

STATE OF CALIFORNIA
AGRICULTURAL LABOR RELATIONS BOARD

TRIPLE E PRODUCE CORPORATION,)	
)	
Employer,)	Case No. 89-RC-3-VI
)	
and)	
)	
UNITED FARM WORKERS OF)	17 ALRB No. 15
AMERICA, AFL-CIO,)	(November 22, 1991)
)	
Petitioner.)	
)	
)	

DECISION AND CERTIFICATION OF REPRESENTATIVE

On August 4, 1989, 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 secret ballot election in a bargaining unit comprised of all the agricultural employees of Triple E Produce Corporation (Employer or Company) in the State of California.

The final tally showed 297 ballots for and 61 ballots against the Petitioner. An additional 141 challenged ballots were insufficient in number to reverse the outcome of the election.

Following a 10-day evidentiary hearing into the Employer's timely filed objections to the election, Investigative Hearing Examiner (IHE) Thomas Sobel issued a decision in which he dismissed virtually all of the Employer's objections but also held that the Board's neutrality had been impaired by a Board agent's overruling of the Employer's denial of access to Union organizers and, on that ground alone, recommended that the results of the

election not be certified.

Thereafter, the Employer, the Union, and General Counsel each filed exceptions to the IHE's Decision (IHED), with briefs in support of their exceptions, and General Counsel filed a response to the Employer's exceptions.

Pursuant to Labor Code section 1146,^{1/} the Board has delegated its authority in this matter to a three-member panel of the Board. The Board has considered the attached decision of the IHE in light of the record and the exceptions and briefs of the parties and has decided to affirm the IHE's rulings, findings, and conclusions, but only to the extent consistent herewith, and to reject his recommendation that the election be set aside.

Although the Employer endorses the IHE's recommendation that the results of the election not be certified due to Board agent conduct, it believes the IHE erred in not finding additional grounds for his recommendation. The Employer contends that the Union conducted a campaign of fear and intimidation which permeated the atmosphere surrounding the election, thereby interfering with the employees' right to exercise free choice and affecting the results of the election and urges the Board to so find. The Union and General Counsel except to the IHE's basis for setting aside the election.

Election Set Aside Due to Board Agent Conduct

The Union and General Counsel independently except to the IHE's finding that a Board agent overstepped his authority in

^{1/}All section references are to the California Labor Code unless otherwise specified herein.

authorizing the Union to take post-work access, notwithstanding the Employer's denial of such access due to alleged violence, and that such conduct impaired the Board's requisite standard of neutrality in election matters.

We agree with the IHE, for the reasons stated by him, that it is for the Board ultimately to determine whether an employer may validly suspend access to its premises as a means of attempting to curb alleged acts of access-related violence. Thus, we concur in his further finding that the Board agent should have refrained from injecting himself into the dispute between the Employer and the Union in order that the parties might be able to preserve the option of referring the matter to the Board.^{2/} That having been said, and the act having been done, the question which is now before the Board is simply whether the agent's action falls within a statutory ground for setting aside the election. For reasons set out below, we conclude that the agent's ruling could not have affected the results of the election. (Labor Code § 1156.3(c).)

Title 8, California Code of Regulations, section 20900 et seq. grants union organizers a pre-election right to, inter alia, enter an employer's property for up to one hour in order to

^{2/} The IHE was of the view that by resolving the question in the field, the Board agent preempted the Board in deciding whether the Employer in this instance could have validly justified the denial of access on the basis of perceived violence. As he pointed out, had the Union conceded the Employer's position, it could have later raised the issue before the Board in the form of an unfair labor practice charge alleging an unlawful denial of access or, should it have lost the election, in the form of an objection alleging that the denial of access affected the results of the election.

communicate with employees who have finished work. Where, as at Triple E, crews complete work at different times, union organizers may meet with each crew as it finishes work provided they do not interrupt any ongoing work. (Gourmet Harvesting & Packing (1978) 4 ALRB No. 14.)

The pertinent facts are as follows. On August 2, 1989, two days prior to the election, the Employer's Caffese Field was the site of tomato harvesting activity by three independent crews totaling approximately 270 employees. In conjunction with a strike called by Triple E employees on July 24, 1989, one week before the Union filed the Petition for Certification, about 75 pickets were assembled at the intersection of the Employer's field access road and the public highway.^{3/}

Farm manager Tom Guido advised UFW organizer Efren Barajas that the number and size of crews were such that the union would be entitled to 17 access takers. Guido also informed Barajas that no access would be allowed until after the last crew had finished work. Guido's restriction of access at that point appears based on his misinterpretation of applicable rules. As he explained:

Once all crews were done . . . access takers could go in ... that's the way access is to be taken, at the end of the day when all the crews are stopped.

A short time later, Barajas could see members of at least two crews getting into their vehicles and preparing to leave the work

^{3/} It appears there is no foot traffic in or out of the fields; employees travel in private vehicles such as vans carrying as many as 12 employees or buses provided by labor contractors.

site. He and the other designated access takers hurried towards the departing employees but were largely unsuccessful in making contact with them.

At hearing, Guido conceded that employees were in fact leaving work before the organizers entered the field and acknowledged that the access takers were merely attempting to reach departing employees, to persuade them to remain at the work site in order talk to them. Guido could see eight access takers who were,

. . . trying to make [departing employees] stay so they could talk to these people . . . [Guido observed them] standing in front of the vehicles as the people were trying to leave . . . [to make] them stop . . . I saw them grabbing onto the mirrors of the vans . . . holding onto the door, telling the people to stop the vans.

After the organizers returned to the edge of the field and were preparing to take access to the third crew, Guido asked one of the Sheriff's deputies who was in the area at the time to inform the Union that no additional access would be permitted. He would later testify that the reason he gave the deputy at the time was "all the violence that had just occurred when the UFW had rushed the field." But Guide's assertion of violence as a basis for restricting access to the last crew is unsupported by his testimonial account. Furthermore, if acts of violence had occurred, there is no indication that he had any knowledge thereof when he invoked the total ban on access.

When Barajas initially challenged Guide's understanding of the Board's access regulation, Guido said he told the organizer, "We had an agreement. I'm holding my end of it [to permit access after the last crew finishes]. Now, you hold your

end of it." Guido later explained to Board Agent Ed Perez that he would deny access to the last crew "due to the fact of all the problems that have just occurred out there . . . Efren and I had an agreement. He broke it. They charged the field." Given Barajas' vigorous objection to Guide's reading of the relevant access provisions, and the organizer's insistence that he was entitled to take access to each crew as it finished work, we find no record basis for concluding, as apparently Guido did, that the Union was willing to voluntarily relinquish its entitlement to access.

Perez advised Guido that the Union had correctly interpreted the pertinent access provisions and therefore he would authorize the organizers to take access. As it turned out, access was never effectuated as members of the last crew left the field before the access takers could reach them.

Based on the foregoing, the IHE found a usurpation of the Board's authority and therefore that the Board's neutrality in election matters had been compromised. In accordance with his reading of the Board's decision in Sam Andrews' Sons (1989) 15 ALRB No. 5 (Andrews), he concluded that the election must be set aside.

In Andrews, the Board set aside a decertification election upon finding that the Board's neutrality had been compromised when a Board agent permitted himself to be drawn into a dispute between the parties. There, a Board agent acceded to the request of a group of pro-union employees to meet with them in order to explain the status of outstanding backpay orders

involving their employer. His comments were later taken out of context, distorted, and made the subject of a pro-union flyer which was widely distributed prior to the election. The Board stated in that case that once partisan alignment or a compromising of the Board's neutrality by one of its agents has been established, the Board may set aside the election. (See Monterey Mushroom, Inc. (1978) 5 ALRB No. 2; Ace Tomato Company, Inc. (1986) 12 ALRB No. 20; Tani Farms (1987) 13 ALRB No. 25.)

We are not persuaded, however, that here the Board agent's conduct reasonably served to impair the Board's neutrality. Certainly there was no partisan alignment under Andrews since the agent interpreted the relevant access provisions in accordance with their uniform application in all pre-election settings. His statement of the law was a correct one. Nor did the Union appropriate and misuse his admittedly proper presence or correct statements of the law for partisan advantage as in Andrews. Furthermore, there is no evidence that the Union representatives who may have heard the discussion between Guido and Perez thereafter disseminated the contents thereof to any employees. We are not unmindful of the applause which emanated from the picket line just as the access takers began walking into the field but do not interpret that conduct to indicate that striking employees were aware of the Board agent's discussion with Guido as the pickets would appear to be outside hearing range of the two men. We therefore reject the IHE's invocation of Andrews on these facts.

Employer's Objections to Election

Having rejected the IHE's finding of Board agent conduct as grounds for setting aside the election, we turn now to the question whether specific pre-election acts of alleged violence, threats, or intimidation created an atmosphere of fear and coercion which would warrant setting aside the election on that basis.

The election took place in a strike situation which was the product of independent employee action implemented prior to the intervention of the Union. Like many strikes, the one at Triple E included picketing, epithet calling, and demonstrations of hostility toward replacement employees. When engaged in picket line activities, the striking employees were acting in the same manner as they had prior to the involvement of the Union. The evidence, not by any means conclusive, supports an inference, as demonstrated by the presence of the symbols, that the pickets were indeed sympathetic to the UFW. Nevertheless, the pickets comprised a "large and amorphous" group whose members were not necessarily viewed as Union agents by nonstriking employees. Campaign activity alone does not establish the requisite close connection with the union. (Certain Teed Products Corp. v. NLRB (7th Cir. 1977) 562 F.2d 500, 509-510 [96 LRRM 2504].)

Moreover, in none of the incidents alleged to warrant overturning the election have we discerned direct evidence of Union complicity. Accordingly, we are limited to a third-party standard. The test for setting aside an election because of third-party conduct is whether the conduct was so aggravated that

it created an atmosphere of fear or reprisal making employee free choice impossible. (T. Ito & Sons Farms (1985) 11 ALRB No. 36.) Alternately stated, the issue is whether each of the allegations, if true, "so influenced potential voters that a free choice [became] impossible." (NLRB v. Advanced Systems, Inc. (9th Cir. 1982) 681 F.2d 570, 575 [110 LRRM 3089].)

An incident involving violence, the throwing of gravel and minor vehicle damage, did occur at one of the Employer's fields two days prior to the election. There was Union presence (access taking) at that time, but it was not in close proximity to the incident. There was also a substantial police presence. We condemn the gravel throwing and vehicle damage and strongly suggest that once a union has assumed an active role in a strike situation, its role in monitoring striker conduct is a proper factor to be considered by the Board. The events complained of, although clearly indicative of harassment, and bordering on the level of violence that has caused this Board to set aside elections in the past (see, e.g., Ace Tomato Company, Inc./ George B. Lagorio Farms (1989) 15 ALRB No. 7 and T. Ito & Sons Farms, supra, were not so tied to the Union's presence and activity that we would set aside the election.

In sum, the Employer herein failed to establish either (1) that the UFW engaged in objectionable conduct which would tend to interfere with employee free choice sufficient to affect the results of the election or (2) that the conduct of third parties was such that it rendered free choice impossible. We also observe

that there was no allegation of misconduct by the Union or even third parties on the day preceding the election, on the day of the election or in or near the polling area. The established misconduct was not attributable to the Union, and did not tend to render free choice impossible.^{4/}

^{4/} As the precedents cited by our dissenting colleague indicate, this Board will set aside elections where it is shown that a general atmosphere of fear and coercion existed and employees were denied a free expression of choice. We believe, however, that they address the particular circumstances reflected in those cases.

In *T. Ito & Sons Farms, supra*, the Board set aside the election on the basis of numerous incidents in which striking employees threatened large groups of non-striking employees with physical harm, brandished sticks at them, blocked their vehicles, punctured a tire on a working employee's vehicle, and frequently threatened to report presumably illegal alien replacement workers to the U.S. Immigration and Naturalization Service (INS). Renewed threats to call in the INS, as well as new threats of job loss if voters failed to support the Union, were made to numerous voters on the day of the election. The Board concluded that

. . . the threats were widespread, directed at a large portion of the voting unit (i.e., non-strikers), repeatedly made, accompanied by some acts of force and made during the time workers wait in line to vote, all with the purpose of coercing workers to join the strike or, on the day of the election, to vote for the Union.

The second of the cited cases, *Ace Tomato Company, Inc./ George B. Lagorio Farms, supra*, is similar to *Ito* insofar as it also reveals a pattern of actual, not just threatened, violence. Moreover, the conduct by Union supporters was rejuvenated right through the balloting process and was directed at the various labor consultants which Ace had retained for the express purpose of fostering an anti-Union vote by employees. The Board concluded that

The Union adherents' violent conduct graphically demonstrated to any anti-Union employees what they could expect if they 'crossed' the pro-Union employees [presumably by listening to the consultants and voting against the Union].

[fn. cont. on p. 11]

Voter Disenfranchisement

As a final and independent ground for setting aside the election, the Employer excepts to the IHE's failure to find that Board agents misled employees waiting in line to vote, causing them to leave the polling area and thereby effectively disenfranchising them. We find no merit in the exception.

CERTIFICATION OF REPRESENTATIVE

It is hereby certified that a majority of the valid votes have been cast for the United Farm Workers of America, AFL-CIO, and that, pursuant to Labor Code section 1156, the said labor organization is the exclusive representative of all agricultural employees of the Triple E Produce Corporation in the State of California for the purposes of collective bargaining, as that term is defined in section 1155.2(a), concerning employees' hours, wages, and other terms and conditions of employment.

DATED: November 22, 1991

BRUCE J. JANIGIAN, Chairman

JIM NIELSEN, Member

[fn. 4 cont.]

The factual setting in the case at hand differs in significant respects from that which obtained in either Ito or Ace inasmuch as here there was no consistent pattern of conduct revived through the election or designed to influence the manner in which employees would vote or whether they ultimately would vote at all. At most, the record reveals isolated and unconnected incidents in which striking employees sought to persuade their replacements to withhold labor in support of the strike.

MEMBER ELLIS, Dissenting:

Guided by this Board's decisions in Ace Tomato Co., Inc./ George B. Lagorio Farms (1989) 15 ALRB No. 5 (Ace Tomato) and T. Ito & Sons Farms (1985) 11 ALRB No. 36 (Ito), I would set aside the election in the present case due to the atmosphere of violence and coercion created in the days leading up to the election.^{1/}

In Ito, the Board set aside an election where it was found that prior to the election union supporters threatened large groups of workers with physical beatings and calls to the Immigration and Naturalization Service (INS), blocked exiting vehicles, punctured the tires of one nonstriker, and waved a stick at the employer's general manager. During the election, union supporters campaigned at the polling site and threatened those in

^{1/}While I agree with the Investigative Hearing Officer's (IHE) conclusion that the Board agent overstepped his authority by granting access over the employer's objection, I also agree with the majority that in the circumstances of this case, the Board agent's conduct did not affect free choice.

line with job loss and calls to the INS if they did not support the union. Similarly, in Ace Tomato, the Board felt compelled to set aside an election where union supporters twice trapped labor consultants in their cars (once on the day of the election), rocking the cars as if to tip them over and pelting them with tomatoes and hard dirt clods, and attacked workers with tomatoes and dirt clods in an effort to force them to stop working and attend a union meeting.

Here, it has been shown that union supporters repeatedly attacked and damaged employee vehicles trying to exit the fields. Twice, lone vehicles were attacked with no one else around, undoubtedly creating among the occupants an acute fear of physical harm. On the third occasion, on August 2, 1989 at Caffese Field, numerous workers attempting to leave had their vehicles blocked and assaulted by a large group of picketers, resulting in damage to several of the vehicles. On July 28, 1989 at Watanabe Field, a group of picketers suddenly rushed the field, shouting insults and demanding that they stop working, thereby frightening two crews of workers and causing them to stop working. Lastly, in full view of many workers, the nephew of the owner of Triple E Produce Corporation was struck by a hard object thrown by someone among the group of UFW pickets.

In my view, these incidents are sufficiently similar to those involved in Ito and Ace Tomato to warrant setting aside the election. In all three cases, large numbers of workers were exposed to violent conduct in response to their refusal to support the union, in this case, for exercising their statutory right to

continue working despite an ongoing strike. Such conduct is inherently coercive and would naturally create fear that failure to support the union in the upcoming election would also precipitate retaliatory actions. Therefore, the fact that the conduct was directed at the workers' refusal to join the strike rather than expressly at their voting preferences did not preclude a deleterious effect upon the exercise of free choice in the upcoming election.

As stated by the Fifth Circuit Court of Appeals:

Men judge what others will do on given occasions by their prior actions, and, less reliably, doubtless, by their statements about their intended future actions. So they assess what kind of folk they are dealing with and how those folk are likely to react if crossed. Even the implicit threat of a club or pistol on the hip, without more, may be sufficient to influence significantly the conduct of those who are cast in company with the bearer.

(Hickory Springs Manufacturing Co. v. NLRB (5th Cir. 1981) 645 F.2d 506, 510 [107 LRRM 2902].) The National Labor Relations Board, in a decision involving threats of future violence if employees did not support the union once elected, but pertinent in any situation where violent conduct is not expressly directed at employees' vote in the election, stated:

A campaign environment in which a union threatens that violent repercussions will ensue, should employees choose to oppose it in the future, is one in which there is substantial likelihood that employees will be inhibited from expressing their actual views, and is surely one which jeopardizes the integrity of the election process. It can hardly be gainsaid that an employee faced with union threats of personal injury will think twice before pinning on a "vote no" button or passing out antiunion literature. A union can, by stilling the voices of just a few employees who oppose it, successfully paint a false picture of its support among the electorate and thereby influence the votes of those employees who find themselves undecided. Such

threats may well have an additional indirect effect on other workers who might have been swayed against the union, had the voices of all employees been heard. Moreover, in any given case, depending on the number, nature, and severity of the threats involved, some employees who are either uncertain, or otherwise opposed to the union, will likely be inclined to opt for the safety of capitulation and decide to cast their lot with the union—the secrecy of the ballot box notwithstanding.

(Home & Industrial Disposal Service (1983) 266 NLRB 100, 101 [112 LRRM 1257]).

Unlike other countries, this nation's electoral process has reached a point where individuals, organizations and issues are determined in a fair and orderly manner.

The acts which took place in this case are intolerable. The safeguarding of the election process in the agricultural fields of California is as necessary as any other election. When individuals of different languages, cultural heritage and political experience are involved, as in this case, an even more stringent requirement must be met in conducting an election.

In taking the view that this election should be set aside, I am also mindful of the admonition delivered in Ace Tomato that this Board "will not tolerate violence in connection with its elections." Such conduct is inherently destructive of the free and uncoerced choice of a collective bargaining representative promised to every agricultural employee by the passage of the Agricultural Labor Relations Act, and I believe that this Board must be diligent in deterring its repetition. I therefore respectfully dissent.

DATED:

JIM ELLIS, Member

CASE SUMMARY

Triple E Produce Corporation
(UFW)

17 ALRB No. 15
Case No. 89-RC-3-VI

THE DECISION

Pursuant to a Petition for Certification filed by the United Farm Workers of America, AFL-CIO (UFW or Union), an election was conducted by the Agricultural Labor Relations Board (ALRB or Board) among all the agricultural employees of the Triple E Produce Corporation, a San Joaquin County tomato grower. Nearly 500 employees participated in the election which was held under strike conditions on August 4, 1989. The final official tally of ballots showed that 297 votes had been cast for and 61 votes against the Petitioner. An additional 141 challenged ballots were not resolved as they were insufficient in number to have affected the outcome of the election.

Following a 10-day evidentiary hearing into objections to the election timely filed by the Employer, the Investigative Hearing Examiner (IHE) assigned to the case issued a decision in which he recommended that the election be set aside on the grounds that the Board's neutrality in election matters had been compromised when a Board agent authorized the Union to take pre-election organizational access notwithstanding a supervisor's ruling that access would be denied due to alleged violence. The IHE found no evidence of Board agent bias in the action but believed nevertheless that the basis for the Employer's denial of access involved questions of fact and law which were solely within the Board's purview but which had been preempted by the Board agent's conduct.

The IHE also examined the Employer's contention that various acts of violence created such a coercive atmosphere that employees could not have exercised free choice regardless of whether the alleged conduct was attributable to the Union or only to its supporters. Although the IHE found two incidents of vandalism to employee vehicles which he characterized as "aggravated" misconduct, he found no basis for attributing responsibility for those acts to a party to the election; i.e., the Union. He ruled, therefore, that he was compelled to apply the so-called "third party" standard which examines conduct according to whether it rendered employee free choice "impossible." He concluded that, against a strike background that was largely peaceful in nature, and after considering the size of the Union's ballot margin, the proven misconduct was such that it would not have tainted the atmosphere in which the election was held and therefore would not warrant the setting aside of the election.

BOARD DECISION

Upon consideration of the IHE's Decision in light of the record and the exceptions and briefs of the parties, the Board affirmed his findings with regard to the allegations and evidence of pre-election violence and concluded that the Employer had not established interference with employee free choice as a grounds for setting aside the election.

The Board, however, declined to adopt the IHE's recommendation that the election be set aside on the grounds that the Board agent's ruling on access served to compromise the Board's neutrality. The Board concluded that since the Board agent had set forth a correct statement of the law, and there was no misuse of his ruling by the Union and, further, no dissemination to employees regarding the dispute in the field between the Board agent and the Employer's supervisor, the Board's neutrality was not compromised.

CERTIFICATION OF REPRESENTATIVE

The Board certified the United Farm Workers of America, AFL-CIO, as the exclusive representative of all agricultural employees of the Triple E Produce Corporation in the State of California for purposes of collective bargaining with respect to its employees' hours, wages, and other terms and conditions of employment.

DISSENT

Member Ellis would find that the acts of violence committed prior to the election were sufficiently close to those found adequate to justify setting aside the results of elections in T. Ito and Sons Farms (1985) 11 ALRB No. 36 and Ace Tomato Co., Inc./George B. Lagorio Farms (1989) 15 ALRB No. 7 that he would reach the same result in this case and set aside the election.

* * *

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

* * *

STATE OF CALIFORNIA
AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of:)
TRIPLE E PRODUCE CORPORATION,) Case No. 89-RC-3-VI
Employer ,)
and)
UNITED FARM WORKERS)
OF AMERICA, AFL-CIO)
Petitioner.)
_____)

Appearances:

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DECISION OF THE INVESTIGATIVE HEARING EXAMINER

This case was heard by me in Stockton, California on various days in August and October, 1990. Briefs were filed by General Counsel, and the Employer (but not by the Union) in February, 1991. On July 24, 1989, the employees of Triple E Produce Corporation went out on strike; a few days later, the United Farm Workers of America, AFL-CIO, began an organizational campaign among the strikers which led to the filing of a Petition for Certification on July 31, 1989. On August 4, 1989 the Board conducted a secret ballot election.

Because the number of unresolved challenges was more than enough to affect the outcome of the election, the Regional Director commenced an investigation and subsequently issued his recommended disposition of the challenges. After the Board affirmed the Regional Director's conclusions, Triple E Produce Corp (1990) 16 ALRB No 5, a revised Tally of Ballots issued showing the following results:

UFW	297
No-Union	61
Unresolved Challenges	141
Total	499

While the Challenged Ballot procedure was taking its course, Triple E timely filed Objections to the Election which, after "screening" by the Executive Secretary, were reduced to the following:

1. Whether the UFW, through its agents, representatives, and supporters, interfered with the fair operation of the election process by directing against the employees of the Employer and of its labor contractor employees a campaign of violence, threats of violence, property damage, intimidation and coercion which, together, created an atmosphere of fear and coercion rendering a free choice of representation impossible.
2. Whether the UFW, through its agents and representatives, violated the Board's access rules and, if so, whether such conduct had a tendency to interfere with employee free choice to such an extent that it affected the results of the election.
3. Whether the ALRB, through its representatives and agents, authorized the taking of unlawful worksite access and, if so, whether such conduct had a tendency to interfere with employee free choice to such an extent that it affected the results of the election.
4. Whether the ALRB, through its representatives and agents, exhibited bias or the appearance of bias by referring to UFW representatives taking access on the Employer's property as "my people" and by authorizing alleged illegal worksite access and, if so, whether such conduct had a tendency to interfere with employee free choice to such an extent that it affected the results of the election.
5. Whether any of the employees who worked in the Norman field harvest or in the Villareal crew on August 4, 1989 were eligible to vote and, if so, whether the Board agents' refusal to allow such employees to vote or their failure to explain the Board's challenge ballot process had a tendency to interfere with employee free choice to such an extent that it affected the results of the election.

1.

Prior to considering the evidence in support of the objections, I will discuss two preliminary questions concerning what is in evidence. A good deal of the strike activity was monitored by the San Joaquin County Sheriffs Department which videotaped some of it. The Employer made use of these tapes by

introducing a composite tape of two separate events, one of which shows Jon Esformes, the nephew of Triple E's owner, reacting as though¹ struck by something; the other of which shows picket line misconduct at Caffese Field on August 2, 1989.

The Union offered all the tapes into evidence on two grounds: first, that I could not make a sound decision about the objectionable nature of the incidents on the composite tape without understanding the flow of events leading up to them; and second, that the full videotape record would demonstrate that the strike was predominately peaceful.

So far as purpose (1) is concerned, Counsel for the Union was instructed to provide specific time codes for the videotape sequences which, according to her, supplied the context for considering the excerpts in evidence; with such time codes, I would not have to search for relevant "contextual material." Despite my holding the record open for Counsel to provide such time-codes, and despite my issuing an Order to Show Cause why she had not submitted them after the deadline for their submission had passed, I received neither the codes nor any explanation about why I had not received the tapes. I therefore decline to review the tapes for whatever light they may throw on the injury to Jon or the alleged misconduct on August 2nd.

Having struck the tapes for this purpose, it remains to

¹In describing Jon's reacting "as though struck", I am not intimating that he was not struck; indeed, I shall find that he was. However, the tape only shows his reaction: if Jon hadn't testified that he was hit by something, I would have to infer the cause of the reaction seen on the tape.

consider whether or not I should consider them for the second purpose. My dominant reason for accepting them was that they represented an opportunity, rare to the administrative process, to actually see a good deal of the strike activity.

Of course, even to think of the tapes as permitting one to see "what happened" on them begs the Employer's objection that "what happened" on them is irrelevant because this proceeding only concerns the conduct set for hearing. Indeed, at the hearing, the Employer urged a variation on this theme when it argued that testimony about the "relative amount" of violence was irrelevant. The Employer's argument is a powerful one, for just as one wave can sink a ship no matter how calm the sea otherwise, so it can be argued that my concern here is only with that which upset the election process.

However, in the absence of a catastrophic event, and to the extent my task is to determine if the events in question spoiled the "atmosphere" in which the election took place, I believe that to the extent "nothing happens" on the portions of the tape the Employer chose not to put in evidence, the tapes are relevant. To return to my analogy again: in considering whether some rough seas would have spoiled a trip, it should help to know that calm seas generally prevailed.² To view the tapes hour-after-hour is to realize that for a great deal of time the

²In treating the tapes as relevant for this purpose, I am mindful of my excluding them for the narrower, "contextual" purpose with respect to the events of August 1st and 2nd discussed above.

strike was just so much background and that it was, as both Sergeant Holman and Sergeant Mills testified, largely peaceful.³

The final evidentiary point I shall discuss is the Employer's contention that it was error for me to refuse to permit employees to be questioned about whether or not they were "fearful" or "afraid." The authority for the Employer's argument is Triple E Produce Corp v Agricultural Labor Relations Board(1983) 35 Cal 3d 42, in which our Supreme Court noted that testimony of this kind was relevant to the question whether "statements made to a handful of employees may reasonably be anticipated to reach a larger part of the work force." 35 Cal 3d at 55 Contrary to the Employer's contention, the Court in Triple E did not treat the testimony as generally relevant to an outcome determinative standard. Indeed, to read the case as requiring me to generally consider testimony about workers' feelings would require me to ignore the Court's clear statement that:

[In] assessing the effect of [a] threat, we do not inquire into the subjective individual reactions of a particular employee but rather determine whether the statements, considering the circumstances surrounding their utterance, reasonably tended to create an atmosphere of fear and coercion. 35 Cal 3d at 55

Our Board has declined to read Triple E in the manner urged

³I decline to permit any additional briefing on my use of the tapes for the purpose. The Employer has seen all the tapes and is in a position to know what is on them. The two purposes for my taking the tapes were clearly distinguished at trial and the tapes "show what they show" without the need for any commentary.

by the Employer. Thus, in Agri-Sun (1988) 13 ALRB No 19, the Board relied upon Triple E to justify its disregarding testimony about the reactions of individual workers. Strong policy reasons support such a view: "If the Board were to rely upon evidence obtained from the voters themselves, it would be necessary in a disputed election to elicit testimony from a large number of individuals to determine the actual (net) effect of particular campaign tactics Hence, very cumbersome investigations would have to be made in a large number of cases." Bok, The Regulation of Campaign Tactics In Representation Elections Under the National Labor Relations Act (1964) 78 Harv L Rev 38, 40 n. 8

Federal authorities agree. Thus in NLRB vs Southern Health Corp (1974) 514 F2d 1121, 1126, the Court noted that in contested election proceedings "[t]estimony by voters as to their motivation in voting is likely not to be satisfactory or useful", and in NLRB vs Gissel Packing Co (1969) 395 US 575, 608, the Supreme Court "rejecte[d] any rule that requires a probe of an employee's subjective motivations as involving an endless and unreliable inquiry." Finally, the NLRB had repeatedly ruled that "the subjective reactions of employees are irrelevant to the question whether there was, in fact, objectionable conduct Emerson Electric Co (1980) 247 NLRB 1365, Electra Food Machinery Inc., (1986) 279 NLRB 297.

2.

On the evening of July 19, 1989, a group of workers from a number of tomato companies in the Stockton area, including Triple

E, attended some sort of presentation on pesticides. Who called the meeting, and how the subject of pesticides related to the subsequent discussion, is not clear from the record. In any event, UFW representative Efren Barajas was present. After the presentation, Luis Magana, apparently the head of some kind of organization of Triple E employees, asked the audience to stay in order to discuss obtaining a raise. Barajas stayed for this part of the meeting, too.⁴

The group, which consisted of about 75 workers, was not entirely from Triple E. Workers from Ace Tomato and San Joaquin/LCL Farms, two other Stockton area tomato growers, were also present. The group decided to ask Triple E first about a raise because the Company was the largest of the area growers and the group thought that whatever Triple E did, the others would do. Five representatives were selected to meet with the Company; according to Barajas, he was asked to go along.

Though there was some talk of a strike at the meeting, no decision to strike was made. X:162. To the extent there was strike talk, Barajas testified that he advised the group not to strike, but to organize. ("I recommendthat it was better to ...sign union cards, try to get the Union, something different

⁴In its brief, the Employer argues that because Barajas is an organizer, one of his purposes in going to the meeting was to organize the tomato workers. Post-Hearing Brief, p5. Barajas did testify that he would "find out from the meeting "whether there would be an opportunity to...organize workers;" however, he denied attending the meeting in order to organize. It "was not in my mind to go and organize....I [went] because I [was] told to be there." X:164

but is not a strike.⁵ But they decide to go to the Company and ask for a raise. If the Company refuse it, to go on a strike." X:12)

The next day, July 20th, the group met with Triple E's owner Nate Esformes, and with Esformes' farm manager, Tom Guido. Though Barajas introduced himself, he did not reveal that he was a UFW representative. According to Nate Esformes, the meeting began with Magana accusing him of renegeing on a promise to give the workers a raise. It ended with certain problems being resolved, but without a raise being granted.

Although both Guido, and, at one point, Esformes testified that Barajas just sat and listened, Esformes also testified that Barajas "seemed to be directing in the back by whispers, by notes as to what was going on." VI:7⁶ I credit Guido's account and so much of Esformes' account as conforms to it: the picture of Barajas as "mastermind" is so noteworthy that it seems unusual for Esformes not to have testified consistently about it and for Guido not to have mentioned it at all.

The worker representatives reported back to the larger group that evening. After some discussion, the group decided to call a strike against all three tomato companies. Though Barajas

⁵Whatever Barajas' original motives for going to the meeting, from the moment he urged the group to sign authorization cards, it seems clear that he had an organizational purpose. Despite this, the uncontradicted evidence indicates that the Union was not directing the workers' actions.

⁶Esformes testified that he only discovered Barajas' identity when he spoke to Rob Carroll, the Company's attorney, after the meeting.

continued to counsel against striking, he was asked to be there when the strike commenced. "I told them that it was not something plann[ed] by the Union [so] it was not possible for me to be there, as a union rep. But I told them I will do everything possible to go to the picket line...and try and give advice to them, or try to control people...." X-.19⁷

The strike apparently began on July 24, 1979 with picketing at Triple E's Watanabe field located at the intersection of West and Morada Lanes in Stockton. Barajas was present at around 7:30 or 8:00 a.m. as the picket line took shape. Initially numbering less than 100 workers, by noon it had grown to between three and four hundred, swelled partly by Triple E workers and partly by workers from the other growers. X:24

Little of note happened that first day, except that when Barajas met with Magana and the "strike committee" later that evening, he told them he "saw things on the picket line that...if I was running the strike, I [would] not permit... such as drinking." X:26,29 Upon hearing this, Magana reacted angrily, telling the workers they didn't need "somebody from the outside" telling them what to do. Barajas told the group he understood it

⁷Because the group which decided to call a strike consisted of only 75 workers and was drawn from the three tomato companies, Respondent argues that there could not have been a majority strike in any of the struck companies. The argument necessarily assumes that the only employees who went on strike were those who attended the meetings which is not the case. According to Respondent's own witnesses, hundreds of pickets were outside the fields. While the number of pickets tells us nothing about who their employers were, it does indicate that far more than the number of employees who attended the meetings went out on strike.

was "their strike", but added that if they needed him, they knew where to find him. According to Barajas, he was entreated by the workers not to pay attention to Magana, X:30-31, and in fact continued to visit the picket line over the next two days "to see what was happening."

On July 26, when Barajas arrived at the Employer's Kimoto field, he saw members of the "committee" straggle out from behind some trucks. One of them, a man named Idelfonso, told him that Company representatives had again refused to grant a raise. Idelfonso was disappointed. He told Barajas that there was no way the committee could keep up the strike and he offered to help Barajas convince the strikers to let the UFW take it over. X:35

Idelfonso stood on the back of a pick-up truck and, after informing the crowd that the company had again refused the raise, he recommended asking the UFW for help. Idelfonso and Barajas then climbed onto the roof of a van and, after being introduced, Barajas told the crowd that the Union was ready to help, but that everyone must understand a few Union "rules":

I explain to them that we play that not violence thing. The I remind them about what I said in the meeting.... I tell them that we don't permit, when we run any strike, anybody to drink on the picket line. And also, I ask them, as proof that they really want the Union to represent them, to sign authorization cards to have an election.

X:38

Finally, he explained about "access", promising to petition to obtain it. UFW representatives Augustin Ramirez and Sefarina Garcia then passed authorization cards among the crowd which

remained together for perhaps two more hours before Barajas invited everyone to re-assemble at a labor camp that evening.

At this point, I take leave of the strikers in order to trace the actions of ALRB representatives, and in particular those of Board agent Ed Perez, before Barajas, Ed Perez and Nate Esformes meet the following morning. A day or two before Barajas climbed aboard the van, Luis Magana has spoken to Perez about obtaining "strike access" for the "committee." As a result, Perez had come to Stockton the evening before the events I have just related. Indeed, just before Idolfonso told Perez that negotiations between the "committee" and Triple E had broken down, Perez had been discussing "strike access" with Magana, Nate Esformes, and the latter's attorney, Rob Carroll. VIII: 132-133⁸

During these discussions, the Company maintained through Carroll that there could be no strike access because there was no strike. Pointing at the crowd around the field, Perez said that it looked like a strike to him. Still insisting there was no strike, Carroll argued that there was no point in discussing any other kind of access because no one had filed a Notice of Intent to Take Access. Perez, believing that it was only a matter of time before an N/A was filed, explained that it was worth

⁸Nate Esformes agreed that he met Perez for the first time on the 26th of July. Rather than describing an exploratory conversation about "strike access" for Magana's group, Esformes described what the rest of the evidence points to as a later conversation about UFW access. On the basis of the record as a whole, I am taking the above account as true.

discussing the access question "now" so that everyone would be "that much further ahead" should an N/A be filed. VIII:134

As best as I can understand the sequence of events, it was after the discussion about access that Magana and his "committee" met with Company representatives behind the truck for another try at a raise. I make this finding on the basis of Perez's testimony that after Magana told him the strike was going to continue, he gave Magana a packet of papers to file before "strike access [would] be considered by the Board" VIII:139, and such a conversation only makes sense if it took place before the UFW passed out the cards. It also appears that shortly after Perez advised Magana about what Magana had to do to take access, Magana faded from the scene.

After the crowd had dispersed, Barajas asked Augustin Ramirez to prepare an N/A for filing with the ALRB. Barajas and Ramirez then went to the motel where Ed Perez was staying, and Barajas sent UFW agent Lupe Castillo to Tracy to serve the N/A upon the Company. Because the Company disputes the efficacy of the N/A, I will recount the events which underlie its argument.

The N/A is in evidence as UFW 6. Barajas testified that Ramirez completed it between 3:00 and 4:30 p.m. and that Lupe Castillo signed the declaration of service before he even left for Tracy to serve it. The reason the proof was signed before delivery was that Barajas and Ramirez intended to lodge the N/A with Perez in Stockton upon receiving word from Castillo in Tracy that service had been completed. The recipient's name was left

blank for either Ramirez or Barajas to fill in upon hearing it from Castillo.

Barajas and Ramirez went to Perez's motel around 5:00 p.m. where they received a phone call from Castillo who told them he had served the document on Rebecca Cebedras of Triple E in Tracy. Ramirez then filled in Cebedra's name over Castillo's signature and gave the document to Perez and Board agent Vicente Paala. X:43⁹ Noting that this was not normal procedure, Perez asked Paala to call their Regional Director to determine if it was appropriate. Paala did call the Regional Office and the document was treated as filed by the agents.¹⁰

Jon Esformes testified that the following morning, July 27th, Captain McClelland of the San Joaquin County Sheriff's

⁹Perez testified that Barajas presented the N/A for filing before Castillo called from Tracy, whereupon Perez said he could not accept it because there was no proof of service, VIII:145-146. Barajas then explained to Perez that Castillo was to call him at the motel to tell him when, and upon whom, service had been effectuated. X:146-7.

¹⁰Counsel for the Employer sought to determine if the Regional Office had approved the filing. The UFW objected. I sustained the objection on the grounds that Perez's and Paala's actions in accepting the N/A on behalf of the Board were actions within their official capacity and it made no difference whether anyone else had approved it. If it be wrong to have accepted the N/A for filing, it makes little difference that the two Board agents acted on their own. If it is not wrong, Perez and Paala cannot be faulted for deciding to accept it over the doubts or objections raised by other Regional staff.

I do not find it wrong. Although the Board's Access Regulation provides that access commences upon the filing of a Notice of Intent To Take Access "in the appropriate regional office" Title 8, Code of California Regulations § 20900 (e) (1) (b) I decline to read "appropriate regional office" as referring to a fixed location so as to prevent the Board from setting up convenient satellite offices closer to activity within its jurisdiction.

Department approached him and his uncle to ask them how the Company was going to respond to the Union's request to take access (II:64). Nate and Jon responded that they had been advised by their attorney that "because of a technicality" they did not have to provide access. II:64 The technicality Carroll referred to was Castillo's signing the declaration of service before service had been effectuated. There was no contention then, nor is there any now, that the Company had not actually been served. Though Jon admitted that the Company was initially "looking to deny access...until we had these problems corrected", he testified that his uncle decided to grant it because McClelland told him access would help relieve a potentially explosive situation. II:106; 1:65

Perez testified that he called the meeting to explain that since an N/A had been filed, it was Board policy to try to work out a voluntary access agreement, VIII:10, 13, as indeed it is. See Title 8 Code of California Regulations, § 20900 (e) (1) (c) (2): "The parties are encouraged to reach [voluntary] agreements [on access] and may request the aid of the ... board agents in negotiating such agreements. . . . "¹¹ Obviously

¹¹The Board's Election Manual (which does not purport to be a final statement of the law) seems to encourage Board agents to take an ongoing role in "monitoring" access agreement:

ACCESS AGREEMENTS

If problems arise or there are limitations on access...encourage the parties to reach agreements on access; they may request the aid of the board agents in negotiating such agreements.

treating the N/A as effective, Perez told Nate "they [the Union] have a right to access, so let's get on with the agreement." VIII:163.¹² In Nate's telling, Perez peremptorily told him, "you're going to have to [grant access.]" VI:10¹³

No matter who called the meeting, Nate confirmed that he was initially reluctant to grant access for both philosophical and legal reasons. Nevertheless, deferring to the Sheriff's concerns, and recognizing that it was only a matter of time before a new, unobjectionable N/A could be filed, he agreed to grant it. The parties then discussed the terms and it was agreed that the ALRB's organizational access guidelines would be followed with respect to the numbers of access takers and the designated access-times. It was also agreed that access would be permitted before the start of work, at the end of the work, and, in the absence of a regularly scheduled lunch-hour, for a half-hour "lunch" period sometime before mid-day (the exact time being

In negotiating such agreements, consider what to do about violations of an agreement and possible methods of self-enforcement.

§ 2-1830

¹²Perez testified that Nate was opposed to access during the strike because he thought it unfair that he be forced to permit strikers to attempt to persuade his employees to join the strike. VIII:14

¹³If Perez said this, he was right. Despite the parties' negotiating about access, the Regulations also provide that any such efforts to come to agreement "shall not be deemed grounds for delay in the taking of immediate access once a labor organization has filed its Notice of Intent To Take Access." Title 8 Code of California Regulations § 20900 (e) (1) (c) (2)

of no import.)¹⁴

Esformes' feeling that he was voluntarily doing what was "right", as opposed to what he had to do, would color his views of both Perez and of subsequent events. For its part, the Union became increasingly frustrated over the next week, as it came to feel that it was only getting what Esformes was willing to give and not what it had a right to receive.¹⁵ Increasingly, Perez found himself in the middle of the parties' disputes.

One of the continuing sources of difficulty between the parties was how to get the access takers in and out of the fields. The problem actually had a number of dimensions, but for present purposes it does not oversimplify matters too much to say that over the course of the strike, the Union was to become primarily concerned about getting access takers into the fields, and the Employer about getting them out. From the beginning, however, the mechanics of getting in were a problem: Union

¹⁴ The Regulations provide that if there is no established lunch break (as is usually the case when employees work piece-rate,) the lunch time access period "shall consist of the time when the employees are actually taking their break." Ibid.

¹⁵ In its Post-Hearing Brief, the Employer argues that (1) it makes no difference whether the Union had any right to access because the parties' agreement about access was controlling; and (2) that the Union never claimed that "any right of access" flowed from the N/A, citing a colloquy between me and Counsel for the Union concerning whether she was contending that the Union had access rights under the N/A. VII:55 I reject the second argument as a matter of fact and the first as a matter of law. Barajas testified that he repeatedly complained to Perez that the Employer was curtailing the Union's "rights" under the N/A; more important, the Board's access regulation provides that voluntary agreements cannot operate to limit the amount of access under the regulations. Title 8 Code of California Regulations, § 20900 (e)1(c)(2)

representatives wanted to be able to drive their own cars into the fields, but Nate opposed this on the grounds that it would create insurance problems. He insisted Union representatives either accept rides in company vehicles or walk in. According to Ramirez, the Union reluctantly agreed to be driven in because it was getting close to the first "lunch" period and the Union did not want to miss any opportunity to talk to workers.

Augustine Ramirez and Perez also testified that the company agreed to have the company vehicles available before the actual access time so that the time spent in reaching workers would not cut down on the amount of time available for communication. Barajas was less definite: though he was certain the matter was discussed, he testified that he had the "impression" the company agreed to have cars available at least 10 minutes before the designated access periods. Nate and Tom Guido apparently had another idea: according to them, the half-hour total access time consisted of 5 minutes for entering the property, 5 minutes for leaving and 20 minutes for face-to-face communication. Such an impression accounts for Nate's being continually troubled by the amount of time it took the Union representatives to leave the fields.

A recurring problem was when to consider the workday to have ended for the purpose of "after-work" access. Though Perez testified he told the parties that the Board took the position that access was available to each crew as it finished, he acknowledged that the company did not assent to this

construction.¹⁶ The company did agree to notify the Union in advance of the end of work so that union representatives could be ready to take access.

When the meeting broke up, Union representatives took lunchtime access at the Kimoto field and, according to the Employer's witnesses, at the Newcastle field. I will discuss what happened at Kimoto first. According to Ramirez, there were two problems at Kimoto: first, Union representatives did not want to ride with a labor consultant originally designated as one of the drivers, and second, when the Union representatives did enter in Nate's car, he deliberately drove slowly in order to cut down the amount of time available to talk to workers before the end of the designated access period. Nate denied driving slowly. It is agreed by everyone that enough non-strikers agreed to join the strike that, when it was time to leave, the now-enlarged group could not fit in company vehicles and had to walk out.

Perez recalled that the company delivered the access-takers at exactly the right time and that they had their full half-hour in the fields. He also testified that, upon seeing workers leaving his fields, Nate not only complained about having to allow access in the first place, but also about how long it was taking everyone to leave. When Perez told Esformes that he had to allow time for people to walk out, and that the thirty minutes

¹⁶ The Employer argues that Perez testified there was no discussion about how to construe the end of the workday at this initial meeting. However, Perez testified he was "almost positive" there was such a discussion. VIII: 170-171.

ended when the access-takers left the crews and not when they left the fields, Esformes told him to fuck himself."

According to Ramirez, the Union was unable to take access at all that afternoon because the company failed to notify it before work ended. Nate, however, testified that he gave about half an hour's notice to the Union representatives that first afternoon. Perez testified that he discussed the problem of the UFW not getting sufficient advance notice on the afternoon of the 27th, thereby impliedly supporting Ramirez's version that there was a problem about after work access that day. VIII:33 About the events at Kimoto on the first day, then, there are two factual disputes: (1) Whether or not the Union had a full half-hour during lunch-time and (2) Whether or not it timely received notification of the end of the workday.

In view of the conflict between Perez's and Ramirez's testimony about whether the Union received a full-half hour at lunchtime, I decline to make any finding about which account is true. Through Ramirez was likely to be alert to any problems in the Union's obtaining the access to which it believed it was entitled, it is equally likely that Perez, who was involved in both developing the guidelines for access and in monitoring the parties' conduct under them, was equally likely to have paid attention to the parties' behavior under them. As indicated previously, I am inclined to believe that there was a problem about whether the Union was denied after work-access on the 27th. My main point in considering these disputes is not to fault

either of the parties, but to show the sort of perceptions that early developed in connection with access.

As stated previously, the Employer's witnesses testified that the UFW7 also took access at the Newcastle field where, according to Employer witnesses, other sorts of problems arose. Ramon Perez, a foreman of one of the contractor-supplied crews at Newcastle, testified that four men who identified themselves as UFW representatives approached his crew in the fields. III:116 Explaining that they worked for the company, they asked the employees to join them in their fight for a raise. As the workers ignored their pleas, the access-takers first became insulting, telling the workers not to be "dumb" and that the strike would benefit everyone, before graduating to thinly veiled threats, asking the workers "weren't we fearful...that they were going to use violence." (III:121) A thin one said loudly, "Weren't [they] afraid there would be blood" (III:122) and warned that the police could not protect anyone outside the fields. (III:140) Perez testified that there were approximately 100 workers within 50 to 60 feet of this speaker who were in a position to have heard.¹⁷

Anita Castro also testified about an incident on July 27th at Newcastle and she related roughly the same remarks. A "thin man" told her that she should stop working, that the company was

¹⁷ The people who were in a position to hear were the Villareal supplied workers; though at one point Counsel for the Employer conceded that they didn't vote, See III:133, 200, 201, 205, the Villareal crew appears on the eligibility list. See GC1 I am treating the workers of the crew as eligible voters.

just using them because of the strike, and that they should be out of work once the strike was over. As the crew continued to work, the "thin man's" tone changed: he called them "bastards" and "fucking wetbacks", warned "there would be blood", and that "they" would hit them. VI:10. When workers replied that they worked to support themselves, the access-takers said that "if they wanted to they would bring us food and [money] for the rent." (IV:11) After some prodding, Castro recalled that the "thin one" said that police could protect them in the fields, but not outside.¹⁸

These accounts have some inconsistencies (whether or not the "thin man" was speaking loudly enough for everyone to hear), the phrasing of the "blood" remark (a more direct threat in Castro's telling and a thinly veiled one in Perez's), and Castro's testimony especially has some jarring elements (the offer to help with rent and groceries is out of keeping with the insults and the threats); finally, Castro had to be prodded to remember the "police" remarks. However, the major difficulty in them is not apparent on their face.

Both witnesses testified clearly that this incident took place on the 27th of July. The July 27th date is important to the Employer's case because, based upon it, the Employer argues

¹⁸Castro did not initially recall this, but had to be asked, "Was there any comment by the 'thin man' about the police?" (IV:19) Castro also testified that she could only hear what the "thin one" said to her; when he spoke to the others "I couldn't listen [hear] very well", (IV:5), thereby implying (contrary to Ramon Perez's testimony) that the "thin man" was not broadcasting what he said.

that the Union inaugurated its campaign with threats and that these threats link the Union to all the subsequent misconduct. However, the crew list for the Villareal crew, in evidence as part of the Eligibility List, GCX1, indicates that neither Ramon Perez nor Anita Castro worked on July 27th. Indeed, Anita Castro's name does not even appear on the list at all.

Now it is possible that Anita Castro worked under another name or social security number. It is also possible (and understandable) that both witnesses were confused as to the date. It is also possible that Perez and Castro are describing two separate occasions, though to believe this would require me to believe that the access-takers and the workers adhered to a kind of script in their encounters. While Castro did testify that the access-takers always said the same thing (IV:32), I am not prepared to believe that the interplay between striker and non-striker always followed the same course.

I am left with the possibility that (1) Perez and Castro are describing the same incident, but are mistaken as to the date or that (2) they have made the episode up. I rule out the possibility of a mistake in dates because the tape of July 27th at Mariposa shows Jon Esformes alleging that the very comments about which Perez and Castro testified were made on that day. Germane to the second possibility is the fact that Ramon Perez's van and that of Anita Castro's son, Baldomero Castro, were subjected to some rough treatment on August 2nd, which could

explain why they might make up such an incident on the 27th.¹⁹ I decline to credit Perez's and Castro's accounts.

On July 28th, Triple E had crews at several locations and there were problems at all of them though the exact sequence of events is difficult to reconstruct. It appears, however, that at some point Ed Perez, who was initially at the Mariposa site, received word that there had been some kind of an incident at the Watanabe field,²⁰ and he rushed over to find out what had happened.

According, to Jon Esformes,²¹ this is what happened: Around 9:30 a.m., 10-20 vehicles with UFW flags pulled along the Morada-side entrance to the Watanabe field and disgorged about 50 picketers who milled about the entrance and then marched into the field. About half the group never got as far as the workers, but left the fields on their own. The rest continued on toward the crews, some walking in the roadway, and some in the fields "on the tomato plants." (I:129)

Two crews were at work, one Hispanic, the other Filipino.

¹⁹In this connection I also note that of five employees who testified that their vehicles were damaged {Mario Ramirez, Jaime Adame, Fausto Mojica, Ramon Perez, Baldomero Castro} two of them, Adame and Perez claimed to have been threatened, and a third Baldomero Castro, though not himself threatened, had a mother who was. This appears to me to represent a remarkable concentration of misconduct.

²⁰Perez initially testified that the Watanabe field incident took place after the lunchtime; however, he eventually recalled the sequence of events related above. VIII:205

²¹Jon Esformes put Perez at the Watanabe field during the incident; the Employer does not contend that this is the case in its Post-Hearing Brief.

The advancing group approached the Hispanic crew first, shouting "Go home, traitors." "You don't have a right to work" and "Pinches Cabron." (I:131.) The crew asked to be permitted to do their work, but some of the picketers knocked over their buckets. Jon went over and asked the strikers to leave the fields. When they refused, he asked help from the Deputy Sheriffs who were right at the scene. The deputies told Jon they would prevent violence, but that they would not try to eject the strikers.

At some point, a portion of the group confronting the Hispanic crew broke off and went to the Filipino crew. Mauricio Bonjoc, the foreman of the Filipino crew picked up the story. According to him, his people were called "monkeys" and "mother fuckers". Besides name calling, he described strikers knocking over buckets, stomping on tomatoes, chomping on tomatoes, and pushing people. In the face of this, the female members of the crew ran from the fields; the men sat down on their buckets. Bonjoc acknowledged that the Sheriff's Deputies were nearby. Despite their presence, and Jon's offering the crew protection in going to and from work, the Filipino crew refused to return to work after July 28th.²²

²²The Employer urges that this testimony is supported by declarations from additional, non-testifying employees taken by the Board agent investigating unfair labor charges. The declarations are not in evidence because I ruled that they were subject to the privilege for official information, "acquired in confidence." Evidence Code § 1040 In view of the direct testimony of percipient witnesses about the event, I could not understand how any interest in their disclosure could outweigh the Board's interest in preserving the confidentiality of its investigative processes.

Perez arrived as the strikers were leaving the field and he immediately spoke to the officers to determine what had happened. According to him, the sheriffs told him that a group of individuals "had come in and attempted to talk to the crews" but, he also heard from "company representatives," (doubtless Jon Esformes) that "a group of strikers had rushed the field and had gone to both crews and the crews didn't want to work anymore." (VIII:198) Perez did observe that no one was working and that "a group of 20 young individuals [were] walking back to the picket line", VIII:201, from which he surmised that work in fact had been disrupted. Jon testified that Perez told him that it was wrong, but that he [Perez] could not do anything about it, though Jon could file a charge.

Perez, however, testified he did more than that: he spoke to the Hispanic crew about their rights as non-strikers, and he instructed Vicente Paala, who was with him and who could speak to the other crew, to similarly advise the Filipino crew. After doing this, he spoke to the picketers and informed them that if they had rushed the fields they were violating the "access rule", and that they could be held accountable. Later, he and the Sheriff both spoke to Barajas and told him to have picket captains available to control the strikers.

Around this time, Augustine Ramirez arrived to take lunch time access. Jon told him he was going to deny access based upon the episode I have just related. Ramirez told him he couldn't do that. Since no one was working at this time, the dispute was

largely academic. However, Jon also testified that when Ramirez saw the van with the Hispanic workers leaving the field, he tried to stop it, and failing that, he stepped behind the van and wrote something on a pad.²³

Perez returned to the Mariposa site where he spoke to Nate Esformes who told him he was contemplating denying access at Mariposa based upon what had happened at the other site. Perez told him that denying access was not appropriate, "that we should try to work it out. That is we give the voluntary access agreement time to work out the bugs. . . it could work."

According to Perez, he also took the occasion to clarify the guidelines under which access was permitted. He testified that he spoke to Nate, Carroll and Barajas together and told them that the half-hour access period ran from the time access-takers were within 100 feet of the crews until they were picked up by the Company vehicles, and that the time spent in getting in and in walking out is not to be considered access-time. He also advised Esformes that the Union was concerned that it was not getting timely notice of termination of work and that access was permitted to individual crews as they finished work, so that the Union was within its rights to enter a field to talk to any crew preparing to leave. Finally, he emphasized that if Nate wanted

²³I take it the Employer intends to imply surveillance from Ramirez's action. Even if it occurred, I do not understand how it could have affected the outcome of the election and I decline to consider it further.

the Union to accommodate his insurance concerns, he should have his vehicles ready 10 minutes before the designated lunch hour.²⁴

Shortly before the designated lunch hour, Perez reminded Nate to have his drivers ready. Although Nate was available with his car, there were about 10 access takers and more than one vehicle would be needed. Though Nate assured Perez that Guido would soon be there, when Guido had not arrived by five minutes before the designated lunch hour, Perez told Barajas to enter the field. Because the crews were deep in the fields, the access takers ran towards the crew. After 30 minutes with the crew, they walked out of the fields and Esformes again complained to Perez that they were taking too much time. Perez repeated that the thirty minutes of access did not include the time spent in transit. Esformes cursed him.

According to Nate, he and Perez spoke alone sometime at the Watanabe field and Nate complained "I thought we had an agreement on access and they're just arbitrarily taking access whenever they want. There was threats and intimidation to the Filipino crew which walked out....[W]hat was the reason for us standing in the hot sun and making the agreement if we can't...get the UFW to abide by the agreement." VI:21

Esformes characterized Perez's response this way:

²⁴In its Post-Hearing Brief, the Company contends that only after-work access was discussed at this meeting, Post-Hearing Brief pg 10, because it took place after lunchtime. However, Barajas testified that Perez was present at Kimoto for lunchtime access on the 28th, X:77 et seq.

Mr. Perez initially and at this time and in subsequent events had the same tone of voice and basically the same response....

His response was always in the affirmative that these were "his people" the strikers, and he could care less about the agreement that was struck, and he could care less about the ALRB laws. VI:21-22.

So displeased was Nate that he called Perez's Regional Director, Lawrence Alderete, to ask that Perez be removed from the case. I don't doubt that Perez and Nate had such a discussion and that Nate asked for Perez's removal from the case; but I doubt that Perez referred to the strikers as "his people." Indeed, since this is the second time the matter of Esformes' credibility has come up, I will now discuss it generally. Nate Esformes is obviously a strong-willed, strong-minded man, but I believe he misunderstood from the beginning the extent of his obligations under the Act, and that this misunderstanding led to a highly distorted view of Perez's efforts, causing him to see bias in everything Perez did, and finally to hear bias in everything Perez said. I do not credit his testimony.

Whatever happened at Watanabe, there was to be more trouble that day. According to Mario Ramirez this is what happened at Toso field: When his crew finished work at around 2:00 p.m., he and 11 other passengers boarded his van and exited the field south along Highway 4.²⁵ As the van approached a stop sign at

²⁵In its Post-Hearing Brief, pp 11-12 the Employer places Barajas at the Toso field in the morning well before the incident I am about to relate; Barajas was apparently not present at the end of the day. I assume that the Employer wants me to infer

the intersection of Mariposa and Highway 4, a red pickup blocked its way. About a dozen men, some of them wearing UFW buttons, emerged from the pickup and, approaching his van, rocked it and pounded on it with their hands. One of them picked up a piece of metal and scratched the side of the van. (IV:104.) The strikers shouted that the work was theirs and that Ramirez and his men were meddling. Someone hit the driver-side window with something like a baseball bat and it exploded, causing a splinter of glass to cut Ramirez on the arm. The front window was also cracked. According to Ramirez, other vehicles were behind his throughout the incident, IV:110, which ended when his driver drove around the pickup. Though July 28th was the last day of work that week, Ramirez testified that the attack was the subject of discussion when his crew resumed work at Triple E on July 31st.

To round out the incidents on the 28th,²⁶ Jaime Adame testified that when he attempted to leave the Employer's fields at the end of the workday, some picketers blocked his van with their cars. As he stopped his van, dirt clods and tomatoes were thrown at it. Adame asked that he be allowed to pass, and

agency from Barajas' presence at the field earlier in the day, but I decline to do so.

²⁶I am attributing the incident I shall recount to the 28th of July; the witness placed it on either the 27th or the 28th. (VI:101) Since UFW access only began on the 27th of July and since Adame appeared to relate two days worth of incidents, I am placing the "second" incident on the 28th. The Employer does the same in its Post-Hearing Brief. I might point out that Adame testified that he was also threatened on previous days; specifically, that he should get out of the fields or be beaten up, (V:95) or that it would be better not to return to work. (V:97)

promised not to return to work. (V:111) He was told that "they" knew his car and he wouldn't have another chance. (V:112.)

Since there was no harvesting activity on July 29th and 30th, I will pick up the narrative on July 31st.

Jon Esformes testified that when work resumed on the 31st, about 300 UFW picketers, including Barajas and Ramirez, were present at around 6:30 a.m. at the Watanabe field at West Lane and Morada. When Esformes observed Ramirez looking at the crews through binoculars, he asked him not to do so; except to tell Jon to file a charge, Ramirez ignored him.²⁷

Sometime during the morning, the picketers began a march along Morada lane toward West Lane. Sitting at that intersection is a roughly triangular, uncultivated patch of ground which is used as an equipment storage area and upon which sits a shop. According to Jon, perhaps a quarter of the 200 or so marchers cut across the base of this area to reach West Lane.²⁸ Jon did admit that no damage to either crops or equipment was incurred,²⁹ but he described the mood of the crowd that day as

²⁷This is the first occasion about which the Employer presented evidence about the use of binoculars. Though I will record both occasions, I do not find the two reported incidents likely to have interfered with the outcome of the election. The Employer has not attempted to establish that whatever "surveillance" took place was used to "target" employees; in the absence of such a linkage I cannot find the use of binoculars reasonably likely to interfere with employee free choice.

²⁸Barajas who was also there, estimated that a handful of marchers cut across the shop area. (X:107.)

²⁹According to Esformes, he heard some chants in the crowd referring to him and his uncle, who were Jewish, as Christ killers and exhortations not to work for "the fucking Jews." As

hostile. During the course of the day, various picketers tried to challenge him or Guido to a fight; others raised their fists to the crew. All the time shouts of "sons-of-bitches," and "mother fuckers" emanated from the crowd.³⁰ I should add that security guards were present. The tape for that day does not reveal out-of-control crowds; indeed while the crowd is sometimes unruly, not much happens.

The next day, August 1st, the Company was again at the Watanabe field. As the crews arrived, so did about 150-200 picketers who crowded at the entrance to the field along Morada Lane. According to Jon Esformes, some of the picketers stopped "a crew and two vehicles" from entering the property by stepping in front of the cars. Jon spoke to the "crew leader" in one of the vehicles who told him the crew would not work that day.³¹

Later in the day, the picketers moved to West Lane north of the field. Everyone agrees the crowd was unruly and could not stay off the Company's property. It is also clear that at least

disagreeable as such epithets are to me, their isolated occurrence does not rise to the level of a "racial campaign." Brightview Care Center Inc., (1989) 292 NLRB No 46, and I decline to consider the matter further.

³⁰I ought to address two matters in connection with this incident. First, I do not believe pugnacious behavior towards Guido or Jon is likely to affect employees who were not targeted and therefore, not threatened by it. Second, while threatening language can amount to misconduct, I do not think insults or foul-language are threatening, and I will henceforth disregard the insults.

³¹Since there is no evidence as to what "persuaded" the crew not to work, I do not find that merely stopping cars on the way into the fields would have affected the outcome of the election.

part of the reason for the picketers' repeated tendency to spill onto the ranch property was that there was not much space between the well-traveled road at their back and the working roadbed along the north edge of the field.

According to Nate, the crowd encroached so much that he had to run a tractor along the ditch road to clear it. Whatever his reason for starting the tractor, he kept it running so that it drowned out Barajas' efforts to use the bullhorn to exhort the field workers. No matter whether Hate's motive in keeping the tractor running was to have it available to keep his property clear or to override Barajas, or both, the tractor was silenced after an agreement was worked out to keep the crowd within more mutually acceptable boundaries. Jon also testified that sometime during the morning both Barajas and Ramirez observed the crew through binoculars; when Jon asked them to stop it, only Barajas complied.

Around 10:00 a.m. something was thrown from the crowd and hit Jon Esformes. This incident had been caught on videotape, which shows Jon reacting as though hit and finally going down on one knee. He was taken to the hospital by ambulance and did not immediately return to work. In the wake of his nephew's injury, Nate told Perez he was going to deny access for the rest of the day. Though Perez decried the incident, he told Nate that the Board felt strongly about using access as a means of defusing tensions and he asked Esformes to reconsider.

When Nate refused, Perez decided to authorize access

because, as he put it, " I thought it would be in the best interests of keeping the peace to allow access." (VII:73) When Perez asked Nate to provide the vehicles to take the strikers into the fields, Nate told him to "go fuck [him]self." Perez told him that if the Company was not willing to provide the vehicles, he would take the UFW representatives in himself:

I notified the Sheriff's Department of what my intentions...were and I notified the UFW to select the appropriate number of access takers and have sufficient vehicles to drive the access takers in, and that they were going to follow me and I was going to drive my State vehicle in to where the people were working and they were to have the drivers drive them to within 100 feet of where the crews were working. VIII:73-74

In this way, Perez provided a half-hour of access on August 1st, when the Company was prepared to deny it.

The following day, August 2nd, there was another incident, this time at the Caffese field. Though this is featured on the videotape introduced by the Employer, I will relate the story as told by the witnesses first.

Ramon Perez was among those who worked that day. He came to work with 12 people in his van. Around 10:00 a.m., as his crew was at work, Perez noted that a good many cars began to park along the Highway 26 side of the field. From out of the cars, pickets emerged to gather in groups, many of them carrying UFW flags. Some of the picketers yelled "Come over here you dogs, sons of your whore mother, you are starving." (III:151.)

Perez's crew finished its work by 12:30, but waited in the

field because it had been asked to do so by its supervisor, Isaac Villareal. A second crew had also finished and it, too, waited to leave. A third crew was still at work. Guido testified that the crews were waiting because the Company had asked its supervisors to hold all the crews in the field until work ended for all, at which point access would be available to all.³²

According to Guido, Barajas and his fellow access-takers arrived before any of the crews had finished. Guido checked their identification and told Barajas he would have to wait until the last crew finished before going in; but he promised to hold all the crews in the field until the last one finished so that the Union would have a chance to talk to all of them. According to Guido, Barajas agreed to the procedure. Guido did admit that Barajas said nothing to indicate assent. (II:28.)

Barajas apparently did not agree, for when he observed that some of the workers had stopped, he told Guido he was going in. When Guido reminded Barajas about their "agreement", Barajas told him: "There's no such rule that if one crew's working that we have to stay out. We can go in right now and take access." (II:30.) At that, according to Guido, Barajas "hollered", and he and the other access-takers jumped across a ditch and began to run into the field.

Guido jumped into his car to track him. When he caught

³²Guido testified this particular arrangement was worked out with Barajas on August 2nd, II:27. Perez testified that Triple E offered to hold crews in the field as early as July 28th. I take it that a general procedure was worked out on the 28th, and Guido employed it on the 2nd of August.

up to him, Guido reminded him that the UFW was entitled to fewer access-takers for two crews than it was for three. Barajas sent two people out.

Ramon Perez testified that upon observing the UFW representatives "walking" into the fields, his crew started "running to where [their] cars were." Guido too, described the crew's reaction as nervous. According to him, they "jumped" into their trucks (II:133) but in his telling, the reaction of the crew is explicable since he also described the access-takers as running into the fields. (II:133,136.) Barajas, on the other hand, testified that he started to take access only because he observed the crews beginning to leave. Like Ramon Perez, he testified that he and the other representatives were walking in. Though Anita Castro's testimony is confusing, she, too, did not describe anybody "rushing" the crews. (IV:22.) According to her, the crew ran from the "thin man" because he went to "get the other ones." Jaime Adame described the access-takers as "walking fast." (V:14.)

Before relating what happened next, I want to sort out which of the two versions reflects what happened up to this point. In the Employer's version, the entry of Union representatives into the fields sent patiently waiting crews scrambling to their cars in fright. Though the impression of a Union onslaught is supported by Guido's testimony that the access-takers were running in, both Ramon Perez and Efren Barajas testified that the representatives were walking in, which does not seem likely to

provoke a panic reaction. Another feature of Guide's testimony also bears mentioning: if Barajas and his group were running so determinedly in as to panic the crews, how is it that when Guido "caught up" with Barajas to complain about the numbers of access takers, Barajas quickly regained enough control of his people to compliantly send back the "excess" access-takers?

There is no need to resolve these difficulties by resort to the testimony for there is the video-tape which, if it does not answer all the questions about what led up to the misconduct shortly to be discussed, does answer some. According to the tape, Barajas did not holler and, by his actions, launch an invasion into the field. A man in a red head-piece, not Barajas, walked in first; as Guido tries to stop him, the whole crowd of access-takers, including Barajas, starts in. Guido was right to this extent: the crowd half-runs, half-walks down the main drive into the field, but by the time the group cuts across the field to approach the workers, the access-takers are walking.

There is not only no visible panic reaction among the crews in the fields, but cars do not even begin to exit the field until some eight minutes after the access-takers arrived in the proximity of the crew. While it is possible that the Sheriff's cameras missed something, I am inclined to rely on what has been taped as representative.³³

³³In using the tapes to illuminate what took place up to this point, I am not violating my strictures against using the tapes to "explain" the misconduct which ensued thereafter. The misconduct remains misconduct.

Guido testified that once inside the field some of the access-takers attempted to stop the vans from leaving the field by hanging on mirrors: "They were trying to talk to make them stay to talk to them." (II:41.) Some access-takers also tried to talk to the crew that had not finished for the day, but which by now had stopped working to watch what was happening.³⁴ Meanwhile, more serious events were taking place as the workers neared the exit to the highway.

Ramon Perez testified that he saw the van ahead of him pelted by "handfuls of stones, soda cans and soda bottles." (III:159.) As his own van passed the intersection, handfuls of stones were thrown into it, and it was struck by "soda bottles." (III:168.) According to Perez, he saw the stone-throwing continue against other cars as he turned east on Highway 26.

Fausto Mojica testified that as he and his crew exited the field, some of the workers threw a bottle at his bus and broke his window. Other tried to pull his door open, but he held it shut. Still others went behind the van and broke his rear window and pulled off the rear door handle. (III:27.) The crowd was shouting "fucking people, leave the job, son-of-bitch[es], you

³⁴I should add that the Employer complains that the UFW stayed in the fields for 40 minutes. This by itself would not constitute excess access since the access regulation provides for one hour of after work access. § 20900 (e) (1) (c) (3) (a) As noted previously, such time periods are not superseded by the parties agreement. § 20900 (e) (1) (c) (2) Guide's uncontradicted testimony also indicates that the work of the third crew was interrupted which could constitute a violation of the access rule. I make no finding as to this, however, since the third crew apparently went back to work, for by the time Perez arrived, Barajas was demanding access to it.

must be starving."

Baldomero Castro testified that, as he was exiting onto Highway 26, he was told to slow down by the officers at the intersection, at which point a striker reached through his open window and tried to pull him out by the arm.³⁵ Two of his mirrors were broken and gravel was thrown into the van. Other members of the crowd tried to open the doors. (V:20.) Screams of "bastards," "hungry people", "sons-of-bitches" came from the crowd. There were 10 or 11 workers in his van at the time.

Jaime Adame also brought his van to Caffese that day. He testified that he had about 12 people with him. As he reached the intersection of Highway 26 and the dirt road, he encountered a crowd throwing tomatoes or pieces of dirt at the line of exiting vehicles. (V:124.) The crowd was also yelling "sons-of-bitches." Though the Sheriffs tried to keep the intersection open for vehicles to exit, just as Adame reached it, his way was blocked, and people pounded on the van. The same man who had earlier threatened him came forward, holding a piece of metal in his hand and began to pull on Adame's door.³⁶ Adame pushed him away by opening the door. Shortly afterwards, he heard the sound of breaking glass from behind his van. Though he couldn't see

³⁵Castro acknowledged that the man who grabbed his arm said he wanted to talk to him, but he testified he was offended by being grabbed.

³⁶I have already remarked on the coincidence of threats occurring to employees whose vans were damaged. Adame's testimony that the same man who previously threatened him now appeared to make good on his threat stretches coincidence too far. I disbelieve this aspect of his testimony.

who hit the rear window, one of his riders said "They already fucked your glass." He also testified his brake-lights were separated.

This incident, characterized by the Employer as a "brutal" assault, has been videotaped and the Board can see it for itself. The tape begins with a view of the intersection of the dirt road leading into Highway 26. The intersection is clearly open and the strikers appear to be standing passively along the edges of the dirt drive leading to Highway 26. Two cars pass easily through the intersection before a young man clad in white saunters from the left to the right side of the screen at the head of the intersection and, as a white van passes close to him, the young man extends his arm through the open window, as though throwing a punch.

A few moments later, a short woman wearing a Mickey Mouse sweatshirt appears to rally the crowd to block the entrance. As the crowd responds and moves across the road to slow a vehicle, the deputies immediately move to draw it through. A number of vehicles then pass through the driveway which, though narrowed by the converging pickets, is nevertheless open. One can see a picketer strike the back of one of the vehicles with his hand: a deputy motions him to stop.

Just as the crowd seems to have calmed, a white van appears on the screen and, if one looks carefully, one can see that, as the van reaches Highway 26, the right rear window appears to flicker: it is cracking. According to Sgt. Larry

Mills, the deputies on screen move into the crowd toward the person who threw whatever cracked the window, but no arrest was made because of the mood of the crowd which, as one can see, closes around the deputies. A moment later a pickup truck comes through the gauntlet and a striker reaches out and stiff-arms the driver's side-view mirror, knocking it from its supports. By 12:40 the deputies have the intersection clear and after that cars move briskly through accompanied by an occasional slap and at least one loud sound which I take to be the sound of another thrown object. In all, Sgt. Mills, who was present, testified that he only saw a few handfuls of gravel being thrown. The tape doesn't clearly show gravel being thrown, but one can distinctly hear what sounds like objects striking the vans perhaps half a dozen times.

Upon being notified by the Sheriff's Department about what was happening at Caffese, Ed Perez drove to the field to hear that Guido and Joe Sanchez were refusing to grant access to the last crew because of what I have just related. At this point, Barajas was claiming that the Company had played games by telling the Union it had to wait for all the crews to finish, and insisting that Perez had to grant access. Perez decided to allow access. He told the access-takers to go in, at which point Guido became extremely angry and told Perez he had gone too far. The crowd applauded.³⁷

³⁷While the Employer argues that the crowd was applauding Perez, applause may also be heard on the videotape when the access-takers initially went in past Guido.

As Guide drove his car to plug the road, Perez walked in with the access-takers who never reached the crew because by then it was leaving. Upon seeing the crew leave, Perez motioned the access-takers back. Sanchez repeated that Perez had gone too far and predicted that he would lose his job. Perez invited him to file an external complaint. Still angry, Guido ordered Perez off the ranch. According to Guido, Perez responded by saying he would leave as soon as "my" people did. (II:171.) Perez testified that he said he would leave "as soon as the other people left."

There is no question that Perez permitted access over Guide's strenuous objections and that the crowd applauded. The only real difference in Perez's and Guide's account is whether or not Perez referred to the access-takers as "my people." Perez denies that he did so, which leaves a clear conflict between his testimony and that of Guido. (VIII:90.) I decline to credit Guido over Perez's denials.

I believe Perez was only too aware of being in the middle of the parties' disputes over access. While I find that he overreached himself in this incident, I do not believe that, conscious as he was of the difficulty of his position, he would explicitly identify himself with a party. Certainly he showed no tendency to do this at the Watanabe field when he instructed the Hispanic employees and he had Paala instruct the Filipino employees about their rights as non-strikers and when he rebuked the strikers for entering the fields.

Before discussing the effect of the preceding incidents on the election, it remains to discuss the disenfranchisement issue. The election was held on August 4, 1989. Anita Castro testified that while she was in line to vote at the Lockford site, a heavy-set (or fat) man from the state, announced something to the effect that those not included on the list could not vote or that only those on the list could vote. According to Castro, she and an undetermined number of others got out of line upon hearing the statement. She then became upset and told the mob that as an American citizen she had the right to vote. According to her, the man said nothing more except to ask her to get out of line.

Baldomero Castro, Anita's son, who was an observer at the election, also testified that he heard "one of the leaders", (V:31.), "one of the ones that had the ballot boxes," (V:32) tell people that if they were not on the list, they could not vote. Indeed, according to Baldomero, the one who said this got on a chair to make the announcement. (See also Testimony of Jaime Adame V:161, although Adame isn't sure if he heard the statement or merely heard that such a statement had been made. V:162)

A number of Board agents testified. None could recall either making such an announcement or hearing it made. Since I do not believe that Castro's testimony, even if true, warrants setting aside the election, I do not see any need to outline the Board agents' testimony in detail. Even if every challenged ballot were to have been cast No-Union, the UFW still would have

won this election by approximately 90 votes, under the circumstances it has not been shown that the undetermined number of voters who might have been discouraged if such a statement had been made could have affected the outcome of the election.³⁸

ANALYSIS

The first objection set for hearing was whether or not the UFW directed a campaign of violence, threats of violence, property damage, intimidation and coercion against employees. As stated, the objection requires proof of Union responsibility for the alleged objectionable conduct, which is not automatically supplied by proof that strikers, or even strikers wearing UFW buttons, did this or that. Rather, a finding of Union responsibility requires proof that the conduct found to be improper was "instigated, authorized, solicited, ratified, condoned, or adopted by the Union, Sub-Zero Freezer Company (1982) 265 NLRB 1521, rev'd on other grounds, 271 NLRB 47, or that those engaged in it were apparently clothed with Union authority. Kitchen Fresh Inc., v NLRB (6th Cir 1983) 716 F2d 351,355.

As in any case involving apparent authority, "the act or declaration of the agent alone can never establish ostensible authority; there must be some conduct on the part of the alleged

³⁸The Employer cites Sequoia Orange (1987) 13 ALRB No. 18 in support of its argument that the "disenfranchisement" in this case requires that the election be set aside. In that case the number of employees disenfranchised was sufficient to have affected the outcome of the election.

principal." Witkin, Summary of California Law Vol 2, §93; p92³⁹ As the Court said in Kitchen Fresh, Ibid: "At the minimum, the party seeking to hold the Union responsible for the employee's conduct...must show that the Union cloaked the employee with sufficient authority to create a perception that the employee acted on behalf of the Union."

The entirety of the Employer's argument on Union responsibility for everything that took place is the allegation that UFW access-takers threatened employees at Newcastle on the first day and that "the UFW made good on its threat" on subsequent days. Since I have declined to credit the Employer's witnesses about this incident, there is no need to discuss the question of agency further from this point of view, though I will consider the question of the Union's responsibility for the stopping of Mario Ramirez's and Jaime Adame's vans, the incident with the Filipino and Hispanic crews, the injury to Jon Esformes, and the incident at Caffesse field in light of the test for agency identified above.

I discuss the question of responsibility for the misconduct first because the standard for overturning elections varies depending upon the identity of the actors. Thus, misconduct by

³⁹While the question of "apparent authority" is to be viewed from the point of view of employees, Vista Verde Farms vs Agricultural Labor Relations Bd (1987) 29 Cal 3d 307, it is still necessary to show congruence of activity between the Union and those alleged to be its agents, and not just a similarity of ends. Otherwise, in cases involving strike activity, in which almost by definition multiple actors share the same goal, the distinction between Union and third-party misconduct disappears entirely.

"union supporters or workers in general" will not suffice to set aside an election unless "it is so aggravated that it creates a general atmosphere of fear or reprisal rendering employee free choice impossible." T. Ito & Sons, 11 ALRB No 36 at 10. Misconduct attributable to the Union warrants overturning an election if it may reasonably be said to have affected the outcome of the election. See Baja's Place (1984) 268 NLRB 868

Because the attack on Ramirez's and Adame's van, did not even take place on the picket line, and because there is no other persuasive evidence of agency, there seems no reason to consider the question of Union responsibility in connection with these incidents further. I find they were the acts of third-party Union supporters. The other incidents which are more or less related to picket line activity do raise questions of Union responsibility precisely because they either took place on, or may be said to be associated with, picketing.

While it used to be the case that picket line misconduct was not attributable to the Union in the absence of a showing of agency, See Longshoreman ILWU (1984) 79 NLRB 1487, 1509, the NLRB has recently ruled that the picket line misconduct will be attributed to the Union on the grounds that picketers are agents of the Union as a matter of law. Avis Rent-A-Car System (1986) 280 NLRB No 60 Since application of the Avis rule would make the Union strictly liable for all misconduct on a picket line, and since there is no rule of strict liability for employers under our Act, Vista Verde Farms v Agricultural Labor Relations Bd

(1981) 29 Cal 3d 307, 326, but only the liability of a principal for the acts of its agent and, finally, because our Board has recently re-affirmed its adherence to these agency principles, Furukawa Farms (1991) 17 ALRB No 4, I do not believe Avis is applicable precedent under our Act and I decline to follow it.

Under traditional agency principals one looks at a variety of factors to determine Union responsibility for the acts of picketers, including whether or not picketing was authorized by the Union; whether or not picket captains or officials were present; whether or not authorized pickets were involved; and whether or not the Union did anything to authorize, instigate, condone or repudiate the misconduct. See International Brotherhood of Boiler Makers (1989) 297 NLRB No 75 n.1 (Slip opinion) I shall consider each of the "picket line" incidents in light of these factors.

1. The incident with the Filipino and Hispanic crews: There is no evidence that any Union organizer was present at Watanabe; indeed; according to Ed Perez, it was after this incident that he and Captain McClelland instructed Barajas to have picket captains available to control pickets. I do not find the Union responsible for the incident.

2. The injury to Jon on August 1st: The incident took place during picketing when Barajas, Ramirez and Zeferina Garcia were present. While their presence weighs towards a finding of agency, the injury to Jon appears to be an isolated event: no hail of rocks or dirt clods emanates from the crowd to alert

Union representatives to the possibility of injury. Indeed, Barajas testified that he wasn't even sure if anything had even happened to Jon. X:123 There is no evidence to indicate the Union authorized or instigated the incident. Under the peculiar circumstances of this case, including the uniqueness and the suddenness of the event, as well as Barajas' confusion over whether anything had even happened, I do not find that the Union condoned or adopted it.

3. The incident at Caffese field on August 2nd:

This took place on a picket line when Barajas was present (though in the field). Despite its duration, and despite Barajas' knowledge of it, as indicated by his telling the crowd that this "was not something [the Union] wanted," he not only did nothing to control the crowd during the incident but he also apparently left no one in his place to be available to control the crowd. Despite his weak disavowal afterwards, I find the Union responsible for the incident.

Do any or all these events together require overturning the election? I will first consider the incident at Caffese since the Employer characterizes it as the very epitome of brutality, and it must be considered under the separate standard for Union misconduct.

Perhaps if I had only heard testimony about this incident, I might have considered it more serious than I do; but, having seen the tape, I am not prepared to consider it the riotous assault the Employer makes it out to be. Indeed, while the pickets surge

to block the exit a few times, thump on cars, throw some stones and gravel, and some vehicles were damaged either from the stones and gravel, or by other means, the crowd is easily controlled by the Sheriff's Department.

While I do not minimize the damage done to vehicles, the test under our Act is whether or not what took place at Caffese would have tended to affect the results of the election. Given the presence of law enforcement and the ease with which the crowd is controlled, I cannot conclude that this incident sent a signal of menace throughout the work force.⁴⁰ Indeed, the level of "violence" at Caffese is not much different from that held to be attributable to the Union in Avis-Rent-A-Car, supra, and which was held not to require over-turning the election.⁴¹

But if the incident at Caffesse does not warrant over-turning the election by itself, did it contribute, along with the other events which were not attributable to the Union, to a general atmosphere of fear or coercion? In connection with this I will first consider whether any of the conduct was aggravated. The incident at Watanabe with the Filipino and the Hispanic crews requires weighing a number of factors. In the first place and once again, law enforcement officials were

⁴⁰To my mind, the presence of law enforcement distinguishes this case from both T. Ito, supra, and Ace Tomato Co (1989) 15 ALKB No 7.

⁴¹In Avis, there was occasional spitting on and slapping of cars crossing the picket line, two instances of cars being damaged as they crossed the picket line and some scattering of nails. 280 NLRB at 581-2

immediately present to prevent violence. Second, the Hispanic crew did not leave the field, but sat down on their buckets as did the Filipino men, a form of passivity which does not bespeak great apprehension. Finally, Board agents specifically instructed both crews about their rights after the incident. Against these considerations, I weigh the disruption of work, the conduct of the women in leaving the field and the fact that the Filipino crew did not return to work after the incident. On balance, I consider the incident serious.

It remains to consider the felling of Jon Esformes and the attacks on Ramirez's and Adame's vans. To my mind, the injury to Jon was isolated and not likely to send waves of fear throughout the employees since it was not even directed at them. I feel differently about the attacks on Ramirez's and Adame's vans, which took place away from the "police lines" when groups of employees were alone and, in the case of Ramirez at least, was the subject of discussion afterwards.

It seems to me that employees trapped inside isolated vehicles would be intimidated, and that their experience is of the sort about which word would move throughout the work force. Accordingly, I find two aggravated incidents of misconduct against a background of other incidents of misconduct, none of which taken alone in my view warrants setting aside the election. However, in view of the size of the Union's election victory, and the largely peaceful nature of the strike as evidenced by the tapes which reflect how most employees would have experienced it.

I cannot conclude that the matters which I find to be serious would have spoiled the "atmosphere" in which this election took place.

II.

The Employer's next objections relate to access. There are two different objections set for hearing in connection with access: (1) whether or not the Union took excess access and whether or not ALRB agent Ed Perez exhibited bias in his decision-making process (a) by permitting access at various times when the Employer would have denied it; and (b) by directly expressing his bias when he referred to UFW access-takers as "my people". Since I have not found that Perez made the "my" people statement attributed to him, I dismiss this objection outright.

At least part of what informs the remaining allegation of bias is the contention that there was no "right" to access because the N/A was improperly served, and that whatever privilege the Union had to enter its property flowed from the Employer's agreement. To the extent that the Employer is wrong about this, its perception of bias loses a good deal of vitality.

The Employer argues that the Union had no right of access pursuant to either (1) the Notice of Intent to Access or (2) Bruce Church (1981) 7 ALRB No 20, which makes it an unfair labor practice for an Employer to deny access to a Union during a strike. Since I conclude that access was available pursuant to Access Regulation, I see no need to discuss the Bruce Church decision.

The argument that the N/A was ineffective to establish a right to organizational access is premised on either the Union's having filled out the proof of service before the notice was actually served, or on the Board agents' having accepted telephonic assurances of service, or both. Since the Employer had never disputed that the Notice was actually served upon it, I find that no matter how the argument would have been framed had it ever been explicitly made, it is irrelevant.

The general rule is that "where proper service is made, a defect in the [proof of service] is not fatal to jurisdiction," Witkin, Actions §15, p 802. If, as far as jurisdiction is concerned, a proof of service merely evidences service, in a case where the fact of service is uncontested, there seems no reason to treat defects in the proof as diminishing any substantive rights which flowed from the Notice. Accordingly, I find that the N/A was effective to trigger organizational access rights under the access regulation.⁴²

Under that regulation the Union had a right to access and Perez's saying so does not demonstrate bias. It also follows that our Board's interpretation of the conditions for access also

⁴²The fact that what evidence we have of the Union's message during access makes it clear that the Union used the opportunity to solicit support for the strike does not alter my conclusion that organizational access is involved here: the Board's access regulation does not distinguish between organizational access during a strike and organizational access in the absence of a strike. In this case, the Union did not call this strike as an economic weapon. Indeed, Barajas counselled against striking and immediately sought to obtain an election as soon as the Union was requested to "take over" the strike.

applies and our Board has held, as Perez told Nate, that access is available to each crew as it finished work.⁴³ Gourmet Harvesting (1978) 4 ALRB No 14, pg 2, n.1. The Employer's assent was not required for access to be available on this basis, and to the extent that it sought to deny access until all crews had finished work, the Employer was, as Perez told Nate, violating the Access Rule. Moreover, while I cannot find that the Board has ever spoken on the question of whether or not access time includes time spent in transit, it seems to me that Perez's interpretation of the Rule as permitting at least a full half-hour for communication is correct. Access is for communication; to treat the total amount of access time as including time spent in reaching the crews seems unreasonable.

Accordingly, I evaluate the Employer's contentions of excess access in light of what it was obligated to provide. The incident at Watanabe with the Filipino and Hispanic crews is "excess access", under this standard; however, since I have discounted it as an incident of violence, it seems anomalous to find that it affected the election when it is considered as a form of communication.

The other alleged incidents of "excess access" involve Perez's permitting organizers to enter the fields on August 1st

⁴³The Access Rule also specifies that access shall be to the place where employees congregate after work. To the extent the Employer held its crews in the fields, the fields become the appropriate access site. If the crews had gone to the buses or vans, wherever the vehicles parked would become the locus of access.

and on August 2nd over the Employer's objections. These incidents entail more complicated considerations. The Access Regulation, under which the Union had a right to enter the Employer's premises, balances both the employees' and the Union's organizational rights against the property rights of the Employer in the abstract one might say; alleged misconduct on the part of employees or Union is not taken into account in striking this balance. Because the balance may change when misconduct does occur, it seems to me that an Employer should at least have the opportunity to assert, at its peril, that the balance has changed, especially in a case in which the claimed misconduct is not trivial. Indeed, in West Foods (1985) 11 ALRB No 17, a majority of our Board drew a similar conclusion in the context of a denial of "strike access":

Access, whether it be organizational, post-certification, or during a strike, should be free from coercion or intimidation. When violence at a picket line is directed towards replacement workers, and is attributable to the Union by agency, ratification, incitement or other forms of participation, its intimidating effect is not removed merely because the Union, in taking... access, now faces replacement workers at the work site rather than at the picket line.

While it is preferable that such picket-line violence be curbed through appropriate injunctive relief, it cannot be said that a ban on access in response to actual (not just suspected) violence that is clearly attributable to the Union is an unfair labor practice. Once the Union takes effective measures to remove the intimidating effects of the violence by disavowing or repudiating the violence and by preventing the violence from re-occurring, there would be no further justification for such a ban and continued

refusal to provide strike access which is otherwise required would be an unfair labor practice. 11 ALRB No 17, pp 27-28 (Emphasis on Original)

The Board went on to conclude that the picket line violence in that case which was quite similar to that which took place at Caffese (picketers' pounding and throwing objects at the cars of entering replacement workers and damaging the windows of several vehicles) warranted a temporary suspension of access.

Given the various findings on the question of Union responsibility which I have made, I find that under a West Foods analysis, the Employer would have been within its rights to deny access on August 2nd at Caffese, and would not have been within its rights to have denied access on August 1st. However, since the incident at Caffese as to which a denial of access would have been appropriate did not actually result in access, it seems silly to treat it as objectionable "excess access."

But that doesn't end the matter for back of the question of whether Perez was ultimately correct in his judgement stands the question of whether or not it was his judgement to make. A denial of access may be either an unfair labor practice or grounds to set aside an election. If the Employer had been permitted to deny access, the Union could have either filed an unfair labor practice charges or its own Objections to the Election. Perez understood these sort of procedural requirements when he earlier told Jon Esformes that he could file a charge in connection with the Watanabe incident. I believe he lost sight of them when, over Nate's objections on August 1st and Guide's

objections on August 2nd, he ordered access. In both these instances, I believe he exceeded his authority.

In concluding this, I find no bias on Perez's part; rather, I believe he was put in an extremely difficult position by virtue of his bearing conflicting responsibilities to help work out an agreement, to monitor the agreement, to interpret Board policy, and to make instantaneous decisions in the face of strident demands from two determined parties with opposing interests. In this context, he made a mistake by not according "due" weight to the Employer's interests on two occasions. Under the Board's recent decision in Sam Andrews Sons (1988) 14 ALRB No 8, I believe that his ordering access violates the Board's neutrality because, by not remitting the dispute to the processes of the Board, he appeared to align himself with a party. As a result, I recommend the Board refuse to certify the results of the election.

DATED: June 21, 1991

A handwritten signature in black ink, appearing to read 'TSW', written over a horizontal line.

Thomas Sobel
Investigative Hearing Examiner