Moorpark, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

THE CAREAU GROUP, dba EGG CITY, Employer, and RAMON ORNELAS and JOSE ZARAGOZA, Petitioners, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Certified Bargaining Representative.	Case No. 86-RD-6-SAL(OX) 15 ALRB No. 21

DECISION AND CERTIFICATION OR RESULTS OF ELECTION

On October 27, 1986, Petitioners Ramon Ornelas and Jose Zaragoza filed petitions under the provisions of Labor Code section 1156. 3 (a)[1/] to decertify the United Farm Workers of America, AFL-CIO (Union or UFW) as the exclusive certified collective bargaining representative of all the agricultural employees of The Careau Group dba Egg City (Employer) in the State of California.[2/] On November 3, 1986, the Regional Director of

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

[2/] The Agricultural Labor Relations Board (ALRB or Board) determined in Cattle Valley Farms (1982) 8 ALRB No. 24 that when no collective bargaining agreement is in effect, decertification petitions may be filed under the general provisions of section 1156.3(a) rather than the specific decertification provisions of section 1156.7(c). At an earlier stage of this case, the Board, under the provisions of Title 8, California Code of Regulations, section 20365(e) (8), determined that non-agricultural employees could also file decertification petitions pursuant to section 1156.3(a).

the Board's Salinas Regional Office conducted a representation election among the Employer's agricultural employees. The official Tally of Ballots showed the following results:

No Union 105

UFW 79

Unresolved Challenged Ballots 9

Thereafter, the Union timely filed postelection objections, five of which were the subject of an evidentiary hearing held before Investigative Hearing Examiner (IHE) Thomas Sobel on April 18, 19, and 20, 1989, in Oxnard, California. On June 21, 1989, IHE Sobel issued the attached Decision in which he recommended that all the Union's objections be dismissed, and that the results of the decertification election be certified. The Union timely filed exceptions to the IHE's Decision with a supporting brief, and the Employer filed a responding brief.

The Board has considered the IHE's Decision in light of the exceptions and supporting and responding briefs, and has decided to affirm the IHE's rulings, findings, and conclusions of law, and to certify the results of the election.[3/]

[3/] The Board has closely examined the record to determine whether there was actual litigation of an objection alleging that statements, unattributable to the Employer and concerning the effect of the decertification election on the Employer's ongoing operations, were made and created an atmosphere of fear or reprisal such that employee free choice was thereby rendered impossible. While the record is unclear on that question, the Board has treated the matter as if it had been litigated, and concludes that the evidence, when viewed in the light most favorable to the Union, is insufficient to justify setting aside the election on that basis.

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 November 3, 1986, among the agricultural employees of The Careau Group dba Egg City in the State of California, and that the United Farm Workers of America, AFL-CIO thereby lost its prior status as, and therefore no longer is, the exclusive bargaining representative of said employees for the purpose of collective bargaining as defined in section 1155.2(a).

Dated: December 15, 1989

GREGORY L. GONOT, Acting Chairman[4/]

IVONNE RAMOS RICHARDSON, Member

JIM ELLIS, Member

JOSEPH C. SHELL, Member

[4/] 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

The Careau Group, dba Egg City (UFW)
15 ALRB No. 21
Case No. 86-RD-6-SAL(OX)

Background Facts

The Agricultural Labor Relations Board (ALRB or Board) certified the United Farm Workers of America, AFL-CIO (UFW or Union) as the certified exclusive collective bargaining agent of all the agricultural employees of Julius Goldman's Egg City in 1978. (See certification order in Case No. 75-RC-21-M.) The Careau Group, dba Egg City (Employer) purchased the operations and succeeded to the prior owner's obligations under the Board certification in May 1985. The collective bargaining agreement in effect between the prior owner and the Union expired in September 1985, and the Union commenced a strike and boycott activities against the Employer in June 1986. (See The Careau Group dba Egg City, et al. (1989) 15 ALRB No. 10.) Petitioners Ramon R. Ornelas and Jose Zaragoza filed separate petitions to decertify the Union on October 27, 1986, and the Board conducted a decertification election among the Employer's agricultural employees on November 3, 1986. The results of the election showed 105 votes in favor of "no union," 79 in favor of the Union, and 9 unresolved challenged ballots. The Union thereafter filed 30 objections to the election, of which the Board set 5 for hearing before Investigative Hearing Examiner (IHE) Thomas Sobel.

Investigative Hearing Examiner's Decision

The IHE granted the Employer's motion at the close of the Union's case to dismiss the Union's objection alleging that statements attributed to the Employer and published in a local newspaper shortly before the election reasonably tended to interfere with employee free choice. The Union's attempted interim appeal of the IHE's ruling under the provisions of Title 8, California Code of Regulations, section 20242 was denied by the Board without prejudice to subsequent presentation as an exception to the IHE's Decision. The Union presented no proof, and withdrew at the hearing, its objection alleging that Board agents acted improperly in failing to notify and/or process for voting eligible voters resident in Mexico. The IHE found that a purportedly violent confrontation between petitioner Ramon Ornelas and Union representative Alberto Escalante, in which Ornelas allegedly grabbed Escalante off the ground by his collar and threatened to kill him, in reality consisted of a fairly innocuous shoving match in which Ornelas knocked a stack of caricatures of himself and petitioner Zaragoza from Escalante's grasp, but returned them at the direction of a security guard. The IHE further decided that Escalante's distorted description of the incident to workers on a picket line could not serve as the basis for overturning the election. The IHE also found that no denial of access to hatchery workers had occurred that could reasonably affect employee free choice since the Union, in its efforts to persuade employees to

vote against the decertification petitioners, was not entitled to post-certification access under O. P. Murphy (1978) 4 ALRB No. 106, or strike access under Bruce Church (1981) 7 ALRB No. 20, and had failed to prove the Employer had waived the prohibition of hatchery access established under Title 8, California Code of Regulations, section 20901(a)(2)(A). Finally the IHE found the Union's sole witness provided insufficient proof to establish that the Employer's security guards seized Union leaflets from employees entering the Employer's property on the morning of the election. The IHE recommended that all the Union's objections be dismissed and the results of the decertification election certified.

Board Decision

At an earlier stage of these proceedings, the Board had determined that non-agricultural employees could file decertification petitions under the provisions of Labor Code section 1156.3(a). The Union subsequently filed timely exceptions to the IHE's dismissal of its objections, and again presented, as authorized by the Board, its objection alleging that statements attributed to the Employer and published shortly before the election had tended to affect employee free choice. The Board upheld the IHE's rulings, findings of fact, and conclusions of law, and adopted his recommendation to certify the results of the election. The Board noted that, while it could not determine with certainty whether an objection alleging that statements unattributed to the Employer concerning the effect of the election on the Employer's ongoing operations had been litigated, it had treated them as litigated, and on that basis determined that insufficient evidence had been presented to support a finding that such statements had created a atmosphere of fear or reprisal rendering employee free choice impossible.

* * *

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

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STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of: THE CAREAU GROUP, dba EGG CITY, Employer, and RAMON R. ORNELAS and JOSE ZARAGOZA, Petitioners, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Certified Bargaining Representative.	)	Case No. 86-RD-6-SAL(OX)

Appearances:

Robert P. Roy
Ventura County Agricultural Association
Oxnard, California
for the Employer

Marcos Camacho
Keene, California
for the United Farm Workers of America, AFL-CIO

No appearance for Petitioners

DECISION OF THE INVESTIGATIVE HEARING EXAMINER

THOMAS SOBEL, Investigative Hearing Examiner: This case was heard by me April 18, 19, 20, 1989 in Oxnard, California. On October 27, 1986 Ramon Ornelas and Jose Zaragoza filed petitions to decertify the United Farm Workers of America, AFL-CIO, (hereafter Union or UFW) as exclusive bargaining representative of the agricultural employees of the Employer. An election was conducted on November 3, 1986. The final tally of ballots[1] was:

UFW	79
No Union	105
Unresolved Challenged Ballots	9

The certified bargaining representative timely filed objections to certification of the election, four of which were set for hearing:

> 1. Whether an alleged physical assault by Petitioner Ramon R. Ornelas on Union representative Alberto Escalante in the presence of employees effected [sic] the outcome of the election.
>
> 2. Whether the Employer interfered with Union access to hatchery employees and, if so, whether such interference effected [sic] the outcome of the election.
>
> 3. Whether the alleged removal of Union leaflets from employee's [sic] hands by Employer security guards effected [sic] the outcome of the election.
>
> 4. Whether statements concerning the decertification petition which were attributed to the Employer's owner and printed in the October 28, 1986 election of "The Enterprise" newspaper effected [sic] the outcome of the election.

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[1]The final tally did not issue until April 28, 1988 after the Board resolved various challenges. See 14 ALRB No. 2.

> 5. Whether the Board agents failure to vote eligible employees who were located in Mexico was improper conduct, and if so, whether such conduct effected [sic] the outcome of the election.

Because objecting party presented no evidence on the question of the Board agent's failure "to vote eligible employees... located in Mexico," it was dismissed at hearing. I also dismissed the objection relating to "the statements attributed to the Employer's owner" in the Enterprise newspaper on the grounds that the article's assertion that the Employer's owner made the arguably objectionable statements was hearsay. The propriety of that dismissal is now on appeal to the Board.

Before addressing the parties' remaining contentions, one other preliminary matter remains. In its Post-Hearing Brief, the Employer has requested that I take judicial notice of certain facts said to be drawn from previous cases, including the decision of the Administrative Law Judge in Case No. 86-CL-14-SAL(OX) now pending before our Board, as well as various cases before the NLRB and before the federal and state trial courts. Since I do not find any of the matters which I am requested to notice relevant to my decision, I decline to even consider the propriety of my taking notice of them.

1.

> Whether an alleged physical assault by petitioner Ramon R. Ornelas on union representative Alberto Escalante in the presence of employees effected [sic] the outcome of the election.

Striking employees Jose Rodriguez, Renaldo Garnica and Juventino Rangel testified for the objecting party concerning this incident.

Rodriguez testified that shortly after noon a few days before the election, he and union representative Alberto Escalante were talking to a group of 10 or 11 non-striking workers in one of the company's dining rooms, when Ramon Ornelas, one of the decertification petitioners,[2] stormed into the dining room, grabbed Escalante, picked him up, and shouted, "I'm going to kill you, you son-of-a-bitch." According to Rodriguez, he separated the two men, at which point Ornelas grabbed a bunch of leaflets Escalante was carrying and refused to return them, all the while continuing to shout mortal threats.

The confrontation ended when the security guard entered the dining room and, after recovering Escalante's leaflets, escorted Escalante and Rodriguez from the dining room. Rodriguez could not identify the particular leaflet Escalante was carrying at the time, but he did acknowledge that it had a cartoon on it. Rodriguez acknowledged that the workers who witnessed the incident were apparently anti-UFW in that they were, as he put it, "in favor of Ornelas." After the guard escorted Escalante and Rodriguez from the dining room area, he dropped them off near a picket line where Escalante announced to a large group of workers (about 100 of whom were striking unit members) that Ornelas had threatened him and would have killed him had Rodriguez not

[2]Rodriguez testified he did not know that Ornelas was one of the petitioners.

intervened. According to Rodriguez, it is widely rumored at the ranch that Ornelas had killed someone in Mexico. The source of this rumor was Ornelas[1] father who frequently said that both he and his son were professional killers in Mexico.

Renaldo Garnica gave a somewhat different version of events, adding some additional details and offering some conflicting ones. Garnica testified that around noontime October 31, 1986, he, Juventino Rangel, Jose Rodriguez and Alberto Escalante took access to company facilities to campaign for the election. Rangel and Garnica were accompanied by a security guard in one vehicle and Rodriguez and Escalante were in another vehicle (apparently) with another guard. The four men (with their escorts) had already been to a number of sites, and had practically exhausted their access-time, when they stopped outside House 21. According to Garnica, he and Rangel stayed in their vehicle while Rodriguez and Escalante left theirs to enter House 21. They never got inside.

As Escalante was passing out leaflets to a handful of employees (about six or seven) outside House 21, Ornelas arrived in a company truck,[3] alighted and, confronting Escalante, pushed him, and took some of the leaflets from him. Since the car in which Garnica, Rangel and the guard were sitting was about 20-30

[3]The UFW makes no contention that Ornelas[1] driving a company truck implies that his actions are imputable to the Employer.

feet away from where the confrontation took place, Garnica was too far away to hear what, if anything, Ornelas said. (I:51.) A security guard (presumably the one who was with Rodriguez and Escalante) immediately separated the two men and "made" Ornelas give the leaflets back to Escalante after which the UFW people were escorted from the area of House 21. Garnica testified that he, too, has heard stories that Ornelas and his father "are people of bad living in their land." (I:54.) The stories emanated from Ornelas[1] father who told Garnica that Ramon had killed two people and had to leave Mexico after the second killing. The story is so widespread, according to Garnica, that Ornelas is nicknamed El Maton, the Killer. Garnica corroborated Rodriguez's testimony that after the incident, Escalante recounted what happened to unit members (he put the number at 50) who were picketing the Employer's premises, telling that them he had been threatened with death by Ornelas. According to Garnica, Escalante always reported back to the picket line in this way. (I:38.)

The final UFW witness to the incident was Juventino Rangel. Rangel confirmed that he and Garnica were in a security guard's car about 25 feet away from Escalante and Ornelas when he observed Ornelas pushing Escalante. Too far away to see or hear much, Rangel nevertheless heard Ornelas tell Escalante to leave; he also saw Ornelas push Escalante. Rangel added to Garnica's account the further detail that the security guard who was with him and Garnica went to help the other guard separate Escalante and Ornelas. He also confirmed that Escalante broadcast an

account of what happened to about 70 or 80 unit members on a picket line. According to him, Escalante told the workers "they tried to beat us up." Although Rangel had heard Ornelas call himself[4] "a killer", he also testified he was not aware that Ornelas was called El Maton. Moreover, Rangel spoke disparagingly of Ornelas[1] swaggering: "whether [the story of Ornelas[1] killing someone] was true or not, we cannot verify that...[M]aybe...he would tell us this so that we might be afraid of him."[5]

The Employer's witnesses provided an entirely different cast to the story. Ornelas testified without contradiction that he was one of the original members of the UFW's Ranch Committee. He also testified that he was pressured into leaving the Committee by other committee members who claimed he sold out to the company. Part of the pressure which caused his departure consisted of fabricating and circulating stories about him, one of which is that he is a killer.[6]

Ornelas admitted that he confronted Escalante; he did so, he testified, because he heard that Escalante was distributing a leaflet which offensively caricatured him. In fact, Ornelas was

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[4]Rangel testified that Ornelas never told him this "personally", which I take to mean that Ornelas never told him in a private (one-on-one) conversation since Rangel also testified that Ornelas told him "in general", which I take to mean as part of a larger group Ornelas was addressing.

[5]There is no question that Rangel spoke ironically.

[6]I should point out that although Ornelas initially denied that he had been dubbed El Maton, he affirmed moments later that the sobriquet had been applied to him. Compare, III:253; 255; see also pp. 281, 282. In view of Ornelas' admission, I find that he is called El Maton. However, in view of the conflict in testimony

anticipating the appearance of such a leaflet because he had seen Escalante working on it at the pre-election conference a few days earlier. The two men were some 10 feet away from each other when it became clear to Ornelas that Escalante was sketching him. Ornelas drew this conclusion because Escalante kept looking from him to the paper while he sketched. Although this testimony implies that Ornelas only inferred from Escalante's actions that he was being sketched, Ornelas also testified that he could actually see that he was being caricatured. I doubt this. If I read the testimony correctly, Ornelas was seated at the time

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over the origin of the name, I decline to find that either Ornelas or his father are the source of it. Accordingly, I find no reasonable basis for anyone's believing Ornelas to be a "killer" and I decline to accept the Union's argument that whatever happened between Ornelas and Escalante would have great impact on the employees because it was likely to have been viewed through the lens of Ornelas' reputation.

Although I do not rely on evidence of Ornelas[1] reputation, I note the Employer has argued that it was inadmissible. Although the rules of evidence do not apply in representation cases, evidence of reputation is not hearsay when offered to prove an element in a case. Evidence Code section 1324. The element in this case as to which Ornelas[1] reputation is relevant is the likely effect of threats uttered by a person reputed to be a killer. It seems clear to me that one would more likely be affected by threats from someone whom one reasonably believed, for example, to be heavyweight champion of the world than from someone about whom one had no such belief.

On this last point, the Employer contends that evidence bearing upon reputation cannot be probative since the actual state of mind of employees is not at issue in this case. The Employer's argument confuses circumstantial evidence relevant to the potency of threats or acts of violence with evidence concerning individual employee reaction to such threats or acts. The acceptance of reputation evidence bore only on the question of how employees would be likely to react to the incident in view of Ornelas[1] reputation.

facing Escalante so that whatever Escalante was drawing would likely have been upside down in relation to Ornelas. I think it unlikely that Ornelas could identify a less than one-inch high upside down caricature of himself at a distance of 10 feet. Nevertheless, Ornelas identified Employer 1 as the cartoon Escalante was producing. Employer 1 depicts the decertification petitioners, including Ornelas, as pet dogs controlled by the Company, describes them as "lackeys" and "sell-outs," and accuses them of robbing the employees of their future and hopes.

Whether or not Ornelas could actually see what Escalante was doing, Ornelas further testified that another worker, looking back and forth from Escalante's sketch to Ornelas complimented Escalante on producing such "a beautiful dog, or...a good-looking dog." (III:74.) Although Ornelas understood he was being mocked, and was "bothered" by it, he did not do or say anything at the time because "[h]e was listening to those from the state and [he] had to remain seated."

Ornelas caught up with Escalante at the dining room in House 21. According to Ornelas, he would have gone to the dining room anyway in order to eat, but he also went there because another worker told him that Escalante was distributing the leaflet "with the body of a dog." "I got bothered...[I was] very bothered....I just went over to tell him did he have the right to

do that." (III:276-277.)[7] He encountered Escalante just inside the door of the dining room. As he entered, Escalante, who was facing away from him, turned towards him. Ornelas immediately grabbed at the leaflets and asked "Why did you draw the cartoon of me." (II:264.) Some of the papers fell. As the men in the cafeteria whom Escalante had been addressing encouraged Ornelas to take the "bozo" from the union out, a security guard pushed Ornelas and told him to return the papers. Ornelas denied grabbing Escalante or threatening to kill him. Although Ornelas followed Escalante out of the dining room where he saw Rangel and the other security guard coming over, nothing further happened between them.

Flavio Monroy was one of the workers in the dining room. He recalled that three union representatives entered the dining room, two of them left and one person remained. He also recalled that Ornelas angrily entered the dining room and grabbed a bunch of papers from the remaining UFW representative, but he did not see Ornelas manhandle the UFW man. The security guard quickly moved Ornelas away and bent to pick up the papers, but Ornelas picked them up first. According to Monroy, the incident was over almost as soon as it began.

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[7]The Employer elicited testimony that being depicted as an animal is considered particularly insulting among people of Mexican descent. I make no finding about any special sensitivity among Mexicans about being caricatured as animals; I believe most people would be insulted if they were called "lackeys," "buffoons," or "sell-outs."

In seeking to determine what happened between Ornelas and Escalante, I first note that nothing contradicts Ornelas[1] testimony that Escalante was distributing Employer 1, that Ornelas was apprised of this, and that he confronted Escalante because he was affronted by the contents of the leaflet. In so finding, I obviously do not make much of my belief that Ornelas testified falsely that he saw what Escalante was drawing; rather, it seems more likely to me that he heard about it after the pre-election conference or on the day that it was distributed.

I also believe most people would be offended if they were the target of such a leaflet. In connection with this, I note that Escalante not only signed the leaflet, but also sought to copyright it, which strongly indicates that he wanted it to be known as his. I emphasize these details because if whatever happened between him and Escalante were likely to be regarded as a "personal" reaction to the leaflet it seems unlikely that the encounter would have affected the free choice of the other employees.

This is in accord with NLRB precedent. Thus, in Mattera Litho, Inc. (1983) 267 NLRB No. 71, the NLRB held that a company president's calling an employee a "liar" and threatening to "get" him would not be considered objectionable conduct when it was clear that the president's comments were made "in a brief and passing episode related only to [the employee's] admission that he had been the one who disseminated what [the company president] perceived to be a lie and a personal affront." 267 NLRB at 376

Although I find Ornelas was indeed motivated by personal reasons in confronting Escalante, other than the fact that Escalante signed the leaflet and was apparently proud of it, there is no other evidence from which to conclude that the personal nature of the incident would have been apparent to the employees who witnessed it, let alone those to whom Escalante related it. Accordingly, this case is distinguishable from Mattera Litho in which the arguably objectionable conduct took place in front of a great number of employees who could judge for themselves that the incident in question reflected personal hostility. Thus, it seems necessary to go somewhat further in my analysis and to determine what really happened.[8]

The Employer argues that the Union's failure to have Escalante himself testify requires me to infer that his testimony would have been adverse to it, especially since the explanation offered by the Union for its failure to call Escalante—that he is addicted to some drug—does not excuse the failure to call him and because Escalante has already proven himself adverse to the Union in a deposition taken by Employer's counsel in another case.

Even if the Employer could have satisfied the requirements of Evidence Code section 1291 respecting the

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[8]The Union argues that our Board does not distinguish between personal threats and threats related to election activity. T. Ito and Sons (1985) 11 ALRB No. 36. I do not read Ito as abolishing this distinction. It is true that Ito does not distinguish between threats related to protected activity and threats related to campaign activity; but that is not the same as treating personal problems as objectionable conduct.

admissibility of Escalante's deposition testimony, I cannot rely on Counsel's assertion about its contents. See, Jefferson Evidence Benchbook Section 47.1, p. 1762. I also reject the contention that the failure to call Escalante alone warrants an inference that his testimony would be adverse to the Union. Counsel for the Union represented that Escalante no longer works for it; thus, I have no basis for concluding that it was within its power to produce him. (Evidence Code section 412, Shapiro v. Equitable Life Assoc. Soc. (1946) 76 C.A. 2d 75; Compare Talbert v. Osterguard (1954) 129 C.A. 2d 222 in which an adverse inference was held justified against defendant where defendant failed to produce an ex-employee who nevertheless maintained a shop on defendant's premises and was thus presumably available to defendant.) I will treat the question of what happened between Escalante and Ornelas as entirely dependent upon the veracity of the versions actually presented at trial. The main differences between the parties' respective versions is: Did Ornelas attack Escalante and did he make the threats against Escalante which Escalante broadcast to the picketers?

Since Ornelas admitted that he grabbed at the leaflets I find that he did. This comports with my finding that it was the leaflet which had angered him. What else he did is the subject of dispute. While Garnica and Rangel testified to some pushing between Ornelas and Escalante, Ornelas and Monroy said there was none; only Rodriguez testified that Ornelas violently attacked Escalante. On the other hand, if, as Ornelas, Rodriguez and

Monroy testified, the incident took place in the dining room, of the three UFW witnesses, only Rodriguez would have been in a position to see what happened since Garnica and Rangel were outside the dining room. Monroy, of course, placed Rodriguez outside the dining room also, but nothing in his testimony indicates that Rodriguez was in no position to see what happened.

In its brief, the Union seeks to reconcile Rodriguez's account with that of Garnica and Rangel by arguing that Rangel and Garnica are describing another incident which took place outside the dining room. This suggestion is useful in light of the testimony of Ornelas, who spoke of the encounter as taking place at the door, and that of Monroy, who spoke of Ornelas following Escalante outside. On the record as a whole, it seems to me that what may have begun in the dining room spilled out of it into the open air, and I so find. Although Both Rangel and Garnica testified they saw Ornelas push Escalante, neither of them described a particularly violent encounter, and Garnica especially emphasized that Ornelas "was trying to take the handbills away from him and pushed him." Since it was the leaflets that were the target of Ornelas[1] anger and, therefore, the likely focus of his attack, I find it more likely than not that Garnica, who saw the leaflets stripped from Escalante, and Rangel who only saw some

pushing, saw most of what happened.[9]

I am inclined, therefore, to disbelieve the violent details that are unique to Rodriguez's account. My impression that Rodriguez's testimony is false is reinforced by Garnica's corroborating Ornelas[1] testimony that the security guard made Ornelas give the leaflets back to Escalante, which strongly indicates that Ornelas was not so violent that he could not be easily controlled. I find that Ornelas confronted Escalante and grabbed the leaflets from him, pushing him or jostling him in some way in the process; I do not find that he attacked Escalante violently or threatened to kill him.[10] As a result, I do not believe that even those who witnessed such a non-threatening incident were likely to be affected by it. Comite 83, Sindicato de Trabajadores Campesinos Libres, (1988) 14 ALRB No. 13.

While I must find, in accordance with the uncontradicted evidence, that Escalante told the strikers he had been "attacked," I further find that in doing so he presented a distorted and

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[9]I do not find it of major significance that Garnica and Rangel differed on the details of what happened. Brief physical encounters often leave a gross impression of what took place as opposed to a precise record of their constituent parts, as anyone who has ever been surprised by an "instant replay" on television can attest.

[10]While the intervention of the guards supports an inference that something was happening which security didn't want to see go any further, I don't think I can infer much about the nature of the incident from the guards' reaction to it: in a volatile situation, which I take a strike to be, prudence dictates that even the least spark be extinguished.

overblown account of what really took place. These findings reduce the question before me to whether the losing party in an election can itself create an objectionable atmosphere of violence and intimidation by spreading false stories attributing the misconduct complained of to the prevailing party. While I cannot find any cases on point, and while I concede that the striking employees could not have known that Escalante's version was either exaggerated or false, to permit elections to be set aside upon such grounds would be to invite mischief.

I recommend dismissal of the objection.

2.

Whether the employer interfered with union access to hatchery employees and, if so, whether such interference effected [sic] the outcome of the election.

There is no serious factual dispute concerning this objection. Karl Lawson testified that shortly before the election, Alberto Escalante was denied access (presumably) to the hatchery as a result of which Lawson called Jim Boyd, the Employer's head of security, to find out why. Lawson sought the access pursuant to the provisions of the collective bargaining agreement which provided a right of access to "the company's premises during working hours for the purpose of adjusting disputes, investigating working conditions and ascertaining that the Agreement is being adhered to," providing only that advance arrangements had to be made for access to the hatchery. The purpose of the last proviso was to assure the hatchery not be contaminated by organisms brought in from other parts of the

Employer's premises. In practice, such assurance meant that access was taken at the hatchery before it was taken at any other part of the facility. There is no contention that contamination ever resulted from access taken by the UFW.

According to Lawson, Boyd told him that the company would no longer permit access in the hatchery "because of potential disease problems." Lawson testified that he assured Boyd that the union would continue to adhere to the procedures for insuring safe access. Boyd continued to deny access to the hatchery but he offered to make the hatchery workers available if the Union wanted to communicate with them. Lawson declined to accept such an accommodation because, in his view, it would depreciate Union representation. As a result of the Union's inability to gain access to the hatchery, Lawson estimated that the Union was unable to communicate with between 8-10 employees before the election.

On cross-examination, Lawson admitted that the contract had expired when his discussion with Boyd took place. He also testified he was aware that the company was taking the position that it was free to reject the collective bargaining contract by virtue of its status as a debtor-in-possession under the bankruptcy laws. Finally, Lawson admitted receiving a letter from the Employer's Counsel prior to the denial of access in question in which the Employer not only took the position that the bankruptcy court had "invalidated [every] remaining...provision of the contract and [specifically] permitted the company to set the initial terms and conditions of employment....," but also advised

the Union that henceforward the company would prohibit access to the hatchery. The Union never filed any grievances or unfair labor practice charges in connection with this change in policy.

Although Boyd did not recall conversations with either Lawson or Escalante concerning access to the hatchery in the week prior to the election, it is beyond dispute that such access was denied. In fact, Boyd indicated that another reason for denying hatchery access was the fear of violence associated with the strike. (II:227-228.) Boyd testified that on any given day three employees at the most might be in the hatchery and generally only two worked on any shift. Mary Gullage, the company's personnel director, testified that only four employees worked at the hatchery in the week before the election.

As my recitation of the facts ought to demonstrate, at the hearing the parties treated the contract as the focal point for determining the Union's access rights during the decertification election. From Lawson's testimony, the UFW[1]s position appeared to be that, since the collective bargaining agreement with the Employer provided access to the hatchery employees, Union representatives had a contractual right to enter the hatchery to talk to employees during the decertification campaign. The Employer, on the other hand, contended that because the contract had expired, the access provision was of no effect in any event but that, even if it were, it had been voided by the bankruptcy court. As proof of this latter contention, Employer presented Employer No. 4, an Order of the Bankruptcy Court. "REJECT[ING]

THE TERMS AND CONDITIONS OF THE COLLECTIVE BARGAINING AGREEMENT BETWEEN DEBTOR IN POSSESSION AND THE UNITED FARM WORKERS OF AMERICA, AFL-CIO." It was pursuant to this Order that the Employer purported to elect to cancel the provisions of the contract relating to access and to prohibit access to the hatchery.

In its Post-Hearing Brief, the Employer continues to contend that it had a right under the Order of the Bankruptcy Court to void the access provision and, at least initially, to unilaterally impose a new hatchery access policy. The Employer also contends that even if its denial of access were improper, it would not have affected the results of the election since the evidence shows that at most only four employees worked in the hatchery during the pre-election period. On the other hand, the UFW no longer appears to rely on the contract as the source of its right of access to the hatchery workers; instead, it argues that it had a right of post-certification access to those workers under 0. P. Murphy (1978) 4 ALRB No. 106, or a right to take strike access to those workers pursuant to Bruce Church (1981) 7 ALRB No. 20.

Although the Employer's argument that the number of potential voters affected by the denial of access was too small to have affected the outcome of the election appears decisive, I am not sure that the Union has even made out a case that it was improperly denied access, although not for the reasons advanced by the Employer. Indeed, it seems to me that both the Employer and the Union have been looking in the wrong place for the appropriate measure of the Union's right to access. I believe it is not to be

found in the contract, in the cases relied upon by the Union, nor even in the power of the bankruptcy court to void the provisions of a collective bargaining agreement. Rather, I believe it is to be found in the access regulation itself which has the force of law. Accordingly, whatever might be the power of a bankruptcy court to enjoin state statutory provisions, the Court did not act in that way; rather, it acted only with respect to the parties' collective bargaining agreement.

In Bruce Church, supra, the Board distinguished between the interest of a union in performing its responsibilities as collective bargaining representative and its interest in persuading employees to join its ranks during a strike. In so doing, the Board classified access according to the purpose for which it was sought, as opposed to the moment relative to certification when it is sought. Further, the Board specifically rejected the analysis of the Administrative Law Judge who, like the Union here, treated the question of the propriety of strike-access under 0. P. Murphy merely because the Union was seeking access after its certification as exclusive representative. While the Board went on to state that even during a strike, it was conceivable that a Union might have a need for 0. P. Murphy access, that is, a need for access for collective bargaining purposes, it also found that the striking Union made no showing that the access it sought was for such a prupose. Similarly, while the Union here argues that it had a need for P.P. Murphy-type access because "the issue of decertification [would] have a direct

impact on the employee's union representation", under a Bruce Church analysis, it appears to me its argument must fail: concerns about the Union's representational status, as opposed to fulfillment of specific obligations arising from that status, fall outside the scope of 0. P. Murphy type-access.[11]

Of course, the Board went on in Bruce Church to identify and recognize an independent right in a Union to take access to solicit support for a strike. The Union thus alternatively claims that the Employer's denial of hatchery access was improper under Bruce Church. However, there is a failure of proof as to this purpose as well: Lawson did not testify that either he or Escalante wanted to talk to the hatchery employees about joining the strike; indeed, Lawson never identified any purpose at all for the Union's wanting to take access. To the extent that an inference as to the Union's purpose in seeking access can be drawn from this record, it seems clear to me that that purpose would have been to campaign for a continued Union majority. While this purpose is not inconsistent with the purpose for which strike access is provided, it is not the same. Accordingly, I find the Union was not entitled to take access to the hatchery workers under either O. P. Murphy or Bruce Church.

While the question of an incumbent union's right to access during a decertification campaign does not appear to have

[11]The Employer also treats this case as a "single" denial of access, It is not. Lawson was not simply told that union representatives could not go on a given day, he was told they could never go.

ever been addressed by our Board, the Board has dealt with the question of access rights of an incumbent union during a rival union campaign. In Patterson Farms (1982) 8 ALRB No. 57, n. 3 the Board held that in a rival union campaign, an incumbent union will be given access for campaign purposes pursuant to the Access Rule only. Since an incumbent union may obtain access for any of the other purposes comprehended by 0. P. Murphy or Bruce Church upon an adequate showing of a specific need for such access, there seems little reason to create any special class of access during decertification elections than is otherwise available in every other kind of election. Accordingly, by analogy to Patterson Farms, I find that the UFW was entitled to access pursuant to the provisions of the Access Regulations.

Turning to the Access Regulation, 8 Cal. Admin. Code section 20900, we find that, generally speaking, an Employer may restrict access to a hatchery. Thus, section 20901(a) states:

> We find that certain conditions exist in the dairy, poultry and egg segments of agriculture which set them apart from all other elements of the industry. These conditions include: (1) the possible transmission of animal disease, (2) possible product contamination, and (3) possible animal stress. Because of these combined conditions, we deem non-employee access into the following limited areas to be prohibited:
>
> (2) Poultry and Egg Industry;
>
> (A) hatcheries; those covered and enclosed areas of the farm in which the eggs are handled and incubated, and in which the chicks and poults are maintained.
>
> (B) poultry production; those covered or enclosed areas of the farm in which the eggs are handled and incubated, and in which the chicks and poults are maintained.

(C) egg production; those covered or enclosed areas of the farm in which the poultry is housed or otherwise maintained.

However, the Access Regulation provides that

> To the extent that employees are permitted to remain in the prohibited areas established herein during their lunch period or during the period of one hour before the start of work and one hour after the completion of work as provided in section 20900(e)(3), the employer shall be deemed to have waived the special limitations of this section and shall not prohibit access thereto.

Under the last quoted proviso, access to the hatchery could be restricted unless the hatchery employees remained in the hatchery during their lunch hour, or in the one hour before or after work. Since there is no evidence as to whether the hatchery employees did remain in the hatchery so as to trigger the implied waiver provisions, and, further since, as the party objecting to the outcome of the election, the Union had the burden of showing the existence of facts establishing such waiver, it seems to me that the Union has not demonstrated that it had any right of access which the Employer denied.

I recommend this Objection be dismissed.

3.

Whether the alleged removal of Union leaflets from employee's [sic] hands by Employer security guards effected [sic] the outcome of the election

Juventino Rangel testified that on the morning of the election he was distributing handbills in front of the entrance to the employee parking lot to employees entering in their cars. While doing so, he observed a security guard taking the leaflets from the hands of the employees. According to him, the guard

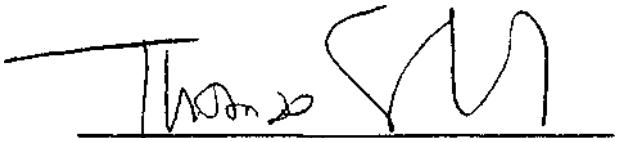
would "just grab them from them. He'd see them behind the steering wheel, and he'd see them with the handbills and grab them from them." (1:65.) This happened about three times (I:65, line 15-16.) On cross-examination, Rangel admitted that some of the people voluntarily handed over the leaflets to the guard; but he was sure equally sure that the guard took or grabbed leaflets from others. (I:84.) He also admitted he was too far away to overhear any conversation. Rangel's testimony is simply too insubstantial to warrant a finding that the guard "took" away leaflets from the employees. Although he claims to have been able to distinguish the voluntary relinguishment of leaflets from the expropriation of them, in view of his distance from the actions he described, I do not believe he was in any position to do so.

I recommend this objection be dismissed.

RECOMMENDED ORDER

In view of my findings, I recommend the results of the election be certified.

DATED: June 21, 1989



THOMAS SOBEL
Administrative Law Judge