

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

BORREGO PACKING COMPANY,	)	
	)	
Employer,	)	Case No. 88-RC-6-SAL
	)	
and	)	
	)	
UNITED FARM WORKERS	)	15 ALRB. No. 8
OF AMERICA, AFL-CIO,	)	
	)	
Petitioner,	)	
	)	

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DECISION AND CERTIFICATION OF REPRESENTATIVE

On September 30, 1988, Investigative Hearing Examiner (IHE) Barbara D. Moore issued the attached recommended Decision in this proceeding. Thereafter, the Employer and the United Farm Workers of America, AFL-CIO (UFW or Union) each timely filed exceptions to the IHE's Decision with briefs in support of their exceptions. The Agricultural Labor Relations Board (ALRB or Board) has reviewed the IHE's Decision in light of the exceptions and briefs of the parties and has decided to affirm the rulings, findings and conclusion of the IHE to the extent consistent herein and to adopt her recommendation that the results of the election be certified.

In upholding the IHE's dismissal of the Employer's objection to the Board agents' handling of the Union's challenge of 17 voters at the Fanoe Ranch voting site, we do not mean to imply complete satisfaction with the process employed by our agents in the matter. The Union had challenged the 17 voters for their anti-union campaigning during work hours the day before the

election and asserted that each of them was acting as an "agent/consultant" for the employer. While we are ultimately persuaded that the record does not demonstrate that the making and acceptance of the challenges interfered with employee free choice, serious concerns are nonetheless raised by this aspect of the election. Since the individuals who were challenged were agricultural employees who met the voter eligibility requirements of Labor Code section 1157, it does not appear that the challenges to their ballots were validly asserted. Moreover, the asserted basis for the challenges is not among the specific categories to which challenges must be limited under our regulations. (See 8 Cal. Admin. Code section 20355 (a)(1)-(8).) A proffered challenge which does not conform to the regulations should be rejected as either improper on its face or more properly the subject of a post-election objection. The recognition of challenges other than those specifically set forth in the regulations facilitates the potential misuse of the Board's challenged ballot procedure and can result in coercive circumstances that ultimately interfere with the election process.

As the invalid challenges here appear to have been processed without undue attention being drawn to the challenged voters and their participation in the anti-union campaign, and as the challenges were witnessed by an insufficient number of voters to have affected the outcome of the election, we find that this misuse of the challenged ballot procedures does not warrant setting aside the election. However, we caution our agents not to make the facile assumption that employees actively campaigning

against unionization are ipso facto serving as agents of the employer. Labor Code section 1152 protects agricultural employees' concerted activities in opposition to representation by a union as well as in support thereof.

CERTIFICATION OF RESULTS OF ELECTION

It is hereby certified that a majority of the valid ballots were cast for the United Farm Workers of America, AFL-CIO (UFW or Union) in the representation election conducted on June 3, 1988 among the agricultural employees of Borrego Packing Company (Employer) and that, pursuant to Labor Code section 1156, the said labor organization is the exclusive representative of all agricultural employees of Borrego Packing Company in the State of California for purposes of collective bargaining, as defined in Labor Code section 1155.2(a) concerning employees' hours, wages and other terms and conditions of their employment.

Dated: August 2, 1989

BEN DAVIDIAN, CHAIRMAN<sup>1/</sup>

GREGORY L. GONOT, Member

IVONNE RAMOS RICHARDSON, Member

JIM ELLIS, Member

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<sup>1/</sup>The signatures of Board Members in all Board Decisions appear with the signature of the Chairman first (if participating), followed by the signatures of the participating Board Members in order of their seniority.

## CASE SUMMARY

Borrego Packing Company,  
UFW

15 ALRB No. 8  
Case No. 88-RC-6-SAL

### Background

On June 3, 1988, pursuant to a Petition for Certification filed by the United Farm Workers of America, AFL-CIO (UFW or Union), the Agricultural Labor Relations Board (ALRB or Board) conducted a representation election among all agricultural employees of Borrego Packing Company (Employer) in the State of California. The Amended Tally of Ballots issued on July 7, 1988, revealed 107 votes for the UFW, 93 for No Union, and 3 Unresolved Challenged Ballots. The Employer filed objections to the conduct of the election, and the following were set for hearing: (1) whether the Board agents' disqualification of the Employer's election; (2) whether the Union engaged in improper electioneering and campaigning on the day of the election which interfered with the conduct of the election; (3) whether incidents and conduct occurred during the course of the election that created the appearance of bias on the part of Board agents and, if so, whether that appearance interfered with the conduct of the election; and (4) whether the allegations set forth in the objections occurred and, if so, whether the cumulative effect of those events and conduct interfered with the employees' free choice in the election.

### IHE's Decision

Following a hearing in which all parties participated, the Investigative Hearing Examiner (IHE) found that there was insufficient evidence that the acts complained of occurred and/or caused interference with the election. The IHE denied the UFW's request for attorney's fees, and recommended that the results of the election be certified.

### Board Decision

The Board reviewed the IHE's Decision in light of the exceptions and briefs of the parties, and decided to affirm the rulings, findings, conclusions and recommendations of the IHE. Though the Board upheld the IHE's dismissal of the Employer's objection to the Board agents' handling of the Union's challenge of 17 voters as "agent/consultant" of the Employer for their anti-union campaigning during work hours the day before the election, the Board cautioned its agents that the process used in this matter was not completely satisfactory. Since the challenged individuals met the eligibility requirements of Labor Code section 1157, and since the asserted basis for the challenge was not among the specific categories to which challenges must be limited under 8

Borrego Packing Company,  
UFW

Cal. Admin. Code section 20355 (a)(1) - (8), the challenge should have been rejected as either improper on its face or more properly the subject of a post-election objection. Labor Code section 1152 protects agricultural employees' concerted activities in opposition to representation by a union as well as in support thereof.

\* \* \* \* \*

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

STATE OF CALIFORNIA  
AGRICULTURAL LABOR RELATIONS BOARD

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

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Appearances:

Chris A. Schneider  
For the United Farm Workers  
of America, ALF-CIO,  
Petitioner

James W. Bogart  
Paul D. Gullion  
For Borrego Packing Company,  
Employer

Cliff Meneken  
For ALRB Salinas Regional Office,  
Intervenor

Before: BARBARA D. MOORE  
Investigative Hearing Examiner

DECISION OF THE INVESTIGATIVE HEARING EXAMINER

I. STATEMENT OF THE CASE

On May 27, 1988,<sup>1</sup> the United Farm Workers of America, AFL-CIO (hereafter referred to as "Union" or "UFW") filed a petition in case number 88-RC-6-SAL in order that an election be held among employees of Borrego Packing Company (hereafter referred to as "Borrego", "company" or "employer") in a unit described in the petition as "all agricultural employees of the employer in the state of California." An election was conducted on June 3. The Amended Tally of Ballots issued on July 7 and showed the following results:

UFW	107
No Union	93
Unresolved Challenged Ballots	3
	203

The employer filed objections to the conduct of the election. Of the objections filed, the Executive Secretary set the following issues for hearing:

1. Whether the Board agents' disqualification of the Employer's first designated choice of election observers substantially interfered with the conduct of the election?
2. Whether the Union engaged in improper electioneering and campaigning on the day of the election which interfered with the conduct of the election?
3. Whether incidents and conduct occurred during the course of the election that created the appearance of bias on the

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<sup>1</sup>All dates herein are 1988.

part of the Board agents and, if so, whether that appearance interfered with the conduct of the election?

4. Whether the allegations set forth in the objections occurred and, if so, whether the cumulative effect of those events and conduct interfered with the employees' free choice in the election?

On August 30 and 31, I conducted a hearing on the above issues in Salinas, California. The parties appeared through their respective representatives<sup>2</sup> and were given full opportunity to present argument, testimony and documentary evidence, and to file post-hearing briefs. Briefs were filed by the Employer and the UFW. Based upon the entire record in the case, including my observation of the demeanor of the witnesses, and careful consideration of the briefs submitted, I make the following findings of fact and conclusions of law.

## II. STATEMENT OF FACTS

A pre-election conference was held on June 2. Among other things, it was agreed that there would be no campaigning on election day and that there would be four election sites. Voting was to begin at 6:30 a.m. at a site known as Soledad Mission. The second site was known as Fanoe Ranch. Spreckles was the third site. Finally, from 4:00 to 6:00 p.m. the library of the Board's Salinas Regional Office was to serve as a voting site.

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<sup>2</sup>At the hearing, General Counsel moved to intervene, and I granted the motion.



On the morning of the election, the company was to send buses to Airport Boulevard in Salinas which was a regular location Borrego and other Salinas companies used to pick-up agricultural workers to take them to the fields. The buses were to leave Airport Boulevard at 5:30 a.m. to go to the fields where the voting sites were located. A Board agent was to ride on each bus to ensure that no party campaigned.

Humberto Gomez, Crop Manager for the UFW in Salinas,<sup>3</sup> expressed doubt at the pre-election conference that the company buses would all be at one pick-up point, so the attorney for Borrego, James Bogart, telephoned company representatives. He told the UFW representatives and the Board agents present at the conference that he had been assured all buses would leave from the one site on Airport Boulevard.

On the morning of the election, however, buses were dispatched from two sites -- Airport Boulevard and Expo Boulevard. This fact, coupled with the fact that the first bus which left Airport Boulevard left prior to 5:30, caused confusion which led to Board agents and UFW representatives arriving at the first voting site at the same time, albeit in separate cars, which is the basis for one objection that Board agents exhibited bias in favor of the UFW.

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<sup>3</sup>As Crop Manager, Mr. Gomez was responsible for contract negotiations, grievances, administering the contract, organizing employees and handling unfair labor practice charges.

What happened is this. Jorge Vargas, the Board agent in charge of the election, and the other nine Board agents working on the election,<sup>4</sup> arrived together at the Airport Boulevard pick-up point prior to 5:15 a.m. Also present were Humberto Gomez from the UFW and, from the company, its attorney Jim Bogart, Joe Sanchez,<sup>5</sup> a labor consultant hired by Borrego; Sanchez' assistant, Sergio Soto, and Jose Guadalupe Guzman, the person the company chose to be its permanent observer who would accompany the Board agents and ballot box from one election site to another throughout the day.<sup>6</sup>

Between 5:15 and 5:30 a.m., one bus left to take the workers to the Soledad Mission where they would start work until it was time to vote. Attorney Bogart, Sanchez, Soto and Guzman followed the bus to the election site.

After the first bus left Airport Boulevard, two more buses came to pick up workers, but neither was going to the first voting site at Soledad Mission. Not having a bus to follow, and all the company representatives having left with the first bus,

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<sup>4</sup>Shirley Trevino, Jack Matalca, Charlie Atilano, Tom Nagle, Javier Sanchez, Helen Yee, Harry Martin, Susan Moleno, and Norberto (Nob) Longoria.

<sup>5</sup>He is to be distinguished from Javier Sanchez who is a Board agent.

<sup>6</sup>The UFW and Borrego were also to designate a crew observer at each election site from whichever crew was voting at a particular site.

Vargas and the remaining agents discussed with Gomez and the other UFW people how to proceed.-]

Lupe Castillo of the UFW stated he thought he knew where the fields were, so everyone decided to follow Castillo. After first going to the wrong set of fields in the Soledad Mission, Castillo found the voting site. Consequently, all the cars arrived at the voting site at the same time, and everyone was late. The people parked the cars some 150 feet from the workers who were still at work in the fields. I credit Vargas, who testified the workers were working facing away from the area where the cars were parked.

A heated discussion broke out regarding the delay in starting the election, the company sending buses to more than the one agreed upon site, and the Board agents and UFW representatives arriving at the same time. As the Board agents prepared to get the election started, Bogart introduced Jose Guadalupe Guzman<sup>8</sup> as the company's permanent observer.

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<sup>7</sup>At the pre-election conference, Mr. Bogart had been unable to provide directions to the fields where the voting sites were located but promised to obtain them. On the evening prior to the election, while discussing various issues, he asked Vargas if he still needed directions. Vargas said he did not. Vargas credibly explained at hearing that he expected to follow the buses to the first voting site and knew where the next two voting sites were located because while distributing the Notice of Election, the Board agents had learned these locations.

<sup>8</sup>He is the same person as Jose Leon Guzman who is listed on the eligibility list.

Humberto Gomez challenged the use of Mr. Guzman on the basis that Guzman was a "paid labor consultant" for Borrego. He based the challenge on the fact that the day before the election Guzman and a number of other workers from broccoli crew No. 1, along with the labor consultant hired by Borrego, Jose Sanchez, and Sanchez' assistant, Soto, went to each of the Borrego crews and spoke against the UFW.

This activity occurred during work hours, and Gomez believed that Guzman and the other workers were paid by the company for making the anti-UFW speeches. Mr. Guzman and Martha Alvarado, another member of crew no. 1, testified that Borrego did not pay them, and there is no evidence to the contrary. Rather, they had requested the day off from work to talk with the crews, and the company granted the request.

After Gomez challenged Guzman, a heated discussion ensued among Bogart, Gomez and Vargas. Other Board agents, particularly Atilano, Trevino and Matalca became involved. Vargas questioned Guzman who acknowledged campaigning against the UFW but denied having been paid.

Vargas consulted both the Board's election manual and the regulations and initially agreed with Bogart that Guzman could serve as observer. (I:15.) After consulting with other agents, especially his supervisors Trevino and Matalca, Vargas told Bogart they had decided Guzman could not serve. Vargas credibly testified that he thought it was safer to replace Guzman in the

event that later investigation revealed that Guzman had been paid. Bogart protested but selected another worker to replace Guzman.<sup>9</sup>

The only workers present during this discussion were Guzman, the UFW permanent observer and, perhaps for part of the time, the two crew observers (one for the company and one for the UFW). (I:14; II:40.) The other workers were still working in the fields, approximately 150 feet away. (II:38-39.) When Guzman returned to his crew, however, an unspecified number of employees asked him why he was not at the election, and he told them the state would not let him serve. (I:48.)

After the election got underway, Bogart left. He went to Fanoe Ranch which was the second voting site. There were two crews working, and the voting had not begun since voting had started later at the first site due to the earlier confusion about the buses and locating the field.

When he arrived, he spoke to Marv Anderson, owner and manager of Borrego, and to David Anderson, Marv's son. Dave told Bogart that the UFW was talking to workers in the fields in violation of the agreement there would be no campaigning. Bogart went to the fields and saw a man talking to a group of employees who were working. Bogart did not know who the man was but saw him

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<sup>9</sup>I take administrative notice of the Board's Election Manual, section 2-6200 of which provides that the use of an ineligible observer may result in an election being set aside.

go to a car where Lupe Castillo and Efrael Edeza, both UFW representatives, were sitting and talk to them. The man then got in the car. (I:18.)

Bogart told Board agent Tom Nagle about what he had seen and protested that Nagle was supposed to keep the parties from talking to employees. Nagle went over to the car, and spoke to the man who had been talking to the workers. Nagle returned to Bogart and told him he had instructed the man not to speak to any more workers. Nagle also told Bogart he would make sure it did not happen again. After Nagle cautioned the man, there is no evidence that man or anyone else spoke to any employees.

Prior to Bogart talking to Nagle, Nagle had been outside the fields talking to a woman whom he introduced to Bogart as another Board agent. There is no evidence whether Nagle had seen the man while he was talking to the workers. I decline to make such an inference. Nagle was engaged in talking to another agent, and his attention may not have been directed at the fields where the workers were harvesting.

At the Fanoie Ranch voting site, after the first crew finished voting, Agent Vargas decided that logistically it would be easier to move the voting site to where the second crew was working rather than have the company put the crew on buses and transport them to the existing site. He also decided to use the same observers at this second site. As a result, Martha Alvarado, who was a member of broccoli crew no. 1 and who had spoken against

the UFW the day before, was not used as an observer. Alvarado's testimony does not contradict this explanation since she testified only that she was not allowed to serve but was not given a reason for the Board's action. (I:91-92.)

Also at this second voting site at Fano Ranch, Alvarado, Guzman and 15 other workers who also had spoken against the UFW on June 2 were challenged by the UFW which contended they were paid labor consultants. At hearing, the parties agreed that four of these employees<sup>10</sup> if called by the company to testify would describe the following procedure. As each of the 17 workers came to the table to get a ballot to vote, each was challenged by the UFW. A Board agent directed each person to an area by a truck some 12 to 15 feet away from the voting tables. They were questioned by Board agents, individually, and were asked questions to the effect of: "Were you given a paid day off to talk to the crews? Each person answered "No." They were then asked "How much did the company pay you?" Each said s/he was not paid. Each Board agent then asked the worker who was being questioned to sign a declaration which each did. Each worker was then directed back to the ballot table, given a ballot and allowed to vote a challenged ballot.

Jose Guzman testified that one employee was questioned the whole time voting was going on -- about 20 minutes. Board

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<sup>10</sup>Maria Eugenia Salazar, Martha Alvarado, Maria Lucia Escatel and Javier Soto.

agent Jorge Vargas testified that the above procedure described generally the usual procedure followed by Board agents to deal with challenges. He clarified that several agents are assigned to take declarations, and each agent questions a potential voter about issues relevant to the challenge, writes a declaration based on the answers to the questions, reads the declaration to the individual (translated into the appropriate language where necessary) and has the person sign the declaration. The time needed to question the individual and prepare the declaration varies, but he estimated that in this case it would have taken 5 to 10 minutes. I credit Vargas and find Guzman's estimate exaggerated.

At the third site, namely the Spreckles Ranch, Sergio Soto<sup>11</sup> testified that he saw Lupe Castillo, who was waiting to serve papers on an owner of Borrego in connection with another matter, talking to two workers. Board agent Javier Sanchez was standing about six feet away from Castillo buying food at a mobile lunch wagon. He did not tell Castillo to stop talking to the workers. Soto did not directly answer the question whether Sanchez saw Castillo speaking to the workers but only said Sanchez was standing only six feet away. Soto did not testify that he told Sanchez what he had observed or that he asked Sanchez to stop

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<sup>11</sup>It will be recalled that Soto is the assistant to Joe Sanchez the head of the labor consulting firm hired by Borrego.



Castillo. There were some 20 workers congregated around the lunch wagon when this occurred. (II:109-111.)

Shortly thereafter, and prior to the workers voting, according to Soto, Board agent Sanchez asked Lupe Castillo if he wanted a taco which Sanchez had bought from the lunch wagon. Castillo said "No." Sanchez asked Castillo if he was sure. Castillo said "No" indicating he did not want one. Soto testified Sanchez did not offer him a taco. (I:111-112.) On cross-examination Soto acknowledged that at that time he and Sanchez had not met. Apparently then, Sanchez did not know Soto represented Borrego, and would not have been aware that he was slighting Soto by not offering him a taco too. According to Soto, workers were working at the edge of the field some 12 feet away when this occurred. (I:112.)

Agent Sanchez did not testify. Lupe Castillo testified that the conversation was slightly different. According to Castillo, Sanchez asked him if he had had a taco. Castillo said "No." Sanchez laughed and jokingly asked "Are you sure you haven't had a taco?" Castillo again replied "No." (II:59.)

I found nothing in the demeanor of Soto or Castillo to cause me to credit one over the other. I credit Soto's version of the taco incident because it sounds more plausible. I credit Castillo that he did not talk to any workers at the Spreckles Ranch largely because I find it unlikely that Soto would not have mentioned the incident in the two page, single-spaced, declaration

he made within days after the election, especially in light of the fact that he specifically mentioned Mr. Castillo with regard to other incidents.<sup>12</sup>

The final incident complained of occurred at the ALRB Salinas Regional Office later that day. Bogart was in the office about 3:45 p.m. It will be recalled that voting was to begin at 4:00 p.m. Mr. Bogart was talking to the Regional Director, Donald Salens, whose office is in the front of the ALRB building. The library, where voting was to take place, is in the back of the building, where there is a separate entrance through which voters were to enter.

Bogart saw Lupe Castillo using a telephone in a cubicle also near the front of the building. Mr. Bogart testified that as he was leaving, Helen Yee, a Board attorney, speaking in a harsh tone, demanded to know what he was doing there and told him to get out immediately. He replied he was in the process of leaving and said he hoped she would make the same request of Mr. Castillo.

As Bogart was leaving, he saw two individuals. He did not know if they were Borrego workers although he had earlier heard someone say that two workers were there to vote. He said Castillo spoke to the two men, and Barry Martin, a Board agent,

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<sup>12</sup>I take administrative notice of Mr. Soto's declaration which is Declaration 9 appended to the company's "Petition to Set Election Aside and Objections To Conduct of Election" dated June 9, 1988, which is part of the official file in the instant case.

was standing about five feet away and said nothing to Castillo. Mr. Bogart did not inquire whether the men were voters, nor did he ask Martin to intervene.

The parties agreed that if Helen Yee were called to testify she would deny having said anything to Mr. Bogart to the effect that he should get out. Board agent Vargas testified that about 4:00 p.m. he saw Castillo and Bogart in the front of the office and said to both of them words to the effect of "It's 4 o'clock, let's get out of here." Vargas then returned to his office at the rear of the building. Thus, he did not see them leave, nor did he see either of them talk to anyone. Board agent Harry Martin did not testify. Both Bogart and Castillo left before 4:00 p.m.

At approximately 5:20 p.m., Board agent Harry Martin telephoned Bogart to tell him that Lupe Castillo had filed a petition in another case in which Bogart was involved. In response to questions from Bogart, Martin told him the petition was filed at 4:45 p.m. and that he did not know whether Iiumberto Gomez had been with Castillo when the petition was filed.

Vargas testified that the parties had agreed at the pre-election conference that the entire ALRB office was considered the quarantine area. But he also testified that there was no discussion of whether the front lobby area would be closed to business prior to the office's normal closing time of 5:00 p.m.

## ANALYSIS AND CONCLUSIONS

The party petitioning to set aside an election has the burden of proof. (TMY Farms (1976) 2 ALRB No. 58.) Overturning an election disenfranchises the entire workforce that voted. In agriculture, it may be the next harvest season before an election may be rerun, and the composition of the workforce may have changed materially. Thus, historically, this Board has not utilized the "laboratory conditions" standard adopted by the National Labor Relations Board (NLRB or national board), but rather, uses an outcome determinative test in assessing whether to overturn an election. Thus, the Board will set aside an election "only where the circumstances of the first election were such that employees could not express a free and uncoerced choice...." (D'Arrigo Bros. of California (1977) 3 ALRB No. 37.) Applying this standard, I turn to a consideration of the events complained of herein.

### A. Election Observers

There is no substantial factual dispute regarding the refusal to allow Guzman and Alvarado to serve as observers. Only other observers were present when Guzman was prevented from serving, and there is no evidence other workers knew of the refusal to allow Alvarado to serve. The only evidence that voters could have been affected is Guzman's testimony that he told an unspecified number of members of his crew that he did not allow him to serve as an observer.

Anytime an observer is challenged, whether the challenge is upheld or rejected, a Board agent, if you will, favors one side or the other. To overturn an election simply because other workers learn there was a challenge and one side "lost" the dispute would be ludicrous.

Borrego in effect argues that the ruling was so clearly wrong and biased that reasonable voters would conclude the Board was prejudiced against the company and in favor of the UFW and would be so influenced by this bias that they would be unable to make an uncoerced choice. I find no basis to make such a conclusion.

There was disagreement among Board agents as to whether the UFW's claim was meritorious. Agents were not convinced by Guzman's denials that he was not paid and had to make a quick decision so as not to delay the election further. They consulted the Board's Election Manual and when Bogart so requested they also consulted the Board's rules and regulations. Allowing an unqualified observer to serve could result in setting aside the election. Supervising agents Trevino and Matalka opted not to take the chance. As provided in the election manual, they gave Borrego the opportunity to obtain a substitute for Guzman. There is no evidence and no claim that the use of the substitute had any detrimental effect on the conduct of the election.

With regard to Alvarado, the evidence indicates she was not utilized as an observer simply because of a logistics decision

by agent Vargas. There is absolutely nothing to suggest his decision was motivated by bias. There is also absolutely no evidence that the failure to use her had any affect on the election.

The national board has held that the use of observers by the parties is a privilege not a right. (Jat Transportation Corp. (1961) 131 NLRB 122. Even allowing an imbalance in the number of observers has been held not to constitute grounds for setting aside an election and not to "create the impression that the [NLRB] favored the petitioners over the employer or otherwise prejudiced the election."<sup>13</sup> This Board has also held that disqualification of an election observer, even if the action may not have been justified, is not grounds for setting aside an election in the absence of a showing that the party was prejudiced by the rejection of the observer or that it affected the results of the election. (Missakian Vineyards (1977) 3 ALRB No. 3.) I find no such evidence here.

B. Electioneering

I also find no merit to the contention that the election should be set aside because of electioneering by the UFW. In the incident witnessed by Bogart, there is no showing that agent Nagle observed the man speaking to workers and then speaking to UFW personnel. Assuming arguendo that he was campaigning,

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130. P. Murphy & Sons (1977} 3 ALRB No. 26 quoting from Westinghouse Electric Corp. (1970) 182 NLRB 481 [74 LRRM 11251.

Nagle quickly put a stop to it when he became aware of the contact and assured Bogart he would watch to ensure it did not happen again, and there was no further contact.

With regard to the incident Sergio Soto said he witnessed, I have discredited him. Moreover, assuming his testimony to be true, there is no evidence what Lupe Castillo said to the workers so it is not known whether he was campaigning. There is no evidence whether he started the conversation or may only have answered a question. Further, there is no evidence agent Sanchez saw the conversation. Despite being only six feet away, he may or may not have seen Castillo, since he was buying food. Also, Soto acknowledges that he did not say anything to Sanchez or any other Board agent and seek to have the conversation stopped.

In Bruce Church, Inc. (1977) 3 ALRB No. 90, the Board refused to set aside an election when a man not proven to be a union organizer, as is the case in the incident Bogart witnessed, stopped electioneering when confronted by a Board agent. Here, it is not even proven that the man was campaigning since no one testified as to what he said. I find no evidence of Board agent bias and no evidence the event(s) reasonably tended to affect the outcome of the election.

### C. Challenges

Similarly, I find the Employer's objection regarding the handling of the challenged voters to be without merit. The

employer's witnesses and Vargas' testimony show that the Board agents did nothing more than follow the usual Board procedures to handle challenges to eligible voters.

The grounds for challenging a voter's eligibility are set out in the Board's rules. (Cal. Code Regs., tit. 8, §20355). The UFW's challenge arguably asserted that the workers were confidential employees. The anti-UFW campaigning took place during work hours, and the members of crew no. 1 were accompanied by Borrego's labor consultant and his aide. The Board agents had to make a quick assessment of how to handle the allegations, and I do not find that they were biased when they chose to follow the normal challenged ballot procedures in order to preserve the challenges rather than refusing the challenges out of hand. (§2-7000 election manual.)

Although there is Board precedent where an election was upheld when Board agents refused to accept challenges that persons on the eligibility list were union organizers, that situation<sup>14</sup> is distinguishable because there was no evidence the individuals were organizers. Here, there is evidence suggesting the employees were paid since they campaigned during the work day. I note further that in D'Arrigo, supra, an individual who voted as an economic striker was also a designated UFW observer. When

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<sup>14</sup>Bruce Church, supra.



challenged as a union organizer, her name was withdrawn, and she did not serve.

At most, I find that the agents were faced with deciding what to do with a debatable challenge and opted to preserve the challenge. I do not find any objectionable bias in that decision.

I also do not find any evidence that the challenged voters were treated in such a way that other prospective voters would be prevented from exercising free choice. Even though I appreciate the employer's argument that those challenged were identifiably anti-UFW, I find no evidence that they were ostracized or humiliated or treated in any way which would cause a reasonable voter to be coerced in casting his/her ballot. The challenged voters were not detained unreasonably, and the challenge tables were even set up on one side of a pickup truck while the workers waiting to vote were standing in a line on the other side of the truck. (Joint Ex. 2.)

D. Board Agent Bias and Misconduct

These final objections, like the foregoing ones, assert that Board agents acted in a manner that was biased in favor of the UFW. In George A. Lucas & Sons (1982) 10 ALRB No. 14, this Board noted that although the NLRB professes to adhere to a "strict neutrality" rule, it actually follows a case by case approach and examines Board agent misconduct in light of whether it tended to affect employee free choice and also whether it

created an appearance of impropriety such as to impair the integrity of the election process. (Wabash Transformer Corp. (1973) 205 NLRB 148 [83 LRRM 14541]). This Board's approach is essentially similar. (Lucas, supra; Coachella Growers, Inc. (1976) 2 ALRB No. 17; Monterey Mushroom (1979) 5 ALRB No. 2.)

The mere fact that Board agents and UFW representatives arrived in separate cars at the election site at the same time, and late, is not sufficient to set aside the election. It is not even established the workers saw the two groups arrive, since they were harvesting at the time the cars drove up.

Moreover, even if the workers did observe it, I find no basis to conclude that voters would (1) interpret the event as favoritism toward the UFW by Board agents or (2) that if they did, they would be so affected that they could not freely cast their votes.

In Exeter Packers, Inc. (1983) 9 ALRB No. 76, the Board declined to set aside an election where a Board agent and Union representative had a personal conversation in view of a large number of voters. Here, there was no evidence of any fraternization and, further, the reason the Board agents and UFW agents arrived together was because of confusion created by the employer's failure to use a single pick up site. I imply no ill motive to the employer for this failure, but I do find it ingenuous to claim bias and misconduct under these circumstances.

I also find no basis for overturning the election based on the taco incident. In the first place, there is no evidence

that any workers observed the incident or, if they did, that they recognized Sanchez as a Board agent. According to Soto, the workers were gathered around the lunch wagon, presumably focused on getting food, and, absent any evidence that anyone besides Soto actually saw and overheard the exchange, I will not infer that such was the case.

While Sanchez' conduct was ill-advised, I find insufficient proof that voters observed it. And, frankly, if they did, I find it hard to believe they would be so influenced by what they saw that they could not exercise free choice.

The employer's counsel cites Athbro Precision Engineering Corp. (hereafter Athbro) (1967) 166 NLRB 966 [65 LRRM 16991 where the NLRB set aside an election because an employee who had already voted in the election saw a Board agent in a nearby cafe drinking beer with a union representative. There was no evidence the conduct affected the votes of the four employees who voted later.

Although the NLRB set aside the election, the federal district court granted an injunction and ordered the NLRB to certify the election since the NLRB had found the agent's conduct did not affect the votes of the employees. The NLRB accepted the court's judgment<sup>15</sup> so it is inappropriate to cite Athbro for the

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<sup>15</sup>See Athbro Precision Engineering Corp. (1968) 171 NLRB 21 [68 LRRM 10011 On petition for enforcement of the NLRB's determination that the employer refused to bargain following the certification, the court of appeals chided the NLRB for not appealing the district court's injunction indicating it believed the district court had exceeded its jurisdiction. -See, NLRB v. Athbro Precision Engineering Corp. (1st Cir. 1970) 423 F.2d 573 [73 LRRM 2355), enforcing 173 NLRB 995 [69 LRRM 15121. This does not alter

proposition stated.

I also find no objectionable bias in the events which occurred at the ALRB office on the afternoon of the election. Bogart was talking to the Board's Regional Director, and Mr. Castillo was using a telephone. If prospective voters observed this, there is no reasonable basis to conclude one side had a more favored status.

There is insufficient evidence to conclude that Castillo was campaigning in the office. The two men talking to Castillo were voters from Borrego. They were in the front of the building, and voters were to be directed through the back door of the building. The fact that Mr. Bogart heard that two voters had arrived somewhere does not mean that the two men in front were the voters.

The Board generally avoids resolving credibility issues involving Board agents if possible, preferring to assume the complained of conduct occurred and determining, in that event, whether the conduct is sufficient to set aside the election.<sup>16</sup> Thus, I assume that Helen Yee made the statement attested to by attorney Bogart. I conclude that such statement does not warrant setting aside the election. There is no showing it affected the

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the fact that Athbro cannot be cited for the proposition stated by counsel.

<sup>16</sup>San Martin Mushroom Farms (1982) 8 ALRB No. 12.

outcome of the election. In Bruce Church, supra, the Board found that, although a Board agent might have been abrupt in controlling an observer, such conduct was not sufficient to set aside the election. I also note that Vargas told both Bogart and Castillo that it was time for them to leave.

Nor is the fact that Lupe Castillo filed documents at the ALRB office during the voting period while the office was open for normal business constitute grounds for setting aside the election. There is no evidence he was seen by any prospective voter, no evidence he had contact with any prospective voter, and the public lobby of the building is at the far end away from the library. In short, there is no evidence that this could possibly have affected the outcome of the election.

E. Cumulative Effects of Incidents Complained Of

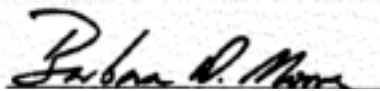
I have found no grounds to set aside the election. I also conclude that the totality of all the conduct complained of does not support a conclusion that it reflects an overall bias of Board agent staff in favor of the UFW and against Borrego so as to warrant setting aside the election. I recommend that all the objections be dismissed and that the UFW be certified as the exclusive bargaining representative of all the agricultural employees of the employer in the state of California.

F. Request for Attorney's Fees

I deny the UFW's request for attorney's fees. Although I have found no basis to set aside the election and although it is

true that many of the objections are not well-founded given Board and NLRB precedent, I do not find the objections rise to the level of being frivolous.

DATED: September 30, 1988

A handwritten signature in cursive script, appearing to read "Barbara D. Moore", is written over a horizontal line.

BARBARA D. MOORE  
Investigative Hearing Examiner