Bakersfield, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of:	
SAM ANDREWS' SONS, Employer, and RUMALDO CUETO, ROGELIO SALINAS and FRANCISCO LUEVANO, Petitioners, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Certified Bargaining Representative.	Case No. 88-RD-l-VI 15 ALRB No. 5

DECISION AND ORDER SETTING ASIDE ELECTION

Pursuant to a Petition for Decertification under the provisions of Labor Code section 1156.7(c) [1/], an election was held on April 22, 1988, at Sam Andrews' Sons (Employer) to determine whether the employees of Sam Andrews' Sons desired the United Farm Workers of America, AFL-CIO (UFW or Union) to continue as their certified bargaining representative under the Agricultural Labor Relations Act (ALRA or Act). [2/] The voting produced the

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

[2/] The UFW was certified by the Agricultural Labor Relations Board (ALRB or Board) as the exclusive bargaining representative of all the Employer's agricultural employees on August 21, 1978. (See Sam Andrews' Sons (1978) 4 ALRB No. 59.)

following results:

No Union	152
UFW	186
Unresolved Challenged Ballots	23
Total	361

The Employer filed objections to the conduct of the election alleging Board agent misconduct, misrepresentations by the UFW, and threats of violence and job loss by the UFW.[3/] All parties participated in an evidentiary hearing on the Employer's objections to the election. Thereafter, on September 30, 1988, Investigative Hearing Examiner (IHE) Thomas Sobel issued the attached Decision, recommending therein that the Employer's objections be dismissed and that the results of the election be certified. The Employer timely filed exceptions to the IHE's recommended decision and a brief in support. Neither the decertification petitioners nor the UFW filed exceptions to the IHE's decision or a brief in response to the Employer's exceptions.

The Board has considered the record and the attached recommended decision of the IHE in light of the Employer's

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[3/] The Executive Secretary of the Board set the following issues for hearing: (1) whether a Board agent or a party misrepresented as being a Board agent by Union agents made untrue, incorrect, and/or biased statements to employees, and if so, whether the conduct reasonably tended to interfere with the election; (2) whether Union officials and agents made untrue and misleading statements regarding a backpay award and Board procedures, and if so, whether those statements reasonably tended to interfere with the election; and (3) whether threats were made against employees who were actively seeking decertification, and if so, whether those threats reasonably tended to interfere with the results of the election.

exceptions and brief, and has decided to affirm the IHE's rulings, findings, and conclusions only insofar as they are consistent with the opinion that follows, and to set aside the election.[4/] [5/]

[4/] Since an ALJ's or IHE's credibility findings will carry great weight once made, and since the Board serves as the ultimate fact finder, it is the Board's belief and desire that credibility findings should be based on objective criteria such as those described by the trial examiner in Lebanon Apparel Corp. (1979) 243 NLRB 1024 [102 LRRM 1022]: observations of the demeanor of witnesses, weight of the respective evidence provided by them, reliance on documentary evidence which supports or detracts from the testimony, established or admitted facts, inherent probabilities and reasonable inferences which may be drawn from the record as a whole. Although the Board's ultimate resolution of the central issue in this case does not depend on the IHE's credibility resolutions, the Board is compelled to note two examples of credibility resolutions which, in its view, do not meet the objective standards of Lebanon Apparel, supra, but which appear to be drawn in large part from the IHE's own subjective impressions of the witnesses' thought processes.

With regard to Francisco Larios, for example, the Employer argued that the witness should not be believed because he was "hostile" and answered questions in a "rhetorical" manner. While the IHE conceded that the Employer had correctly characterized Larios' testimony, the IHE found that the traits exhibited by Larios while testifying were those of a "fighter rather than a liar." Such a conclusion is necessarily based on a subjective analysis of a person's psychological make-up.

The IHE again resorted to such analysis when Board Agent Albert Mestas was asked by the Employer's counsel whether he had ever been accused of misconduct in the performance of his duties for the ALRB. Mestas denied that he had ever been so accused, but he was subsequently forced to admit that, although ultimately reinstated, he had once been terminated for alleged misconduct. The IHE did not discredit Mestas for this lack of candor. He concluded that Mestas, rather than being engaged in deliberate concealment, was acting under the influence of a "rich mixture of emotions" generated by being reminded of the incident.

The Board does not quarrel with the IHE's right, indeed his obligation, to determine whether or not a witness is being truthful on the stand. Our concern is with the propensity of an IHE or ALJ to make unwarranted forays into the subjective realm of psychology. Credibility determinations can and should be made without resort to such personal forms of speculation.

[5/] Labor Code section 1142(b) authorizes the Board to delegate to its regional offices certain representation matters and to review

(fn. 5 cont. on p. 4)

Factual Background

Approximately one month prior to the holding of the decertification election in this matter, UFW member Francisco Larios, a member of the UFW's Ranch Committee at Sam Andrews' Sons, contacted Board agent Albert Mestas to arrange for a Board representative to meet with members of the bargaining unit who were confused about the status of backpay and bargaining makewhole awards previously ordered by the Board.[6/] Some of the confusion apparently stemmed from the additional procedures required by the Board's attempts to comply with the decision of the Third District Court of Appeal in William Pal Porto & Sons, Inc. v. ALRB (1987) 191 Cal.App.3d 1195 [237 Cal.Rptr. 206] (Pal Porto). Mestas was unable to arrange for a definite meeting date at the time of Larios[1] initial inquiry, but shortly thereafter suggested the meeting take place on Wednesday, April 20, 1988. The record is

(fn. 5 cont.)

such matters when requested to do so by an interested party. (8 CCR section 20393(b) .) Given that no party has filed a request for review of the Regional Director's action concerning application of the Board's "blocking" policy in this case, and since the Board perceives no independent or otherwise compelling reason for review, we believe that it is unnecessary and ill advised for our dissenting colleague to address that issue sua sponte. However, since she has elected to raise the question, the majority is compelled to point out that she has faulted the Regional Director for abusing his discretion in failing to "block" the instant election where in fact there is no evidence, and thus no basis, for her determination that the Regional Director failed to exercise his discretion in that regard and, furthermore, that he did so in an improper manner. Accordingly, we see no reason to further address the concerns set forth in Member Ramos Richardson's dissent.

[6/] The backpay was ordered by the Board in Sam Andrews' Sons (1986) 12 ALRB No. 30, while the bargaining makewhole remedy was awarded in Sam Andrews' Sons (1985) 11 ALRB No. 5 and Sam Andrews' Sons (1987) 13 ALRB No. 7.

silent as to how the location was determined, but the meeting was finally set for Wednesday, April 20, 1988, at approximately 6 p.m., at the UFW's office in Lamont, California.[7/] Mestas left to Larios the arrangements for contacting interested employees and informing them of the meeting.

Mestas informed his immediate supervisor and his Regional Director that he would be present at a meeting of Sam Andrews' employees, and assured them that he would not inititate a discussion of election-related issues, but that if employees' questions touched on the election, he would try to answer them. On the day of the meeting, Mestas and Board agent Charlie Atilano were at the Employer's property locating suitable polling places. Mestas intended to meet with unit members in Lamont prior to the pre-election conference set for that same evening at the airport in Bakersfield. Atilano accompanied Mestas to the employees' meeting because he and Mestas were traveling in the same State car.

After a somewhat late start, the meeting began with a strongly pro-union speech by Larios. He told the employees that he was aware of "a company in El Centro" that had seen a bargaining makewhole award reduced from over $10 million to $700,000 following the decertification of the Union as the employees' exclusive bargaining representative. He also stated that, after the departure of one of the partners from Sam Andrews'

[7/] Mestas did, however, decline to hold the meeting on the Employer's property when Larios called him on the 19th of April to confirm. Larios testified that Mestas believed that to meet on the Employer's property could "interrupt" the election process.

Sons, the employees working for the departing partner were being mistreated in a non-unionized work environment. He also asked rhetorically who would be available to put pressure on the Employer to see that the employees received the remedial awards the Board had already ordered if they were to decertify the Union. Throughout the course of these remarks, Mestas was standing within three or four feet of Larios.

Larios then introduced Mestas to the meeting. Mestas testified that he confined his remarks to explaining the status of his work on the backpay computations in 12 ALRB No. 30 and the present status of the makewhole award in 13 ALRB No. 7. Concerning the former, he testified that he informed the employees as to how the Board's backpay specification was calculated and what documentation he would require from the employees to establish interim earnings and net backpay. Regarding the latter case, he testified that he informed the employees of the essentials of the Board's procedures required by the appellate court in Dal Porto, and that, since the Employer had invoked these procedures in 13 ALRB No. 7, any award of bargaining makewhole in that case would be delayed pending the outcome of those procedures.

In response to Larios' remarks concerning the "company in El Centro" where the decertification of the Union had allegedly caused a drastic reduction in the employees' makewhole award, Mestas denied knowledge of the case, but offered to furnish further information upon request. Employer witnesses Garza and Marquez testified that Mestas stated that the employees would have

their backpay awards reduced from $10,000 to $2,000 apiece in the event of decertification. Mestas flatly denied having made such a statement. The meeting ended with Mestas answering individual employees' questions as to their entitlement to backpay and the necessary documentation for establishing their claims. Shortly before dusk, Mestas and Atilano departed for the pre-election conference.

The following day Mestas and Atilano returned to the Employer's property to give the employees in the fields notice of the upcoming election. That same day the Union distributed copies of a flyer to the approximately 160 members of the lettuce harvesting crew. That flyer depicted a figure, identified as "Sam Andrews," who holds a knife behind his back labeled "appeal to ALRB" as he addresses three employees, stating, "And if you vote for the company we will pay you the retroactive [i.e., backpay] that the law say [sic] we owe you!" The three employees think in response, "Better vote union," "I think they want to use us only for the vote," and "But the rep of the state said the company had appealed so they won't pay us." The following day, which was the day of the election, Mestas was again present on the Employer's property as assistant agent in charge of the election.

Decision of the Investigative Hearing Examiner

As noted above, the IHE recommended that the Employer's objections be dismissed and that the results of the election be certified. In reaching that decision he credited the testimony of Larios and Mestas over that of Marquez and Garza, finding that Mestas made no statements either that the backpay would be reduced

if the UFW were decertified, or that the workers would find their awards diminished from $10,000 to $2,000 in that event.[8/] The IHE also found that Mestas' statement concerning the dilatory effect of the Employer's Dal Porto motion was an accurate statement of the circumstances at that time, and could not reasonably raise an inference of bias. He further found that misrepresentations of the Board's compliance procedures by Larios in his statements concerning the "company in El Centro," as well as misrepresentations by the UFW of Mestas' statements concerning the effect of the Employer's Dal Porto motion in its flyer distributed to lettuce harvesters, were not grounds for setting aside the election. Finally, the IHE found that the Employer had failed to prove that UFW organizers Antonio Galvez and Lupe Martinez told lettuce harvest crews and tractor drivers on the morning of April 21, 1988, one day before the election, that if the Union were decertified the employees would not receive their backpay awards.

For the reasons that follow, we reject the IHE's analysis concerning the UFW's use of Mestas' statements.

Analysis

We view with the utmost seriousness allegations that conduct of our agents, whether intentional or inadvertent, has acquired such an appearance of bias that it tended to affect the exercise of free choice by agricultural employees. In Coachella Growers, Inc. (1976) 2 ALRB No. 17, the Board stated that its agents must not only be free

[8/] Although the IHE did not rely on his testimony, Board agent Atilano also corroborated Mestas' and Larios' version of the events at the meeting on April 20.

from actual bias, but also avoid giving even the impression of bias The Board also observed in that case, however, that appearances of Board agents before assemblies of agricultural workers to explain the workings of our Act were appropriate and to be encouraged, so long as those appearances did not result in its agents' becoming aligned with a particular party.

In Monterey Mushroom, Inc. (1979) 5 ALRB No. 2, the Board applied the above principles under circumstances that were similar, but not identical, to those present in this case. In that case, the Board found that its agents were not present at a UFW organizational meeting since, when the agents arrived at the gathering, the actual meeting was not in progress. Moreover, the agents performed their duties of gathering information related to unfair labor practice charges in a room physically separated from the meeting room. The agents conveyed only inconsequential social greetings to participants as they passed through the assembly. The Board concluded there that the mere presence of Board agents at employees' organizational meetings, without more, is insufficient to justify setting aside an election.

In Tani Farms, Inc. (1987) 13 ALRB No. 25 we again examined the conduct of our agents at an informational assembly of employees for evidence of conduct reasonably tending to affect employee free choice. There our agents were asked a question by the employees that the Board found was reasonably interpreted by the agents as whether an employer could lower wages in retaliation for the employees voting for a union. In response to this general question, the agents answered accurately that such action by an

employer was forbidden under our Act. In finding no misconduct on the part of the Board agents, we indicated our general intention not to set aside an election on an allegation of bias unless our agents acted so as to align themselves with one of the parties, or so as to allow themselves to be used in a manner seriously affecting the neutrality of our procedures.

The foregoing principles control our decision here. The undisputed facts establish that Mestas was present at a meeting reasonably perceived by the employees as a partisan Union assembly. (See IHED at p. 19.) He was introduced to the employees as a Board agent and spoke for the greater part of the meeting. However, to warrant setting aside the election, we must, in accordance with Monterey Mushroom, supra, 5 ALRB No. 2 and Tani Farms, supra, 13 ALRB No. 25, find additional conduct that demonstrates either partisan alignment or a compromising of the Board's neutrality.

The record discloses no intentional impropriety on Mestas[1] part, either in his general attendance at the meeting, or in his correct evaluation of the probable effect of the Employer's motion. We believe, however, that his conduct herein was such that he allowed himself to be used in a manner which seriously affected the neutrality of our procedures since he made it possible for his presence and statements to be used by the Union for partisan advantage.[9/] We therefore conclude that Mestas'

[9/] We do not, in this context, require proof of the impact of this conduct on the results of the election. (See William

(fn. 9 cont. on p. 11)

presence at the meeting, together with his comments regarding the delaying effect of the Employer's Dal Porto motion and the subsequent appropriation of that presence and those comments in the Union's widely distributed flyer, reasonably tended to affect employee free choice in this matter. It is on that basis that we set aside the election.

ORDER

It is hereby ordered that the election conducted in this matter be, and hereby is, set aside without prejudice to the refiling by petitioners of a subsequent petition, if desired, when the requisite statutory conditions are met.

Dated: July 20, 1989

BEN DAVIDIAN, Chairman[10/]

GREGORY L. GONOT, Member

JIM ELLIS, Member

(fn. 9 cont.)

Mosesian Corp. (1978) 4 ALRB No. 60, George A. Lucas & Sons (1982) 8 ALRB No. 61, Agri-Sun Nursery (1987) 13 ALRB No. 19. We note, however, that the flyer was distributed to the 160-plus members of the lettuce harvest crew, a number clearly sufficient to be outcome determinative.)

[10/] The signatures of Board Members in all Board Decisions appear with the signature of the Chairman first (if participating), followed by the signatures of the participating Board Members in order of their seniority.

MEMBER RAMOS RICHARDSON, Dissenting:

I would nullify this election based on my finding that the Regional Director abused his discretion by failing to block this election at a time when two litigated, but unremedied, unfair labor practices created an atmosphere where employees could not exercise their choice in a free and uncoerced manner.

In Cattle Valley Farms (1982) 8 ALRB No. 24 (hereafter Cattle Valley), the Agricultural Labor Relations Board (Board) adopted a modified version of the National Labor Relations Board's (NLRB or national board) blocking policy, and held:

> Henceforth, when a petition for certification or decertification is filed, the Regional Director shall immediately investigate and determine whether any unfair labor practices alleged in an outstanding complaint against the employer(s) and/or union(s) involved in the representation proceeding will make it impossible to conduct an election in an atmosphere where employees can exercise their choice in a free and uncoerced manner. (Id. at p. 14, emphasis added.)

However, the Board stated that, "In implementing a blocking procedure, however, we will as noted above, take into

consideration the various problems presented by the Act's peak requirement and the difficulty of re-running elections in the agricultural setting." (Id. at p. 11.)

In Panda Terminals, Inc., a wholly owned subsidiary of Pacific Intermountain Express Co. (1966) 161 NLRB 1215 at 1233 [63 LRRM 1419], the national board stated, "It is discretionary with the Board to determine, on the facts in each case, whether an election at a given time and under prevailing circumstances would effectuate the policies of the Act." (Fn. omitted.) The NLRB reasons that the probable impact of unfair labor practices would be to deprive employees of a free and uncoerced choice in a representation election and permit the charged party to profit from its unfair labor practice. As the Fifth Circuit Court of Appeals stated in Bishop v. NLRB (5th Cir. 1974) 502 F.2d 1024, 1929 [87 LRRM 2524]:

> If the employer has in fact committed unfair labor practices and has thereby succeeded in undermining union sentiment, it would surely controvert the spirit of the Act to allow the employer to profit by his own wrongdoing. In the absence of the "blocking charge[1] rule, many of the NLRB's sanctions against employers who are guilty of misconduct would lose all meaning. Nothing would be more pitiful than a bargaining order where there is no longer a union with which to bargain.

Following the directive of Cattle Valley, the Board has, by order, blocked decertification elections in two cases.

On May 29, 1985, the Board in San Clemente Ranch, Ltd., Case No. 85-RD-2-EC, blocked an election based on a finding that three unremedied Board orders were outstanding at the time the

decertification petition was filed, one of which ordered a makewhole award for a refusal to bargain violation.

Again, in Ventura County Fruit Growers, Inc., Case No. 86-RD-2-OX, the Board ordered an election blocked and ballots destroyed based on its determination that an unpaid makewhole award of approximately $40,000 prevented the employees from making a free and uncoerced choice in election, even though the non-monetary aspects of the Board's remedial order had been complied with.[1] In its order the Board stated:

> While this amount is obviously not final, it at least prima facie represents to the employees the fruits of the collective bargaining process. Since the makewhole remedy is central to the remedial scheme of the Act, (See Superior Farming (1978 4 ALRB No. 64), we cannot say that the effect of the Employer's unfair labor practices has been dissipated when it is not clear that it has been fully remedied.

My review of the record in this case shows that at the time the decertification was filed, a bad faith refusal to bargain finding and makewhole award against the Employer in Sam Andrews' Sons (1985) 11 ALRB No. 5 was unremedied as was a finding in Sam Andrews' Sons (1986) 12 ALRB No. 30 that the Employer discriminatorily refused to reinstate striking employees resulting in a backpay award. When the decertification petition was filed, the Regional Director had an affirmative duty under Cattle Valley

[1]On November 18, 1987, the Ventura County Superior Court ordered an injunction against the Board directing it not to destroy the ballots pending a final decision as to whether or not the election should have been blocked. The Board is currently considering whether any amount of makewhole was owing in that case at the time the election was held.

to determine if the unremedied unfair labor practices would "reasonably tend to affect employee choice" in the petitioned for election. (Id. at p. 15; see also NLRB Casehandling Manual, pt. two, Representation Proceedings, § 11730.3, where Regional Director is directed to promptly dismiss any representation petition if an unlawful refusal to bargain charge is found to have merit.)

The very fact that an informational meeting was scheduled to answer numerous employee questions regarding the unpaid backpay and makewhole awards put the Regional Director on notice that the anremedied unfair labor practices had become an employee issue. Moreover, once the meeting was held, it became very evident that the unremedied unfair labor practices had become a prominent election issue. Employee questions asked at the meeting regarding how the results of the election would affect their backpay and makewhole awards, quite clearly established that the unremedied unfair labor practices would, not only tend to, but actually would affect the employee's ability to make a free and uncoerced choice in the election. Once the Regional Director became aware of the employee questions, he abused his discretion by conducting an election just two days later.

Whether a formal investigation was conducted or not is irrelevant. The Regional Director had knowledge of facts which clearly indicated that the unremedied unfair labor practices were affecting the employee's choice in the election. Likewise, it is

irrelevant whether or not any party requested that the election be blocked, inasmuch as it is the Board's responsibility and duty to the public to conduct elections in a free and uncoerced atmosphere. Even if the parties had requested that the election proceed, despite a bad faith bargaining complaint, such a request would not be honored because a meritorious bad faith bargaining charge would preclude the existence of a question concerning representation. (Cattle Valley Farms (1982) 8 ALRB No. 24, p. 5; see also NLRB Casehandling Manual, pt. two, Representation Proceedings, § 11730.10.) Labor Code section 1156.3(a) states:

> Upon receipt of such a signed petition, the board shall immediately investigate such petition, and, if it has reasonable cause to believe that a bona fide question of representation exists, it shall direct a representation election by secret ballot to be held, ...

Where no question of representation exists, the Board is thus precluded from conducting an election.

This member is cognizant of the fact that the blocking policy results in a delay in election proceedings. However, the public interest in conducting elections in a free and uncoerced atmosphere outweighs the need for expedient elections. I would conclude that to decide this case based on election objections, rather than nullifying the election, would abrogate the policy reasons for having a blocking rule. Dated: July 20, 1989

IVONNE RAMOS RICHARDSON, Member

CASE SUMMARY

Sam Andrews' Sons
(UFW)

15 ALRB No. 5
Case No. 88-RD-l-VI

IHE DECISION

Two days prior to the holding of a decertification election, a Board agent appeared at an employees' meeting to discuss employees' questions about pending backpay and makewhole awards. The meeting was called by a Union ranch committee member who gave a strongly pro-union speech immediately prior to the Board agent's introduction and subsequent remarks. The Board agent explained the methods of computing backpay and makewhole awards, and attempted to explain the impact of William Dal Porto & Sons v. ALRB (1987) 191 Cal.App.3d 1195 [237 Cal.Rptr. 206] on a makewhole award previously imposed against the Employer. The Board agent noted that the Employer's invocation of the Dal Porto process would delay the employees' receipt of a makewhole award. The following day the Union distributed a one-page flyer implying that the agent had stated the Employer's use of the Dal Porto process would mean the loss of any makewhole award whatsoever.

At hearing on the Employer's objections, the Investigative Hearing Examiner (IHE) found that the agent had not made statements indicating employees' backpay awards would be reduced or eliminated in the event of a Union victory, nor that misrepresentations had been made by the Union speaker and adopted by the Board agent that would have a reasonable tendency to interfere with employee free choice. The IHE also found that the agent's presence and introduction at the partisan meeting were not sufficient to justify setting aside the election, since the agent withstood the Union speaker's efforts to draw him into the campaign by refuting the possibility of a correlation between the outcome of the decertification election and the Board's computation of backpay awards. Finally, the IHE found that the Employer had failed to prove that Union organizers told employees that a Union loss would result in the loss of backpay awards.

BOARD DECISION

The Board rejected the IHE's treatment of the Union's misrepresentation concerning the agent's Dal Porto remarks. Although the agent's mere appearance at the meeting was not enough to justify setting aside the election, the Board determined that the Union's subsequent dissemination of a misleading version of the agent's statement concerning the effect of the employer's Dal Porto motion made clear that the agent had allowed himself to be used in a manner that seriously affected the neutrality of the

Board's election procedures. The Board set aside the election on that basis.

DISSENTING OPINION

Member Ramos Richardson would nullify this election based on her finding that the Regional Director abused his discretion by failing to block this election at a time when two litigated, but unremedied, unfair labor practices created an atmosphere where employees could not exercise their choice in a free and uncoerced manner.

* * *

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

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STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of:	)	
	)	
SAM ANDREWS' SONS,	)	Case No. 88-RD-l-VI
	)	
Employer,	)	
	)	
and	)	
	)	
RUMALDO CUETO,	)	
ROGELIO SALINAS, AND	)	
	)	
FRANCISCO LUEVANO,	)	
	)	
Petitioners,	)	
	)	
and	)	
	)	
UNITED FARM WORKERS OF	)	
AMERICA, AFL-CIO,	)	
	)	
Certified Bargaining	)	
Representative.	)	

Appearances:

Kenneth D. Sulzer, Esq.
Los Angeles, California
for the Employer

Jose-Luis Morales, Esq. Keene,
California for the United Farm
Workers of America, AFL-CIO

Sidney P. Chapin, Esq.
Bakersfield, California
for the Petitioners

Juan Francisco Ramirez
Visalia, California for
the General Counsel

DECISION OF INVESTIGATIVE HEARING EXAMINER

THOMAS SOBEL, Investigative Hearing Examiner: The case was heard by me on July 12, 13, 14, 1988 in Bakersfield, California. Pursuant to the filing of a decertification petition on April 16, 1988, a decertification election was held among the employees of the Employer, Sam Andrews Sons. The tally of ballots resulted in a victory for the incumbent union, United Farm Workers of America, AFL-CIO. Pursuant to applicable procedures, the Employer timely filed a petition objecting to conduct affecting the outcome of the election. The Executive Secretary set the following objections for hearing:

> 1. Whether a Board agent or a party misrepresented as being a Board agent by Union agents made untrue, incorrect, and/or biased statements to employees, and if so, whether the conduct reasonably tended to interfere with the election.
>
> 2. Whether Union officials and agents made untrue and misleading statements regarding a back-pay award and Board procedures, and if so, whether the conduct reasonably tended to interfere with the election.
>
> 3. Whether threats were made against employees who were actively seeking decertification, and if so, whether those threats reasonably tended to interfere with the results of the election.

At the hearing, the Employer moved to dismiss Objection No. 3 on the grounds that it had been unable to find any non-hearsay evidence to support the objection. I granted the motion. Before considering Objections 1 and 2, I should point out that no evidence supports that part of Objection 1 which alleges that "a party misrepresented as a Board agent" made certain untrue

statements which affected the outcome of the election; accordingly, so much of that Objection is dismissed. It remains to decide (1) what statements were made by Board agents and union officials or agents and (2) whether, in view of either their origin or nature, those statements affected the outcome of the election.

II.

BACKGROUND

The incumbent union, the UFW, and the Employer, Sam Andrews Sons, have not had a harmonious relationship. At the time of the decertification election, there were at least two Board orders outstanding against the employer, one involving conventional backpay and the other involving contractual makewhole. Although the record is silent with respect to whether or not the non-monetary aspects of the Board's Orders in these cases had been complied with, inasmuch as specifications had not even been prepared in either case, it is certain that the "makewhole" provisions could not have been complied with. Board agent Albert Mestas testified that the backpay case had only been released to the Regional office to begin compliance no earlier than a few months before the election,[1] and preparation of the

[1]Mestas initially testified that he was "definitely" assigned to prepare the backpay specification in December 1987, and later that he did not "know" whether he was assigned to the case before April, 1988.

specification in the make-whole case had been suspended pending Board action on the Employer's Dal Porto motion filed two months before the election.[2]

The Board orders had apparently aroused expectations. According to Mestas, when unit employees learned the makewhole case was in compliance, he began to receive phone inquiries about it. Employee witnesses, too, indicated that there was considerable interest in the compliance cases. Antonio Diaz, for example, testified that he had asked the union about backpay "a lot of times". Francisco Luevanos indicated that both before and after the election the tractor drivers and the irrigators

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[2]In William Dal Porto and Sons, Inc. v. Agricultural Labor Relations Board (1978) 191 Cal.App.3d 1195, the Court of Appeal held that before the Board may impose the makewhole remedy in surface bargaining cases an employer found guilty of bad faith bargaining must be given the opportunity to prove that it would not have agreed to a contract calling for higher pay even if it had bargained in good faith.

In the wake of this decision, the Board issued what was in essence an Order to Show Cause to employers against whom make-whole orders had issued in surface bargaining cases, which permitted such employers to make a showing that the makewhole remedy had been "improperly invoked" in their case. Interim Order of the Board Respecting Bargaining Makewhole Cases Potentially Affected by William Dal Porto & Sons. Order dated November 16, 1987. Respondent-Employers within the affected class were given until February 15, 1988 to make the required showing. Pursuant to the Board's Order, Sam Andrews Sons duly filed a Pal Porto motion.

I should point out that even though the Employer has filed a Dal Porto motion, it is still appropriate at this point to speak of the original make-whole order as "outstanding" against the Employer. As a practical matter, because the Board has taken no action on the Employer's motion, the original order must still be regarded as in place and, as a theoretical matter, until the Employer's proof is in, makewhole must be considered as "presumptively" appropriate. William Pal Porto and Sons v. Agricultural Labor Relations Board (1987) 191 Cal. App.3d 1195, 1207.

expressed continuing concern about makewhole. (I:137-138.) It is against this background that the events which are the subject of this case unfolded.

III.

THE OBJECTIONS

A. Board Agent Misconduct

Francisco Larios, a member of the UFWs Ranch Committee, testified that about a month prior to the election, there was confusion among the workers about the status of the Board orders. (See also testimony of Luevanos, I:127-8.) It is clear from Larios[1] testimony that he shared the confusion. Thus, he initially ascribed the confusion to the fact that workers had heard that the Employer had already paid the money and they were wondering why, if that were so, they had not received any of it. Larios testified that because he was "sure" this was not so, he promised to arrange a meeting with a representative of the Board so that a Board agent could explain what was happening. However, in speaking again of his desire to see if someone from the Board could speak to the workers about the compliance cases, he testified:

> I wanted to know if it were possible for one of the state agents if he could have a meeting with some of the workers because the workers were very confused with the decisions that some managers had with the ALRB which had already been won.... (11:19.)

Although this testimony is far from clear, I infer from his reference to "confusion" over decisions "which had already been

won," that the "confusion" he is describing was engendered by the Board's Interim Order Respecting All Bargaining Makewhole Cases Potentially Affected by William Dal Porto which, as previously noted, raised the possibility that the makewhole order against the Employer could be vacated.

Larios called the Board and spoke to Board agent Albert Mestas. Both agree that their initial conversation took place approximately a month before the election. (II:19.) Although Mestas agreed to meet, he could not give Larios a meeting date during this initial conversation. As a result, he called Larios back some two to four days later to set the time and place for the meeting. (I:26-27.) The date he gave was April 20, 1988; the place was the union office in Lament. There is no evidence to indicate that the decertification campaign was even under way when Larios and Mestas made their arrangements.

On April 16, 1988 a decertification petition was filed, pursuant to which an election was set for April 22, 1988. Although Mestas apparently gave no thought to calling off the meeting when he became aware of the election, he testified that he wanted to avoid interfering with it. Thus, when Larios and he spoke on April 19th to confirm the meeting date, and Larios asked him if they could now meet at work, Mestas demurred, advising Larios that "he was aware of [the decertification election] and he did not want to interrupt the campaign." Mestas left it entirely to Larios to notify employees about the meeting.

Both Mestas' immediate supervisor and Regional Director Lawrence Alderete were advised of the meeting. When Mestas informed Alderete about the meeting, he told Alderete that he did not intend to discuss the election, adding, however, that if he were questioned about election matters, he would respond. Another Board agent, Charlie Atilano, attended the meeting, but only because he and Mestas had to attend the pre-election conference which has scheduled for the same evening.

All the witnesses agree that only Larios and Mestas spoke at the meeting; except for being present, Atilano said and did nothing. Estimates of the size of the audience range from 15-30 people.[3] According to the Employer's witnesses, Larios spoke

[3]Among the factors the Board conventionally looks to in determining whether Board agent misconduct (including allegations of bias or the appearance of bias) warrants refusing to certify the results of an election, is whether the misconduct was perceived by a number of eligible voters sufficient to have affected the outcome of the election. Exeter Packers (1983) 9 ALRB no. 76 p. 3-4; Monterey Mushrooms, Inc. (1979) 5 ALRB No. 2. Although the Board omitted this outcome-determinative factor when it restated the test in Tani Farms (1987) 13 ALRB No. 25, I do not believe the Board intended to abandon it. The Board simply had no occasion to reach the outcome determinative step since it did not find any misconduct in the first place.

Since 361 total ballots were cast, the Union needed 181 votes to retain its majority. The Tally of Ballots shows 186 votes for the UFW, 152 votes for Decertification and 23 Unresolved Challenges. If the maximum number of employees estimated to have been in attendance at the meeting was actually present, and if misconduct tending to interfere with employee free choice is found to have occurred, it follows that the Union would not have retained its majority. Accordingly, the "impact" factor has been satisfied.

very briefly. Porfirio Garza testified that "all he [Larios] said" (I:11) was that "at El Centre there's this company" that had won $7,000,000 but the employees had gotten only $7,000 because they had taken the union out." (I:14.) I have chosen this version of Garza[1]s testimony about Larios[1] remarks because it conforms to the testimony of the other witnesses, but I must emphasize that Garza was a very confused witness. When he was initially asked what Larios said, he related:

> A: That at El Centre there's this company that had won seven million, and that it stayed at $7,000. It remained at $7,000 to take the union out.
>
> (I:10.)

When asked again what Larios said, he related:

> A: That a company existed over there that had won seven million and been left at seven thousand.
> Q: Who did....Larios say won the seven million?
> A: [A] company in El Centro.
>
> (I:11.)

And in his declaration in support of the objections, Garza related that it was a Board agent who made this remark.

> "Also this agent [did state] at this meeting that a company in El Centro lost a similar case for $7,000,000 but now they took out the union. They're only dealing with $700,000."

[4]The declaration was translated at the hearing. The transcript reads: "Also this agent did sat at this meeting that a company in El Centro had also a similar case for seven million dollars, but now they took out the union. They're only dealing with $700,000." (I:19.) The "did sat" is obviously wrong and General Counsel has appropriately moved to correct the transcript.

Unfortunately, the correction he offers incorporates what I believe to be a mistake made by the Employer's interpreter in transcribing the Spanish version of Garza[1]s declaration. General Counsel argues that the declaration should read "Also this agent did not state at this meeting etc." General Counsel's proffered

After this introductory remark, Larios then introduced Mestas who, according to Garza, spoke very briefly. Garza recalled him saying that "if the union were taken out, instead of getting ten thousand, [the employees] were going to get two thousand." (I:12.) Garza also recalled Mestas having some sort of a list with him which contained the names of employees eligible to receive what Garza called "retroactive pay." In connection with this, Mestas advised the employees that it would help in the computation of "retroactive" if they had pay stubs.

Alvaro Marquez, another employee, also testified for the Employer about the meeting. According to him, too, the only thing that Larios said was: "[at] El Centre a company had the union, and they were going to give them seven million, and being that the Union lost, they only gave them seven thousand dollars." (I:24.)

(Footnote 4 Continued)

translation accurately tracks the Spanish version of Garza's declaration which reads: "Tambien esta agente no dijo....que una compania en El Centro perdio un caso similar por $7 milliones.... pero como sacaron a la Union solo cobraron $700,000 declares." [This means: "Also this agent did not say that a company in El Centro lost a similar case for $7,000,000 but as they took out the Union they only recovered $700,000." Hearing Officer's translation] The English version of the Declaration attached to the Objections Petition and also executed by Garza reads differently. It states: "I also heard the ALRB agent....tell those in attendance that a company in El Centro owed [7,000,000] etc. etc.."

I believe the English version remedies a typographical error in the Spanish version which would read more appropriately "Tambien esta agente nos dijo ["this agent also told us"] instead of "Tambien esta agente no dijo" ["This agent also did not say"] Accordingly, I am regarding the English declaration as the more accurate one.

Mestas was then introduced and began to discuss backpay procedures, advising the employees present that it would help him to prepare the specification if they had their check stubs or income tax returns.[5] in connection with this discussion, Mestas brought a list of those eligible for "retroactive pay." According to Marquez, Mestas told the employees that "if they were going to give $10,000 to each one of the workers, if the Union lost, they would only give each one two thousand." (I:25.) In his declaration, Marquez declared that Mestas said "if the Union lost, the workers would not receive their retroactive pay."

Larios and Mestas recall the meeting differently. Larios testified he introduced Mestas as "the one who was going to explain to us how the cases were, those which had been won so they [the workers] wouldn't be confused." (II:20.) He also "told the workers that it was very important that we think correctly what we were going to do at the voting. Because if we took the union out, who would be, who would be there to put pressure on the company to pay the money that they owed us." (II:21.) As to the comparison related by Marquez and Garza, Larios said:

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[5]The transcript renders this part of Marquez's testimony incoherent According to the transcript, Marquez has Mestas saying: "He said so as to have this trouble, that they were going to have to bring him their check stubs where they had worked previously. It was some income tax." (I:25.) My notes have Marquez saying "There will be less trouble if people bring check stubs....or income tax."

> I told them that I was aware of a company named Abatti, that that company owed the workers money and the ALRB, an agent from ALRB just got together with the company and they had an arrangement that they owed the workers about $10 million more or less. And they made an agreement for $700,000 only. And then so the union was not in agreement and appealed that agreement. And that if we took out the union, the same thing was going to happen to us. And who is being very bad for the workers. That's what I remember.
>
> (II:22.)

With Larios' identifying the Abatti case, and recourse to Board files, it is possible to clarify what he is talking about. Larios is apparently referring to a settlement agreement executed by General Counsel and the Respondent in the Compliance phase of Case No. 78-RD-2-D. In that case, the Regional Director issued an initial makewhole specification calling for a $17,000,000 make-whole award. On July 26, 1984, after hearing in the case had been concluded, but before the ALJ had issued his decision, General Counsel and Respondent entered into a settlement agreement requiring Respondent to pay approximately $750,000 in makewhole to unit employees. The union objected to the settlement which was rejected by the ALJ.

Larios testified that after mentioning the Abatti case, he asked Mestas if he knew anything about the case, but Mestas said he did not, adding that he could investigate the matter and get back to him. After describing the Abatti case, Larios told the employees that the company was disputing how many people were going to be receiving backpay at which point the workers began asking Mestas if he had a list of those entitled to backpay. When

Mestas said he did, workers began to ask if they were on the list. Mestas asked them to identify themselves so he could see if they were on the list. Larios denied that Mestas made any sort of statement indicating that employees would get less money if the union was voted out. (II:23.)

According to Mestas, Larios spoke for 5 or 10 minutes before introducing him, after which he did most of the talking in an attempt to "clarify" the status of the backpay and makewhole cases. (II:81.) Mestas began his discussion by explaining the difference between coventional backpay and contractual make-whole, and the difference between the status of the two cases. With respect to the latter, he explained that he had previously been assigned to the make-whole case, but that it had been subsequently assigned to the Board's Sacramento office. He explained that the case was now in abeyance pending the Board disposition of the Employer's Dal Porto motion. (II:76.) He then tried to explain what a Dal Porto motion was and how it affected the compliance case. (II:84.)

According to Mestas, it was after he provided this explanation that Larios interjected and referred to the Abatti case, telling the workers that "because the union had lost support that the makewhole had been reduced." (I:85.) In response to Larios[1] comment, some employees questioned Mestas about whether that could happen in this case.

> I told them [Abatti] happened down in the Imperial Valley, that was out of the El Centro region, and

> another investigator had done that, and I had no knowledge of it. That I could not answer any specific questions in regard to how the Union lost or gained support from the reduction that he was making reference to. Only that in these two particular cases, that was not going to happen. That—and I think at that point is when I told them that regardless of what happens in an election, that that was not going to affect how, or what my computations were going to be. And I indicated to them that I didn't have any cases to give them at that point in time, because it would be misleading to tell them or give an individual worker a set figure as to what they'd be getting in either case. Number one, one case had been transferred from me, so I didn't know what Mr. Sanchez was doing, and plus the appeal pending on that particular case, and that in the back pay case I was just in the first stage of collecting data, being their interim earnings, in order to establish what would be mitigation for a net backpay figure.
>
> (I:85.)

At another point in his testimony, Mestas said that in this context he also explained:

> Only--workers asked me if the results of the election, or whether either party won, would that have an effect on my completing or coming up with a compliance figure on either one of these cases. The election had no bearing on any of the compliance cases. It was a separate issue. It was their choice. It was *a* secret ballot process. If they wanted to be represented, they could. If they didn't want to be, also it didn't matter. Either way, these decisions had already come down by the Board. They had been appealed by the Company through the appellate courts, and they had been released to the Board for compliance, meaning that the appellate courts had already [up]held the Board's ruling in both cases, and that we were now being required, the Board, was, to collect data in order to start preparing a make-whole and a back pay computation. And regardless of what happened in the election, it had no bearing on either case.
>
> (I:80-81.)

Mestas also emphasized that he told employees it was not the responsibility of the company or the union to determine what backpay or makewhole would be, that the only role of the parties

was to assist the agency in determining backpay.[6] He denied making any sort of statement about the amount of backpay being reduced as a result of the union's being voted out. The meeting ended with Mestas talking to individual workers about whether they were entitled to backpay. Atilano confirmed Mestas[1] testimony that Mestas made it clear the election would have no impact on the employees claims.

Accepting the truth of Garza's and Marquez's testimony, the Employer claims that Mestas made blatantly pro-UFW statements concerning a campaign issue and that such statements warrant my overturning the election and ordering a re-run election.[7] Obviously most of what Mestas said is the subject of considerable

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[6]The text of his testimony on this point is:

> Q (from Employer's Counsel) Did you or Mr. Atilano indicate in any way that the Union had any role whatsoever in the back pay case?
>
> A I don't -- I can answer your question, "role," only to assist. But I indicated to the workers that neither party had a role other than to assist the Agency in making a determination what the back pay would be.
>
> Q So you mentioned that the Union would assist the Agency in determining what backpay would be.
>
> A Only in collecting information.

The Employer argues in its brief that Mestas demonstrated bias in these remarks by identifying the Union as assisting in the backpay case. The implication of Mestas' complete answer is that the only role for either party was that of assisting the Regional Office.

[7]Apart from the question whether the election should be set aside, it is not all clear to me that a re-run election would be appropriate in this case. Under NLRA precedent, the decertification petition would have been held in abeyance because full compliance had not be achieved in the backpay and makewhole

dispute, and so the Employer's argument principally depends upon my making factual findings in its favor. So far as credibility is concerned, the Employer argues that I ought to credit its witnesses because Mestas and Larios were generally incredible and, in particular, that Mestas rambled, changed his story, and testified disingenuously about whether or not he had ever been disciplined, while Larios was hostile and sarcastic. The Union and the General Counsel argue that it is Garza and Marquez who are unbelievable.

I will consider the credibility of Mestas and Larios first. It is difficult to construct a chronological account of Mestas' remarks, but I would not characterize his testimony as rambling for that reason since he was answering questions that plainly did not aim at developing such an account. It seemed to me that Mestas was only too anxious too convey the full extent of his remarks within the limitations of rather confining examinations. In this context, I do not find it either unusual or suspicious that he progressively brought forward new details

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(Footnote 7 Continued)

cases. NLRB Field Manual Section 11730. See also 16 ALR Fed. 420, 430. Our Board has adopted the NLRB's policy of blocking elections, except where it is clear that the unremedied unfair labor practices will not affect the outcome of an election. Cattle Valley Farms (1982) 8 ALRB No. 24. In light of the fact that the pendency of the Board orders dominated the election campaign, I could not conclude that the effects of the previous unfair labor practices had been dissipated. Under these circumstances, I would not order a re-run election.

whenever he was given occasion to do so. Finally, I did not find him generally "evasive, "agitated", and "nervous". Although he did testify with feeling, it seemed to me it was the feeling of a man anxious to exonerate himself.

In this connection, there is one aspect of Mestas' testimony, highlighted by the Employer, which requires specific comment, and that is Mestas[1] evasiveness about whether he had ever been "accused" of misconduct when he had apparently been terminated as a result of "misconduct." Although Mestas also testified without contradiction that he was subsequently reinstated, and that at the time of his reinstatement, his record was purged, I was not convinced by his testimony that he only failed to mention the matter because he had put it out of his mind. Far from being out of his mind, it seemed to me that Mestas felt so wounded by the incident that, regarding himself as having been vindicated, he simply refused to acknowledge that anything had ever occurred. Although I am troubled by his testimony in this respect, the rich mixture of emotions he displayed in connection with this matter, is a good deal different from mendacity and I do not disbelieve him on account of it.

With respect to the Employer's attack on Larios[1] credibility, I own that Larios was hostile and provided rhetorical answers on cross-examination; as a result, I admonished him to simply answer the question put to him. But the admonition was made only to expedite the hearing: it seemed clear to me that

Larios didn't enjoy having his motives or actions subjected to the sort of scrutiny they were receiving. Although such an attitude, if pushed, would undermine one's credibility, I am convinced from what I observed that Larios is a fighter, rather than a liar. I do not discredit him on demeanor grounds.

While Larios and Mestas testified long enough to permit me to obtain enough of a sense of their personalities against which to assess their performances as witnesses, Garza and Marguez testified so briefly that I have only their bare words from which to draw any conclusion about their reliability, and on this score neither inspired confidence. Both of them had only one important piece of evidence to provide and neither got it the same way twice.

Primarily on the basis of Garza's and Marquez's testimony, the Employer argues that by his remarks Mestas aligned himself with the union and thereby contravened the "neutrality" required of our agents. See Tani Farms (1987) 13 ALRB No. 25. Of course, to the extent the Employer's argument depends upon my crediting Garza's and Marquez's version of Mestas' remarks, I must reject it since I do not find any overt partisan action on the part of Mestas. But that does not end our inquiry for under NLRA precedent the question remains whether there was anything in Mestas' remarks which could reasonably be construed by the employees as Mestas having taken a position in the election. In this connection, the Employer argues that Mestas[1] failure to deny

or contradict Larios[1] remarks about the Abatti case corroborated Larios "misrepresentations"[8] about the case and was likely to lead the employees to vote against decertification.

Although it is true that Mestas declined comment on the Abatti case, it is not true that he "corroborated" Larios' argument since he contradicted Larios[1] claim that the compliance cases were in any way dependent upon the outcome of the election. Indeed, it seems to me that Mestas went to great pains to affirm the Board's "neutrality" in the election by truthfully advising the employees that the election would not affect their backpay or makewhole claims.

Although I have thus rejected all the factual premises of the Employer's arguments, I must note that there is one case which would appear to make Mestas' participation in the meeting grounds to overturn the election. In Provincial House, Inc. v. NLRB (6th Cir. 1977) 568 F.2d 8, the Court of Appeals overturned a Board certification because a Board agent permitted himself to be

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[8]I have already detailed the extent to which Larios' description of the Abatti case accurately reflects record facts; for all that, however, it is still a misrepresentation in that it treats an original specification as representing what the employees were entitled to receive in makewhole as opposed to merely being an initial pleading. Indeed, in the Board's recently issued Abatti decision, 14 ALRB No. 8 (which issued after the events in this case), the Board rejected the formula upon which the $17,000,000 was based and approved, instead, a formula which appears to lead to a makewhole award of less than the $17,000,000 contained in the original specification. I should point out that even though Larios misrepresented Board actions, under current NLRA law, this is not grounds to overturn an election. Riveredge Hosp. (1982) 264 NLRB No. 146; Midland National Life Insurance Co. (1982) 263 NLRB No. 24.

introduced at a union meeting which the Board agent was attending solely for the purpose of interviewing witnesses. By permitting himself to be introduced, the Court held, the Board agent compromised the neutrality of the Board.[9]

Under the Provincial House standard, the circumstances of Mestas[1] appearance could also be said to impair the neutrality of the Board. Mestas appeared at a meeting which, for all the employees knew, had been organized by the union, and which, from the tenor of Larios[1] remarks, Larios plainly intended to serve partisan purposes. Despite this, I believe that what distinguishes this case from Provincial House -- namely, Mestas' resisting Larios[1] effort to draw him into the campaign and his refutation of Larios[1] Abatti-analogy -- is decisive. Although it is tempting to think that Mestas would have been better advised to postpone the meeting -- after all, he had the compliance case for months and there does not appear to have been any special urgency in obtaining compliance information at that point -- on the whole, it seems to me that his presentation really did serve the overall interest in an informed electorate which grounds the democratic presuppositions of our Act when he delivered a correct statement[10]

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[9]I should note that another Courts of Appeal has disagreed with Provincial House. See NLRB v. Osborne Transportation, Inc. (5th Cir. 1979) 589 P.2d 75

[10]Indeed, in Tani Farms, supra, the Board emphasized the truthful nature of the Board agent's response in considering the objectionable nature of his remarks. Unlike the situation in NLRB v. Silver State Plating and Finishing (6th Cir. 1984) 738 F.2d 733, Mestas' remarks were not misleading.

of the lack of any relationship between the election and the employees' backpay and makewhole claims.

I recommend this objection be dismissed.[11]

B. THE UNION STATEMENTS

The Employer's second objection concerns (1) statements made by union organizer Antonio Galvez to the tractor drivers and irrigators and (2) representations made in a flyer widely circulated among the lettuce harvesting crews the day before the election. I will discuss the flyer first.

The flyer has a cartoon drawing of a man representing the Employer telling three employees to "Vote for the company [and] we will pay you retroactive pay we owe you". The employer is also represented as holding a knife behind his back labelled "Appeal to the ALRB." Three workers think to themselves: "Better vote for the Union"; "I think they want to use us only for the vote"; and "But the rep of the state said the company had appealed so they won't pay us." The plain import of the flyer is that, even as the Employer is seeking the support of the employees in the decertification election, he is secretly attacking their interests by appealing the makewhole order. Since the handbill relies upon that part of Mestas' presentation in which he explained the

[11]I have omitted from this section any discussion about Mestas' telling the employees that the Employer's Dal Porto motion had caused the makewhole case to be put in abeyance. I will discuss the effect of this statement in the next section when I discuss the UFW leaflet which repeats Mestas[1] statement.

consequences of the Employer's Dal Porto motion, it is necessary to consider the effect of Mestas' statement, both (1) as it came from him and (2) as it is reflected in the leaflet.

The Employer argues that Mestas' statement was objectionable in the first instance because it "improperly blamed the Employer for delaying payment to affected employees."[12] In the first place, Mestas' statement did not refer to the Employer's motive in filing its Dal Porto motion, but only to the effect of the motion. Thus, I do not believe the statement is reasonably construable as a commentary on the Employer's "right to appeal"; it is simply an assertion of fact and, as such, does "not indicate that the Board favors one choice over another." Riveredge Hospital, supra, at p. 1095.

Nevertheless, if Mestas did not attribute any motive to the Employer, the handbill certainly does, and the question then becomes whether this "misrepresentation" of his remarks is grounds for overturning the election. Under current NLRA precedent, I do not believe it is. Generally speaking, campaign

[12]It is not entirely clear to me what the Employer means by this argument: (1) that the blame for delay really belongs elsewhere, on the Board, for example: or (2) that the Employer, being within its rights to file an appeal, "cannot be faulted for exercising its right." Post-Hearing Brief, p. 18. To the extent the Employer might be arguing that the "blame" for delay belongs elsewhere, no evidence was presented in support of this contention. The only evidence on the question is Mestas' testimony that he worked on the specification and that, after him, another agent worked on it. Accordingly, in my discussion above, I am assuming the Employer means that it cannot be "faulted" for exercising its right to appeal.

misrepresentations are no longer grounds to overturn an election unless they make use of facsimiles of official Board documents which have been altered in such *a* way so as to indicate an endorsement by the Board of a party to an election. Otherwise, so long as campaign literature is identifiable as originating from a party, misrepresentations contained within it will not be considered objectionable. See Riveredge Hospital (1982) 264 NLRB No. 46. Since I do not believe the leaflet is even arguably attributable to anyone but the Union, *I* recommend any objection related to the flyer be dismissed.

2.

Both Abelino Diaz and Jose Flores testified that shortly before the election union organizer Antonio Galvez told the tractor drivers and irrigators that if they didn't vote for the union they would lose their backpay. Although Diaz was quite definite that this was what Galvez said (II:101, 105), when Flores was pressed as to Galvez's exact words, the words and the message changed considerably. He now testified: "They said that the union was the only one that would fight with the company regarding that money." (II:12.) As sure as he was of his initial version, so he was not sure that this was the "propaganda" the union was spreading.

An equally obvious question of interpretive transformation came up in the testimony of Gabino Salinas, who at first quoted Galvez as saying that if the union were to lose, the

employees would "lose" their retroactive (II:129) only to confirm on cross-examination that Galvez actually said that "if the union lost the election, there would be no one to fight for the money." (II:132.) Francisco Luevanos combined both versions in his testimony. According to Luevanos, Galvez told the irrigator:

> Antonio was saying for everyone to think about it well, that which they were doing, not to pay any attention to some who had sold themselves to the Company, because if the Union lost, we were not going to recuperate the retroactive pay. And that the Company was going to do to us anything they wanted, the Company and the foremen. We were going to lose the medical service. He said that's why we have to think very well about that which we were going to do. Because if we kick out the Union, there would be no one else to defend us.
>
> (II:136.)

For his part, Galvez denied saying that the workers would not receive their money if they voted out the union, although he was asked by the workers whether or not that might be the case. According to Galvez, he responded that if they voted against the union, "perhaps the union would not be able to represent them to win cases for them." Lupe Martinez corroborated Galvez's testimony. It is clear from the testimony of some of the Employer's own witnesses that there is considerable confusion about what Galvez said. Under these circumstances, I cannot find the Employer has met its burden of proving that Galvez made any objectionable comments.

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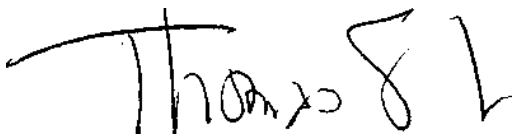
I recommend that this objection be dismissed and, in view of my previous conclusion, that the results of the election be certified.

DATED: September 30, 1988



THOMAS SOBEL
Investigative Hearing Examiner