY L. GONOT, Acting Chairman[5/]

IVONNE RAMOS RICHARDSON, Member

JIM ELLIS, Member

JOSEPH C. SHELL, Member

[5/] 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. The Board currently has one vacancy.

CASE SUMMARY

Perez Packing Company, Inc. 15 ALRB No. 19 Case
UFW No. 88-RC-6-VI

Background

On July 27, 1988, the Employer's employees went out on strike. The following day, the UFW filed a representation petition alleging therein that a majority of the unit employees were engaged in a strike. Finding that a majority of the workers were indeed on strike, the RD directed an expedited election pursuant to Labor Code section 1156.3(a). A pre-election conference was held at the Employer's premises on July 29, 1988, and at that time the Union made an unconditional offer to return to work on behalf of the striking workers. Concluding therefrom that the strike was over and that, therefore, an expedited election was no longer necessary, the Employer objected to the 48-hour election, contending that it was improper to proceed with the election when it was evident that the strike had ended. The RD dismissed the objection for the following reasons: (1) the Notices and Direction of Election had already been posted; (2) picketing was still taking place, and (3) the Employer had not been prejudiced. Later in the evening of July 29, 1988, the Employer went to the labor camp to campaign in connection with the upcoming election, which was held on July 30, 1988. The Official Tally of Ballots revealed 108 votes for the UFW, 47 for No Union, and 1 Unresolved Challenged Ballot. The Employer filed an objection to the election contending that it was an abuse of discretion for the RD to proceed with an expedited election when it was evident the strike was over the day before the election.

IHE's Decision

Following a hearing in which all parties participated, the IHE found that the RD did not abuse his discretion in deciding to proceed with the expedited election and that the Employer had an opportunity to campaign in connection with the election. The IHE dismissed the Employer's election objection and recommended that the results of the election be certified.

Board Decision

The Board found that at the time the RD made his decision to proceed with the expedited election, strike circumstances were ongoing in that picketing was still taking place several hours after the Union made its unconditional offer to return to work on behalf of the striking workers. On the basis of the evidence before the RD, the Board did not find that he abused his discretion in refusing to postpone the election since the Act's mandate is clear that elections under strike circumstances are to be held in an expedited fashion wherever possible.

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STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of: PEREZ PACKING COMPANY, INC., Employer, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Petitioner.	)	Case No. 88-RC-6-VI

Appearances:

Robert H. Murray
Visalia, CA 93219
for the General Counsel

Lee Tarkington-Lundrigan
Modesto, CA 954354 for the
Employer

Larry A. Dawson Dressier
and Quensenbery El Centre,
CA 92243 for the Employer

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

Before: Thomas Sobel
Investigative Hearing Examiner

DECISION OF INVESTIGATIVE HEARING EXAMINER

THOMAS SOBEL, Investigative Hearing Examiner: This case was heard by me on December 19, 1988 in Visalia, California. After an expedited election which resulted in a Union victory the Employer filed objections to the election. The Executive Secretary set two issues for hearing:

> 1. Whether an employer can obtain review of a regional director's decision to proceed with a strike election where the employer's objections to the expedited election are presented after the pre-election conference has been held and where the basis for such objections did not arise until after the pre-election conference was over?
>
> 2. If review is found to be available, whether the Regional Director in this case acted properly in refusing to cancel the previously scheduled election after being informed that the strike was over and in light of all the information available to him at that time?

FINDINGS OF FACT

On July 28, 1988, the United Farm Workers of America, AFL-CIC (UFw) filed a Notice of Intent to Organize and a Petition for Certification. The Petition alleged that a strike involving a majority of the employees of the Employer was then in progress. Pursuant to applicable Board regulations, Board Agent Ed Perez determined that a majority of the employees was on strike[1] in a dispute over how their pay was computed and because they wanted an

[1] The company does not contest Perez's ultimate conclusion that a majority of employees was on strike. See Employer's Statement of Facts and Law in support of its Objections Petition, page 1; see also, Tr:30.

election. In fact, the employees told Perez "we won't go back to work until we have an election."[2] (Tr:32.)

Following this conversation, agent Perez (hereafter Perez) went to the Employer's office where he spoke with Tom Perez (hereafter Tom), the son of the Employer's owner. Perez told Tom that the workers appeared to want to get back to work, but they also wanted an election: "I told [him] that....it appeared that the union was willing to tell the workers to go back to work if they [the company] agreed to a 48-hour election." (Tr:33,34.) Tom told Perez that he could not agree to a 48-hour election until he spoke to either his father or to the company's attorney, Larry Dawson. Apparently Tom relayed the Union's "proposition"[3] to Dawson because Dawson called Perez later in the afternoon to tell him that the company would not agree to an expedited election. In the course of this conversation, Perez opined that the Union

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[2]So long as no other union is certified to represent an employer's employees, it is lawful under the NLRA for a union to strike for an election, United Mine Workers v. Arkansas Oak Flooring Co. (1956) 351 U.S. 62. There seems no reason to treat having an election as an unlawful strike objective under the ALRA.

[3]Perez described the Union's "position" regarding the 48 hour election very gingerly. He testified that there was never any direct offer to end the strike if the company would agree to a 48 hour election and that the Union did not request him to sound the company out on its willingness to agree to one. "It was more of a question that was posed to me . . . . by both the workers and the union representatives." [Tr:28-29] However Perez understood his role, I conclude that the Union and the employees wanted a quick election .

wanted an expedited election because it "didn't want to give the company an opportunity to campaign." (Tr:35.) Perez acknowledged saying this, but also admitted that he was only offering his opinion: no one from the Union and no striker told him why they wanted an expedited election.[4]

Meanwhile, in apparent anticipation of an election campaign flowing from the strike, the Employer had contacted Jose Agraz, a labor relations consultant, for assistance. Agraz testified he was "called in for the election" on July 27, 1988, the day before the petition was even filed,[5] but that he couldn't

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[4]With all due respect to Perez ' s opinion, it seems to me that if the Union wanted an expedited election solely for a tactical reason, the reason would probably be that it was more likely to prevail among an aroused electorate than that it simply wanted to deny the Employer the opportunity to campaign.

While I am considering the question of motivation, I should point out that the Employer requested that I take administrative notice of the fact that the UFW has twice before unsuccessfully sought certification at this unit on the theory that these "losses" indicate the Union was not likely to win a seven-day election. (Tr: 48-49.) While I advised the employer I could take notice of Board records in respresentation cases, I also advised the Employer I could not draw the conclusion the Employer wanted me to draw. Board records do show that there were two previous elections among the Employer's employees. The Union did not lose both of them, however. On the contrary, it was victorious in a 1975 election, but the election was set aside. Perez Packing, Inc. (1976) 2 ALRB No. 13. Although a 1983 election did result in a No-Union victory, I do not believe I can infer from the results of a previous election what the results would have been in this one. Indeed, if predictions of this kind were reliable, one election every five years would be sufficient under the Act. More importantly, the Employer's argument treats the amount of time it has to campaign as the only variable affecting employee sentiment and completely ignores the emotional impact of the wage dispute and the strike as affecting employee sentiment.

[5]The Petition for Certification was filed shortly after 9:30 a.m on July 28, 1988.

come immediately because he was then involved in another campaign The following morning, however, he went to the Employer's labor camp, but he decided not to conduct any sort of campaign:

> "Well, on Thursday when I arrived at the camp there, no actual campaigning took place because the workers were on strike. The union was out there. They had their flags. They were waving the flags. So I was not able to go and talk with the strikers or do any campaigning at that time since the majority were outside the—the camp there, in front of the camp. You know, waving their flags and, you know, screaming and yelling. (Tr:63.)
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> * * *
>
> [T]he reason I didn't go out and campaign while the strikers were outside, it's not very prudent to go out and campaign while strikers are—are out there striking, with flags flying, you know, sticks, you know waving. The adrenaline's very high and anytime you try to talk with workers, you know, where the adrenaline's high, the emotions are running high, and its not a very safe or healthy situation.
>
> I've been involved in other campaigns when I've attempted to do that, and at one other strike situation where the UFW was involved also, you know, it was — they tried to drag me out of the jeep.... (Tr:71.)
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> * * *
>
> So that experience showed me that, you know, you can't really go out there and talk, you know, talk or campaign with strikers when the adrenaline's going and you...can't present any positive information to the workers, present the employer's side, get the facts to--you know the workers. (Tr:72.)

When asked to specify what the strikers were actually doing, Agraz emphasized "name-calling," "heckling and screaming," and "running back and forth with flags."[6]

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[6] The Employer's Counsel also elicited testimony from Agraz that strikers had entered the Employer's fields earlier in the day "to stop the replacements from working" and that the Sheriff's

I take it that Agraz has identified two related, but nonetheless distinct reasons for not attempting to campaign: 1) that it is not "safe or prudent" to do so "where the adrenaline's high, the emotions are high," and 2) that it is not effective to campaign "when the adrenaline's going and you...can't present the employer's side, get the facts to...the workers."

(Footnote 6 Continued)

department had been called to remove them. Agraz explained that this, too, helped to determine him not to campaign:

> So when we arrived, the strikers were no longer in the--in the field. They had gone out inside the field to stop the replacement workers from working. So by the time we got there, the sheriffs were—were still there, and the sheriffs had gotten the strikers, you know, out of the field, and they were out in the--the side of the road.
>
> * * *
>
> Well, they were going back and forth alongside of the field, you know, waving the flags and, you know, calling out at the replacement workers that were inside the field working.
> Q (By Employer's Counsel) And did this affect whether you went forth and presented any kind of campaign at that time?
> A. No. You know, we couldn't campaign under those –
> Q. But did it affect whether --
> A. Yes. You know, when — when you get, you know, people rushing, you know, workers rushing the fields and trying to get workers from stopping picking, you know, there's no way you're going to be able to campaign, to present, you know, any facts to them or talk with them.

It is clear from his testimony that Agraz himself did not see anyone "rush" the fields; indeed, he didn't even testify that anyone told him the strikers had "rushed" the fields. For all the record shows, the strikers may have been attempting to take strike access, one of the purposes of which is to persuade employees to join a strike. See Bruce Church (1982) 7 ALRB No. 22. Agricultural Labor Relations Board v. California Coastal Farms (1982) 31 Cal.3d 469, 482-83. That the Sheriff's Department was present does not establish what took place during the incident. I advised Employer's Counsel at the hearing that I could not take this testimony as proof of violence during the strike.

On July 29th, the pre-election conference was held. It began at about 10:15 a.m. Perez testified that he brought up the question of the company's agreeing to a 48 hour election on "more than one occasion" during the pre-election conference. He did so because in his judgment it would "be better for everybody concerned to defuse the situation" (Tr:37), but the Employer would not agree to the expedited election. As the pre-election conference was coming to an end — Perez testified it had either ended or was coming to an end (Tr:37) -- Miguel Camacho, the Union's representative, asked to speak to Perez privately:

> Vvell, I indicated to him that during the pre-election conference it was very improper to do that. And you had to be very open, and so that everybody sees that, you know, you don't have any vested interest one way or another, that you're impartial. So I declined meeting in private with him. But he kind of insisted, in a nice way, and so to keep things rolling, I agreed, okay, tell me what it is. But I told the company, you know, I'll let you know what -- the gist of what -- what transpired.
>
> And that's when we -- I think we stepped -- no, the company stepped out, I think. They went into another office. And we remained there in the conference, and that's when Mr. Camacho indicated what he was going to do, that he was in fact going to tender an official offer to return back to work. And he wanted me to do it. And I said, you know, I very respectfully declined. But I, really, this is one issue that the parties should work out themselves. Because, you know, if I — if I am party to -- to something of this nature, I might in some date in the future find myself testifying about what went on here.
>
> So I -- I declined. I came back -- when the company came back. I indicated to them that Mr. Camacho wanted to tender an offer — and that I wanted --
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> Q (By Employer's Counsel) You said that during the meeting?
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> A No, when they came back to the meeting. They came

> back to the pre-election conference, after they had taken the -- the company representative, Mr. Dawson, and Mr. Perez, and I -- believe Mr. Agraz was -- and they came back. I told them that the union — what had transpired, that the union was going to offer to have the workers come back to work the following day, I think. And I told them that, you know, I'd rather that they work out the details amongst themselves.
>
> (Tr:38-39)

From the absence of any discussion among the Union representatives both before and after Camacho's tender of the unconditional offer, the Employer asks me to conclude that the Union planned to end the strike before the pre-election conference even began. Although I do not believe the Union was willing to call off the strike under any circumstances, it is reasonable to infer, and I so find, that the Union was prepared to call off the strike once an expedited election had been scheduled.[7] That was one of the objectives of the strike.

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[7]The Employer argues that the strike was over as soon as the unconditional offer was tendered on the grounds that Camacho stated it was over. I have not been able to find any cases directly on point and the Employer does not cite any. However, NLRA precedent on an analogous point is instructive. Both the NLRB and the courts have endorsed variants of a rule that makes it an unfair labor practice to discharge employees who continue strike activity after execution of a collective bargaining agreement with a no-strike clause. The rationale for the NLRB's rule that a no-strike clause is not instantaneously effective is that after a strike there must be "a period of time .... for the air to clear and the dust to settle." Deauville Hotel (1981) 256 NLRB 561. Although the Board's rule was disapproved in NLRB v. Deauville Hotel (llth Cir 1985) 751 F.2d 1652 as too subjective, the Court of Appeals concluded that the Board could fashion a rule which provided a "reasonable period of time to allow the parties most affected by the contract to be informed." Since, as Perez testified, all Camacho offered was to have the employees return the next day, and under analagous federal law, a no-strike clause is not instantaneously effective, I conclude that the strike was not "over" immediately upon Camacho's tender of the unconditional offer.

The company's attorney at once objected that an expedited election was no longer appropriate. Not having confronted such a situation previously, Perez told Dawson he would have to consult with Regional Director Lawrence Alderete. Perez returned from talking to Alderete about one-half to three-quarters of an hour later whereupon he advised Dawson to call Alderete personally. Perez admitted that in his discussion with Alderete he did not tell him about the Union's earlier "feelers" to the company about calling off the strike if the company would agree to an expedited election.[8] (Tr:46.) In the meantime, Perez advised Dawson that unless he heard differently from Alderete, he would conduct himself as if the election would proceed as scheduled.

Dawson reached Alderete by telephone at approximately 2:15 p.m. to object to the expedited election. Alderete claims[9] that he told Dawson to submit his objection in writing; Dawson claims Alderete merely inquired whether he was going to submit something in writing.[10] At 2:45 p.m. Dawson read the company's

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[8]Whether Alderete would have made a different decision had he known about this will never be known, nor is Perez's failure to tell him important since I am taking the union's and the employees' desire for an expedited election into account.

[9]Alderete did not testify. It was stipulated that, if called, he would testify as described above.

[10]I do not regard it as of any moment which version of this conversation is credited. The factual dispute is relevant only to the procedural question which I dispose of on other grounds.

written position to Alderete over the phone and advised Alderete that a copy would shortly be delivered to him. At 4:15 p.m., Dawson learned from Jose Agraz that Alderete had denied the company's objection for three reasons: (1) the Notices and Direction of Election had already been posted; (2) picketing was still taking place, and (3) the employer had not been prejudiced. In a later conversation with Dawson, Alderete confirmed this decision.

The Employer does not dispute Alderete's contention that the Notice(s) and Direction of Election had already been posted.[11] It seems to dispute his conclusion that picketing was still taking place and it vigorously disputes his ultimate conclusion that it was not prejudiced. I will discuss the "prejudice" issue in the next section. With regard to the question whether picketing had ceased, I must conclude that no evidence contradicts Alderete's conclusion that it had not. In the first place, the parties' stipulation indicates that Camacho needed time to contact the strikers in order to "make sure all picketing had ceased and all the union flags would not be displayed." (Tr:16.) Second, Alderete made his decision around 4:15. Agraz admitted that picketing was

[11] Indeed, the Employer's Petition to Set Aside the Election, p. 4 at n. 2, states that "the Employer had agreed the Notice [and Direction of Election] could be posted." I regard this as a judicial admission since the validity of Alderete's conclusions is at issue in this case.

going on during the pre-election conference, but that it had ceased by the time he got to the labor camp after the pre-election conference. Since Agraz did not arrive at the labor camp until approximately three quarters of an hour to hour and three quarters after 4:15,[12] there is no contradiction between Agraz's testimony and Alderete's conclusion.

When Tom and Agraz went to the labor camp, they met with somewhere between 15 and 40 workers according to the respective offers of proof. Tom testified there were only 15 or 20 workers present in the labor camp kitchen when he and Agraz spoke, although there were a lot more workers present in the camp. Agraz admitted the meeting was sparsely attended. Although Agraz attributed the lack of attendance to the fact that it was payday, and the fact that the Union was having a meeting of its own, Tom admitted the workers just "didn't want to talk to [them]." (Tr:57.) The two men passed out some leaflets at the meeting. The parties also stipulated that the Employer placed leaflets on all the beds at the labor camp earlier in the day.[13]

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[12]The parties stipulated that Tom and Agraz met with employees at the labor camp at 6:00 p.m. Tom testified the meeting took place a little after 5:00 p.m. Since both times are after 4:15 p.m. it is not necessary to decide whether the stipulation or the testimony should control.

[13]Despite the fact that the leaflets it distributed contain the message the Employer wanted to deliver, the Employer claims that leaflets are not an effective way to campaign. In support of this contention, it cites Derek Bok ' s important article, The Regulation of Campaign Tactics in Representation Election Under the National Labor Relations Act (1964) 78 Harvard Law Rev. 38, 88-89. Bok ' s statement in this regard is supported by several studies. Other empirical studies have concluded that "employees are not generally

ANALYSIS

1.

As noted, the Executive Secretary explicitly set for hearing the question whether the objection to holding the strike election can even be raised in post-election proceedings. The procedural problem recognized by the Executive Secretary flows from Title 8, Code of California Regulation, section 20377(c) which, on its face, appears to require that objections to a 48 hour election be raised prior to the pre-election conference:

> Any party who contends that a 48-hour election is improper shall notify the regional director of its contention and shall submit evidence in the form of written declarations under penalty of perjury supporting the contention and the manner in which the party would be prejudiced. The notification and submission of such evidence must be made prior to the pre-election conference. Absent such notice, the regional director"s determination shall not be reviewable in post-election objections under section 20365.

The Union argues that the regulation is clear on its face and that the Employer, having failed to follow the notice and

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(Footnote 13 Continued)

attentive to the campaign.*** More importantly, there is little evidence that the precise details of campaign propaganda play a substantial role in influencing voters." Getman and Goldberg, The Behavorial Assumptions Underlying NLRB Regulations of Campaign Misrepresentations: An Empirical Evaluation (1975) 28 Stanford Law Review 263, 383. While this study has been challenged, see e.g., Miller, The Getman, Goldberg and Herman Question (1976) 28 Stanford Law Review 1163, Miles to Go, Promises to Keep Securing Workers' Rights to Self-Organization Under the NLRA (1983) 96 Harvard Law Rev. 1769, 1781-86, the skepticism it invites swallows the Employer's entire argument. I take no position in this debate, I advert to it only to demonstrate that on his record, I cannot evaluate whether a particular campaign message would be more effective if delivered in one form than in another. That is an empiric question.

submission requirements of subsection (c), cannot now obtain review of the Regional Director's decision to proceed with a 48 hour election.

The Employer's answer to this procedural question is merged in its constitutional attack on the use of the expedited election procedure. It appears to contend that if subsection (c) is read to prevent it from asserting a constitutional claim, then subsection (c) is unconstitutional. I do not believe I need to reach the "procedural" aspect of the Employer's constitutional argument, since I believe that when section 20377 is read in its entirety, it will be seen not to block consideration of the Employer's objection in these proceedings.

> Section 20377 - Elections Under Strike Circumstances
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> (a) Where a petition for certification alleges that a majority of employees are engaged in a strike at the time of the filing, the regional director shall conduct an administrative investigation to determine whether such a majority exists, and shall notify the parties of his or her determination. Where the regional director determines that a majority of employees in the bargaining unit were on strike at the time of filing, he or she shall exercise all due diligence in attempting to hold an election within 48 hours of the filing; however, this shall not be construed to require that an election be held in 48 hours. The holding of elections under strike circumstances takes precedence over the holding of other elections.
>
> (b) The procedures set forth in Chapter 3 of these regulations shall apply to the conduct of elections under this section insofar as is practicable under strike circumstances. The regional Director shall have authority to establish reasonable procedures for the conduct of expedited elections under strike circumstances. In particular, upon notice to an consultation with the parties, he or she may establish procedures for expediting the receipt of information necessary to evaluate showing of interest and timeliness of the petition pursuant to Labor Code section 1156.4: and may reasonably shorten deadlines specified in

section 20300(j)(2) and (4), 20310(d), 20325(e), and 20350(d) of these regulations.

(c) Any party who contends that a 48-hour election is improper shall notify the regional director of its contention and shall submit evidence in the form of written declarations under penalty of perjury supporting the contention and the manner in which the party would be prejudiced. The notification and submission of evidence must be made prior to the pre-election conference. Absent such notice, the regional director's determination shall not be reviewable in post-election objections under section 20365.

Subsection (a) requires the Regional Director to make a "determination whether a majority of employees is on strike". It further requires him (or her) to notify the parties of this "determination." The "determination" spoken of by subsection (a) is whether or not a majority of employees is on strike. The word is not used in section 20377 again until the final sentence of subsection (c) when, after setting out the notice and submission requirements at issue in this case, the subsection makes conformance with such requirements a precondition for obtaining review of a Regional Director's determination.

By tracing the use of the word "determination" back to subsection (a) where it originates and where it is contextually defined, it seems to me that the "determination" which subsection (c) makes unreviewable except upon the giving of notice prior to the pre-election conference is that which relates to the question of majority support. I conclude, therefore, that the question "whether a 48 hour election is proper", which the first sentence of subsection(c) makes conditional upon the notice and submission

requirements, also refers only to the "majority" requirement about which the Regional Director makes a "determination." Thus, the Employer's lack of compliance with the procedural requirements of subsection (c) is not an impediment to hearing on its objection since its particular objection does not relate to the "majority" question.

2.

The second question set for hearing by the Executive Secretary is whether the Regional Director abused his discretion in refusing to re-schedule tne election once it was clear the strike was over.

The parties do not agree on the scope of this question. The employer argues that as a matter of fact it was "prejudiced" by the Regional Director's refusal to reschedule the election. The Union argues that prejudice is not an issue: it was neither raised by the Employer nor set for hearing by the Executive Secretary, and that, in any event, the Regional Director could not have abused his discretion since he did nothing more than what the statute permitted him to do.

I will deal with the last argument first. It is true that the Regional Director had the authority under the statute (and, if I read the statute correctly, is even encouraged by it) to hold the election within 48 hours.[14] However, since the Board

[14]Labor Code section 1156.3(a) reads:

> If at the time the election petition is filed a majority of the employees in a bargaining unit are engaged in a

has interpreted section 1156.3(a) as not requiring it to hold 48 hour elections in all strike situations, see 8 Code of California Regulations section 20377(a), supra at p. 13, it seems proper to ask whether the Regional Director should not have done so in this case.

For similar reasons, I also reject the contention that the question of "prejudice" was not specifically set for hearing. The Executive Secretary did set for hearing the question whether the Regional Director acted properly in refusing to reschedule the election. As a general proposition, it seems to me that the question whether an official acted properly fairly includes the question whether anyone was prejudiced by what he did. Moreover, since the Regional Director gave lack of prejudice as one of his reasons for not rescheduling the election, the propriety of his conclusion in this regard is necessarily at issue in testing his discretion.

3.

Although I conclude that the issue of prejudice was properly raised, I am not persuaded that the kind of prejudice the Employer claims to have suffered has been demonstrated on this

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(Footnote 14 Continued)

> strike, the board shall, with all due diligence, attempt to hold a secret ballot election within 48 hours of the filing of such petition. The holding of elections under strike circumstances shall take precedence over the holding of other secret ballot elections.

record. It is clear from the record that Agraz made a decision not to even try to campaign because in light of his previous experience he concluded that it was imprudent or useless to do so.

With respect to the question of safety, I do not believe that Agraz's having been attacked by strikers at another election supports his conclusion that he was liable to be attacked during this one. While I can understand his personal reluctance to expose himself to what he considered a dangerous situation, I think this Board must be guided by more objective considerations. Agraz's fear of danger based upon one experience no more proves the imminence of danger during this strike than the reluctance to drive on the part of someone who has once been in an automobile accident "proves" he will have another one. Had the picketers approached Agraz threateningly or menaced him with their signs, the matter would be different, but the fact that they were carrying placards and yelling and rushing from place to place, does not imply danger. What Agraz described is no more characteristic of a riot than it is of a parade, of a political convention, or of a peaceful demonstration.

Evaluation of the Employer's contention that it could not campaign effectively during the strike entails different considerations. Since Agraz himself did not try to speak to anyone on the picket line, there is no direct evidence that he would have been rebuffed. However, from Tom's testimony that the

strikers still "didn't want to listen" to him and Agraz after the strike ended, it seems reasonable to infer that the strikers would not have been greatly receptive to his message. But that would be their choice to make, strike or no-strike. Given adequate opportunity to speak, neither the fact that those for whom a message is intended choose not to listen, nor the fact that they are not persuaded by a speaker's message, implies any limitation on the speaker's freedom of expression. (Rowan v. United States Post Office Department (1970) 728, 737 "Nothing in the Constitution compels us to listen to or view any unwanted communication....)[15]

The Employer had the same 48 hours in which to campaign as any other agricultural employer generally has under strike circumstances. The disadvantages it complains about during this period were inherent in the nature of the strike and in the nature of the relationship between employers and employees during a strike; they do not derive from anything the Regional Director did. Up through the pre-election conference, then, what the

[15]It is true that the Board has spoken in terms of "effectiveness" of communication in discussing "access" questions, but, as the rubric implies, "access" cases are really about the opportunity to communicate, not the impact of the intended message. See Agricultural Labor Relations Bd. v. Superior Ct. (1976) 16 C.3d 392. It is also true that the Board typically looks to the impact of speech to see if it violates section 1153(a) or, in the election context whether it unfairly effects the outcome of an election, but these prophylactic functions do not imply a correlative duty on the Board to insure that a party's campaign efforts have an effect.

Employer is really complaining about is the validity of the legislative judgment that 48 hours provides a meaningful opportunity to campaign. But this argument was specifically rejected by the legislature in enacting the expedited election procedure. Thus, the following exchange took place between Senators Greene and Dunlap and an employer representative during hearing on the bill that became the ALRA.

> SENATOR GREENE: I wanted to ask the attorney what you meant when you said the employer did not have the opportunity to express...
> JORDAN ELOOM: Let me put it in more definitive terms. The employer does not have the right to effectively express his views to employees.
> SENATOR GREENE: Specifically, how is the employer denied that?
> JORDAN BLOOM: For example, if a union can file a petition at peak harvest time, and if they can allege in the petition that a majority of the employees are on strike, how they can prove that I don't know, but that can be alleged, that election could be conducted in 48 hours before the employer might even know that the petition was on file because the law says that it has to be served by registered mail.
> SENATOR GREENE: Well, the...
> JORDAN BLOOM: You know, forty-eight hours later.
> SENATOR GREENE: Does the 48 hours give him plenty of time?
> JORDAN BLOOM: Absolutely not.
> SENATOR GREENE: Why does this 48 hours not give him enough time?
> JORDAN BLOOM: Well, suppose you're talking about a situation where you have a couple of hundred, three hundred employees and you wish to communicate your views to them. How are you going to do it?
> SENATOR GREENE: Well, what precludes you from doing it?
> JORDAN BLOOM: What precludes it? As a practical matter, it can't be done. Within 48 hours after a petition has been filed?
> SENATOR GREENE: Well, you have 48 hours.

* * *

SENATOR DUNLAP: They both have 48 hours, and printers operate pretty fast. Those of us in politics are quite aware of that.
Public hearing on SB1, Third Extraordinary Session, May 21, 1975

I do not believe I could find the sort of prejudice the Employer claims to have suffered on this record without upsetting the legislative's judgment that no such prejudice exists.

4.

This does not settle the matter for the question still remains whether the Board had an obligation to provide additional opportunity for the employer to campaign (to borrow a phrase) "after tne air had cleared and the dust had settled." As noted, the Employer essentially maintains that it was entitled to have the election postponed in order to have the opportunity to conduct a "meaningful" campaign, which I take to mean one in which it could communicate with workers off the picket line. The Employer's argument is quickly summarized: Employers have a right to attempt to persuade their employees to vote against unionization. This right is not merely of statutory, but also of constitutional, dimension. In view of the constitutional footing of the this right, it may only be curtailed by a compelling state interest. It follows, the argument concludes, that once the strike ended, the balance shifted in favor of its opportunity to campaign.

The Employer is correct, and our Board has recognized, that "an employer is free to communicate to his employees any of

his general views about unionization 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.'" Limoneira Company (1987) 13 ALRB No. 13, Arrow Lettuce Company (1988) 14 ALRB No. 7. The Employer is also correct that this right is of constitutional dimension, Dow Chemical Co., Texas Division v. NLRB (1981) 665 F.2d 637, NLRB v. Gissel Packing Co. (1969) 395 U.S. 575, at least insofar as the expression of "views, arguments and opinions" may not be considered in violation of the Act, or as grounds to set aside an election. Labor Code section 1155. Dal Tex Optical (1962) 137 NLRB No. 189.

However, I can find no support for the Employer's contention that a compelling state interest analysis applies in this case. The employer cites no labor cases in support of its contention and I have not been able to find any; nor, as a general matter, is there any support for the unstated premise of the argument that the First Amendment standard applicable to issues of public concern is unvaryingly applied to any context in which speech interests are involved. To the contrary, as Mr. Justice Stewart put it in another context: "the scope of constitutional protection of communicative expression is not universally inelastic", Va. St. Bd. of Pharm. In fact, there are frequent differences between the treatment accorded speech in the area of labor relations and in the public forum:

> Speech by an employer or a labor union organizer that contains material misrepresentations of fact or appeal to racial prejudice may form the basis of an unfair labor practice or warrant the invalidation of a

> certification election. [Cite] Such restrictions would clearly violate First Amendment guarantees if applied to political expression concerning the election of candidates to public office. [Cite] Other restrictions designed to promote antiseptic conditions in the labor relations context, such as the prohibition of certain campaigning during the 24 -hour period preceding the election, would be constitutionally intolerable if applied in the political arena. [Cite]
>
> Ibid, at p.788, n.3

The most ample statement of the theoretical foundation for these differences appears in NLRB v. Gissel Packing Co. (1969) 395 U.S. 575, 617-618.

> [Vv]e do note that an employer's free speech right to communicate his views to his employees is firmly established and cannot be infringed by a union or the Board. Thus, §9(c) (29 U.S.C. §l58(c) merely implements the First Amendment by requiring that the expression of "any views, argument, or opinion" shall not be "evidence of an unfair labor practice," so long as such expression contains "no threat of reprisal or force or promise of benefit" in violation of §8(a)(a). Section 8(a)(l), in turn, prohibits interference, restraint or coercion of employees in the exercise of their right to self-organization.
>
> Any assessment of the precise scope of employer expression, of course, must be made in the context of its labor relations setting. Thus, an employer's rights cannot outweigh the equal rights of the employees to associate freely, as those rights are embodied in §7 and protected by §8(a)(l) and the proviso to §8(c). And any balancing of those rights must take into account the economic dependence of the employees on their employers, and the necessary tendency of the former, because of that relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear. Stating these obvious principles is but another way of recognizing that what is basically at stake is the establishment of a nonpermanent, limited relationship between the employer, his economically dependent employee and his union agent, not the election of legislators or the enactment of legislation whereby that relationship is ultimately defined and where the independent voter may be freer to listen more objectively and employers as a class freer to talk.

Gissel does not establish a test for generally determining questions concerning First Amendment interests; what it does do is define and protect a core area of speech that may not be considered as deriving an unfair advantage from the employer's superior position. This is the area of "views, arguments, or opinions" recognized by both section 8(c) and Labor Code section 1155. While the Board must determine in the first instance how particular statements square with these privileged categories, the Board cannot regulate expression that is fairly included within them. Outside of this irreducible area of "views, arguments, opinions," and pursuant to the stricture of section 1153(a), the proviso in section 1155 and the Board's statutory power to control elections, the Board regularly exercises its judgment as to the likely implications or effects of particular forms of expression.

The Board's power to regulate the "time, place and manner" of party speech pursuant to these other statutory provisions is by now so well-established that the courts typically resort to a "reasonableness" standard in viewing Board rules touching the content and maaner of campaigning.[16] indeed, under a

[16]When Gissel is seen to set the balance against whatever may fairly be said to interfere with employee free choice, or in a complementary formulation, in favor of whatever may fairly be said to promote employee free choice, the question of the "reasonableness" of determinations about the likely effect of communications becomes dispositive.

test of "reasonableness" a variety of rules designed to effectuate the NLRB's "laboratory conditions" standard, and effecting both the content and opportunities for speech in representation elections, have been upheld.

Thus, the National Board's Peerless Plywood rule which, like our statute's expedited election procedure, limits the opportunity to campaign, has been uniformly accepted by the courts[17/] on the grounds that "[w]hether a representation election has been conducted under conditions compatible with the free choice of employees, is a matter which Congress has committed to the discretion of the Board." NLRB v. A.J. Tower Co. (1956) 329 US 324, 330. The deference accorded the Board with respect to the conduct of representation elections is so great that even contradictory approaches, such as in the area of campaign misrepresentations, have also been upheld as equally within the scope of reasonable discretion. See, e.g., NLRB v. Monark Boat Co. (8th Cir. 1983) 713 F.2d 355, NLRB v. Best Products Co., Inc. (9th Cir. 1985) 765 F.2d 803, 913.

It seems to me, therefore, that The Employer's constitutional attack upon the Regional Director's decision

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[17]See International U Electrical R & M Workers v. NLRB (DC Cir 1974) 502 340, NLRB v. Yokell (2nd Cir 1967) 387 F.2d 758, American Bride Divison, U.S. Steel Corp v. NLRB (3rd Cir 1972) 457 F.2d 660; National Labor Relations Board v. Shirlington Supermarket (4th Cir. 1955) 224 F.2d 649, Argus Optics v. NLRB (7th Cir 1975) 515 F.2d 939; NLRB v. KIT-MCO Incorporated (8th Cir 1970) 428 F.2d 775; NLRB v. Hudson Oxygen Therapy Sales Co. (9th Cir 1985) 764 F.2d 729; NLRB v. Excelsior Laundry Co. (10th Cir 1972) 459 F.2d 1013.

to go ahead with the election reduces to the question whether the Regional Director's decision reasonably promoted employee free choice. If holding the election as scheduled did promote free choice, then whatever diminution of the opportunity to campaign was suffered by this Employer, would be outweighed by the broader statutory interest in employee free choice.

The Employer does not directly address this question. However, it generally argues that once the strike ended, no statutory purpose could be served by holding an expedited election because the rationale for an expedited election evaporated with the strike. In order to assess this argument, we must first consider the intent behind the strike election procedure:

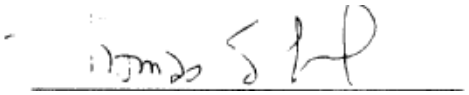
> The Act directs the Board to conduct strike-time elections within 48 hours after the filing of a petition if at all possible and mandates that such elections take precedent over all other elections. In enacting this scheme, the legislature recognized the inherently volatile nature of a strike, the potential for violence and/or disruption in production, and directed us to conduct elections in order to mollify the situation.
> Muranaka Farms (1983) 9 ALRB No. 20, p.9

In other words, the Legislature hoped that quick elections might substitute the system of collective bargaining through freely chosen representatives for economic warfare between the parties. It appears to me that the Union's willingness to trade the strike for an election is not only consonant with, but also fulfills, this statutory purpose. The Employer's argument, that if the Union wanted an expedited election, it should have

continued to strike not only serves no one's interest but also finds no support in the statute which makes the time when the petition is filed the critical reference point for determining the propriety of an expedited election. Moreover, since an expedited election was one of the objectives of the strike it is not at all clear to me that the election could have been called off without the strike's being resumed. Indeed, the weakness of the Employer's argument is that it treats the strike's ending as a totally noncontingent event unrelated to the condition on which it ended. Under the circumtances of this case, including the fact that the Employer chose not to campaign when it could have, it seems to me that the statutory purpose behind the expedited election procedure, namely, to relieve the pressures of a strike situation and to permit the substitution of employee free choice for economic warfare between the parties, remained fully operative and the Regional Director did not abuse his discretion when he drew the same conclusion.

Accordingly, I recommend that the objection be dismissed and that the results of the election be certified.

DATED: March 20, 1989



THOMAS SOBEL
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