

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

LONOAK FARMS, PACIFIC VALLEY)	
HARVESTING, BITTERWATER FARMS,)	
MUSTANG PRODUCE, INC.,)	Case No. 90-RC-3-SAL
)	
Employer,)	
)	
and)	17 ALRB No. 19
)	(December 5, 1991)
)	
UNITED FARM WORKERS)	
OF AMERICA, AFL-CIO,)	
)	
Petitioner.)	
)	
)	

DECISION AND CERTIFICATION OF REPRESENTATIVE

On September 20, 1991, Investigative Hearing Examiner (IHE) Thomas Sobel issued the attached recommended Decision in this proceeding. Thereafter, Lonoak Farms, Pacific Valley Harvesting, Bitterwater Farms, Mustang Produce, Inc. (Lonoak or Employer) timely filed exceptions to the IHE's Decision along with a supporting brief,^{1/} and the United Farm Workers of America, AFL-CIO (UFW or Union) timely filed a responsive brief. Pursuant to the provisions of Labor Code section 1146, the Agricultural Labor Relations Board (ALRB or Board) has delegated its authority in this matter to a three-member panel. The Board has reviewed the IHE's Decision in light of the exceptions and briefs of the parties and has decided to affirm the rulings, findings and conclusions of the IHE and to adopt his

1/ Although the Employer excepted to many of the IHE's credibility findings, it provided no argument in its brief as to why it believed the findings were improper or should be overruled. The Board has examined the testimony and other record evidence de novo and finds no cause for disturbing the IHE's credibility resolutions.

recommendation that the results of the election be certified.^{2/}

CERTIFICATION OF RESULTS OF ELECTION

It is hereby certified that a majority of the valid ballots were cast for the United Farm Workers of America, AFL-CIO in the representation election conducted on October 5, 1990 among the agricultural employees of Lonoak Farms, Pacific Valley Harvesting, Bitterwater Farms, Mustang Produce, Inc. (Lonoak Farms) and that, pursuant to Labor Code section 1156, the said labor organization is the exclusive representative of all agricultural employees of Lonoak Farms in the State of California for purposes of collective bargaining, as defined in Labor Code section 1155.2(a) concerning employees' hours, wages and other terms and conditions of their employment. Dated: December 5, 1991

IVONNE RAMOS RICHARDSON, Member

JIM ELLIS, Member

JIM NIELSEN, Member

2/ The IHE correctly concluded that although the ALRB Elections Manual does not require that Board agents' questioning of voters at the challenge table be confidential (see sec. 2-7200 of the Manual) the Board agent's treatment of the process as confidential did not constitute misconduct and did not prejudice the election herein. Since a Regional Director's Report on Challenged Ballots analyzes the asserted grounds for challenges and provides a basis for the Regional Director's conclusions regarding challenged voters' eligibility, the procedure allowing appeal of the report's conclusions to the Board provides sufficient due process to the parties.

CASE SUMMARY

Lonoak Farms
(UFW)

17 ALRB No. 19
Case No. 90-RC-3-SAL

Background

On October 5, 1990, pursuant to a Petition for Certification filed by the United Farm Workers of America, AFL-CIO (UFW or Union), the Agricultural Labor Relations Board (ALRB or Board) conducted a representation election among all agricultural employees of Lonoak Farms, Pacific Valley Harvesting, Bitterwater Farms, Mustang Produce, Inc. (Lonoak or Employer) in the State of California. The revised Tally of Ballots showed 196 votes for the UFW, 182 votes for No Union, 3 Unresolved Challenged Ballots, and 2 Void Ballots. The Employer filed objections to the conduct of the election, and the following were set for hearing: (1) whether Board agents engaged in conduct indicating favoritism for the Petitioner, and whether such conduct affected the outcome of the election; (2) whether supervisors of the employees engaged in unlawful campaigning that deprived the employees of their free choice in the election; and (3) whether Board agent mismanagement of the election deprived the employees of their free choice in the election.

IHE's Decision

Following a hearing in which all parties participated, the Investigative Hearing Examiner (IHE) found that there was insufficient evidence that the acts complained of occurred and/or caused interference with the election. He therefore recommended that the results of the election be certified.

Board Decision

The Board reviewed the IHE's Decision in light of the exceptions and briefs of the parties, and decided to affirm the rulings, findings, conclusions and recommendations of the IHE. The Board therefore certified the UFW as the exclusive representative of the agricultural employees of the Employer for purposes of collective bargaining.

* * *

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:)
)
LONOAK FARMS, PACIFIC VALLEY)
HARVESTING, BITTERWATER FARMS,)
MUSTANG PRODUCE, INC.,)
)
Employer,)
)
and)
)
UNITED FARM WORKERS)
OF AMERICA, AFL-CIO,)
)
Petitioner.)
_____)

Case No. 90-RC-3-SAL

Appearances:

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Before: Thomas M. Sobel
Investigative Hearing Examiner

DECISION OF INVESTIGATIVE HEARING EXAMINER

On September 28, 1990, the United Farm Workers of America, AFL-CIO, filed a Petition for Certification seeking an election among the employees of Lonoak Farms, Pacific Harvesting, Bitterwater Farms and Mustang Produce Inc. (hereafter referred to as the Employer upon the parties' stipulation that the entities are a joint employer.) An election was held on October 5, 1990. A revised Tally of Ballots shows the following results:

UFW	196
No Union	182
Unresolved Challenges	3
Void Ballots	2

The Employer timely filed Objections to the Election which, after "screening" by the Executive Secretary, resulted in the following issues being set for hearing:

1. Whether Board agents engaged in conduct indicating favoritism for the Petitioners, and if so, whether such conduct affected the outcome of the election.
2. Whether supervisors of the employees engaged in unlawful campaigning that deprived the employees of their free choice in the election.
3. Whether Board agent mismanagement of the election deprived the employees of their free choice in the election.

Although a majority of the objections focus on the conduct of Board agents, the objection concerning unlawful campaigning, requires the most attention. Accordingly, I will take the objections out of order and consider Objection No. 2 in the first part of this decision before taking up the objections

inspired by Board agent conduct in the second part of the Decision.

I. UNLAWFUL CAMPAIGNING

In May or June 1990, several months before the Union appears on this scene, the broccoli crews met with Rusty Cauley, the owner of Lonoak, to discuss wages and health conditions. Cauley responded to their sanitary demands and agreed to raise the hourly wage to \$5.50. This raise did not prove entirely satisfactory, and by September the employees were ready to try for more. Their efforts would overlap an organizing campaign conducted by the UFW.

Details about the onset of this campaign are sketchy: I do know (1) that sometime after the spring meeting with Cauley, Ana Bermudez, who was one of the leaders of the employees' effort to get higher wages, began to attend union meetings; (2) that the Union filed a Notice of intent to Take Access on August 31, 1990; and (3) that, despite her attending union meetings, Bermudez herself does not appear to have become convinced of the need for a Union until the last week of September.¹

¹ In its Post-Hearing Brief, page 5, the Employer argues that Bermudez and her sister began passing out authorization cards by "the third week of September", which I take to be the week of the 17th. This puts the commencement of Bermudez's Union campaigning a week before I have placed it. The testimony of Cruz Olguin, upon which the Employer relies for its assertion, does not support it: Olguin testified Ana and her sister passed out authorization cards "about two weeks before the election [on October 5th.] (1:19) To the extent Olguin's testimony is to be taken literally, it must refer to the week of the 24th of

(continued...)

In any event, a little more than a week before the Petition for Certification was filed, discontent in the crews again drove them to seek a meeting with Cauley. Bermudez describes the crews' efforts as arising spontaneously when the members of Jesus Perez's broccoli crew² came to the ranch where her own crew, under foreman Gustavo Aldaco, was working. The other crew wanted the Aldaco crew to join them in seeking a raise. According to Bermudez's declaration, Perez's crew had even prepared a schedule of the rates they wanted. The Aldaco crew apparently agreed with the proposal for they asked Aldaco to call someone to talk to them.³ Aldaco testified that he radioed supervisor Estanislao Reyes to come to the field, but that "Chano" Reyes, another supervisor and Estanislao's brother, came instead.

¹(...continued)

September which is consistent with my finding. A fuller statement of the reasons underlying my finding appear in the text.

² Bermudez identified two broccoli crews and two broccoli foremen, Gustavo Aldaco and Jesus Perez. Since Aldaco was the foreman of Bermudez's crew, Perez must have been the foreman of the other.

³ Since an important issue in this case is whether or not Aldaco was "objectionably" pro-Union, I should point out that the fact that he called his supervisor to the fields to hear the employees' complaints does not necessarily mean he was taking the their side in doing so. I can take notice that it is not uncommon for foremen to convey such messages to higher management. The fact that he may have been sympathetic to the demands for higher pay does not alter my conclusion that, in being a conduit for employee complaints, Aldaco was doing his job.

A woman named Edelia from the Perez crew spoke to Chano: she reassured him that the crew did not "want anything [to do] with the Union" (UFW 12, p. 3), but that they wanted more money. Although Chano promised to take the proposed rates to Cauley, the crew wanted to present it to him themselves. Chano briefly returned to the office only to return to tell the crews that Cauley's father had died and that he was not prepared to meet with them.

In her declaration, Bermudez says that after the meeting with Chano her "crew got together [after work] to put [its] concerns in writing". In her testimony, she says that both crews met in King City Park on an "off-day" to discuss "higher wages." Based upon the dual references (1) to her own crew's meeting after work and (2) to both crews' meeting on a "day-off", it seems more likely than not that Bermudez is describing two meetings. If there were only one meeting, it took place on September 20th at the King City park, but if there were two, I only know what happened at the meeting of the 20th and that is the one I will discuss.

Although it is clear that Union representatives were present at this meeting, there is a dispute about whether or not Aldaco was. Santiago Rodriguez testified that he attended two or three Union meetings in the King City park and that Aldaco was present

at "all of them", and that he advised the crews to "vote for the Union so that they would pay us better."⁴ (I:99)

According to Aldaco, he attended only one meeting in the park and the meeting of September 20th was not it. I credit Aldaco for the following reasons: Ana Bermudez emphasized that the crews stayed after the organizers left "to talk about what we were going to take Rusty on Friday," which implies that the crews were still trying "to go it alone". Since, as I shall show, they would continue along this track for a while longer, talk about "voting for the Union" at this meeting, especially from Aldaco whom the Employer paints as a man of considerable experience in these matters, appears premature.⁵ Since the statements attributed to Aldaco seem unlikely to have been made at this time, I decline to credit Rodriguez's account that Aldaco was even present.

In any event, after their own meeting the employees decided to designate two members of each crew to present their demands to

⁴ Rodriguez offers this testimony in response to the general question, what did Gustavo say at those meetings. (See also, 1:115.) Cruz Olguin testified that she went to two meetings with the Union in the park, but because she was only asked "Did you see Gustavo at either of those two meetings", her testimony that Gustavo said "That the Union was good" (1:23) could apply to either meeting or to both. Thus, it is not necessarily corroborative of Rodriguez's testimony.

⁵ It is possible that an aggressively pro-union foreman (or employee) might have been so far out in front of the employees as to be plumping for union representation before the employees themselves were ready for it, but the Employer has the burden of proving that Aldaco was such a person. The evidence adduced to support that conclusion, (1) wanting his crew to be happy and (2) previously serving on a UFW ranch committee, while consistent with such a conclusion, does not establish it.

Cauley. Ana and her sister Malena emerged as the representatives of Aldaco's crew; Edelia and another employee named David represented Perez's crew. Ana and her sister agreed to type the demands in the form of a letter to Cauley which could be signed by everyone. By lunchtime of the following day, the letter, which also included demands for medical insurance and paid holidays, was ready to be presented to Cauley.

Since Aldaco's crew was not working, the meeting with Cauley took place around noon at the ranch where the Perez crew was working. As Ana was about to present the proposal, UFW organizers Miguel Loza and Efraiel Edeza arrived for lunchtime access. When Cauley saw them, he became enraged and ordered them out of his fields. Though initially refusing to leave on the grounds that it was their access-time, the two men left after Cauley called the Sheriff.⁶ When Cauley and the crews were again alone, Ana presented the letter to him. He promised an answer by the following Monday, September 24th.

On Monday, Gustavo told Ana that Chano wanted the crew representatives at the office. Ana, Malena, David and Edelia went to meet Cauley who told them he would give a \$.25/hr. raise, but no medical plan and no paid holidays. He also said he was open to changing certain other working conditions. The four representatives agreed to take his answer back to the crews.

⁶ In her Declaration, Bermudez implies that the organizers left because the Sheriffs arrived; though this implication is not as strong in her testimony (see IV:189), the testimony may also be read that way.

They went to the Aldaco crew first. They told Gustavo to stop the machine "because Rusty wanted [them] to talk to the crew about what he had decided." (IV:193.)⁷ After some discussion, the crew rejected the offer. The four representatives then sought the reaction of the other crew, which also rejected the offer. The representatives returned to the office to tell Cauley his offer was not adequate. Cauley said he didn't want the Union; Ana told him: "If [he] was willing to negotiate, [they were] willing to negotiate." (IV:197.) The meeting ended with Cauley asking the employees to try to convince the crews to accept his offer.

The following day, September 25th, Cauley summoned the representatives to hear a new proposal: an immediate \$.25/hr. raise, no paid holidays, and a medical plan in 6 months, the cost to be borne equally by the employees and by the company. Again the employees took the offer back to the fields, stopping first at Aldaco's crew. Ana described the reaction:

They said no. They said they weren't going to accept 25 cents.
For 25 cents they could find it on the floor. And they said
that "How

⁷ The Employer argues in its Post-Hearing Brief that "[on] occasion Aldaco would have the members of his crew stop working, in order to have them listen to the Bermudez sisters and him speak in favor of the UFW", Brief p. 5 Though nothing is cited in support of this assertion, I take it that the Employer is referring either to Olquin's testimony about Aldaco's stopping the machine after another meeting or to the incident just related. In either case, it is clear from the circumstances related above, as it will become clear from those shortly to be described, that Cauley sent the representatives back to the crews. It is hard to view Aldaco's "stopping the machines" so that the representatives could convey Cauley's offer to the crew as furthering only the employees' interests.

come we are going to pay 50 percent of the medical plan and he was going to pay the other 50, and why in six months, and why not sooner," and then I said, "Well, that's what I told him, but he said no."

* * *

And . . . everybody just started shaking their heads and saying . . . "No, we're not going to go for that." And that's when they . . . started saying that then we were going to bring in the union.

(IV:199.)

Cruz Olguin must be referring to this meeting when she describes Aldaco's speaking in favor of the Union since he did so, according to her, at a meeting when the "percent of insurance" was discussed. Olguin reports Aldaco's talking about "benefits," and urging people to "sign for the Union." Finally, she related this exchange between Aldaco and another employee:

He said - first the lady asked him, Ofelia -she's the one who has been there the longest -asked him . . . from what years he started and how much increase we were going to get. And she said that they had only increased us by a quarter. He said, then, "Look, woman, look at all the times we've waited for a quarter. . . . Why don't we wait a little longer and support the union.

(I:26.)

Aldaco denied saying anything of the sort at this meeting and Ana Bermudez (IV:205), Angel Perez (IV:82), and Sergio Mendoza (IV:104) corroborated his denial.

While Olguin's account of the Aldaco/Ofelia conversation is not inherently incredible, it also seems slightly out of kilter. While it seems natural for someone attempting to demonstrate the paltriness of a raise to point out that over time it isn't much, Olguin seems to have confused the likely role of the two speakers

in the conversation she relates. Thus, it does not seem likely for the most senior employee to ask a foreman how long he had worked at Lonoak to show the employees how small the proposed raise was, especially since, as Aldaco testified, his pay was different from that of the crews. (IV: 151). There is also the matter of Olguin's testimony about Aldaco's distrusting her and about how Aldaco once took a machine away from her and gave it to someone else (see I:16, 49, 33-34, 80). While the latter testimony was intended to demonstrate Aldaco's supervisory authority, it mostly succeeds, especially in combination with the former, in portraying Olguin as highly resentful of Aldaco. I do not credit her testimony.

After meeting with Aldaco's crew, Bermudez and the others went to Perez's crew, which rejected the proposal and also began to speak about going "for the union." Asked what she thought, Bermudez said "We should go for the Union." (IV:200.) Though it is not clear that the employees' representatives also visited other crews, either they did or word of what was going on must have gotten around to them. Thus, it is likely that Juan Reyes is referring to a discussion that took place in his crew at about this time, when he testified (1) that after "they made a petition" and (2) "they wanted more than the company was offering them", and they (3) "started speaking that it might be better

with the Union" (III:70), his foreman, Gaspar Pacheco, advised his crew there would be more benefits with a union.⁸

Reyes¹ testimony is confusing. Read closely, he appears to be describing two meetings: (1) a first, which took place "two weeks, more or less," before the election when the crews started talking "Union", and (2) a second, subsequent meeting when Chano and Rusty came to the fields on a day when the crews were laid off (III:73-74, 90),⁹ and during which Pacheco told the crew "they could get even more" if they stuck together. According to Bermudez's and Aldaco's account, the crews were laid off the afternoon of the day I am now talking about, and the only meeting in the fields with Chano and Rusty took place before the layoff. Since Bermudez's chronology is the more detailed and coherent one, I rely on it, which reinforces my picture of Reyes as a very confused witness. I do not credit him.

When the employees returned to the office to tell Rusty that his offer had been rejected, he said he couldn't believe it. According to Bermudez, he was silent for so long that she felt awkward enough to have to ask whether or not they could leave. As the group began filing out, Cauley told Chano to get on the

⁸ Reyes also testified that just before the election Pacheco "made a meeting with the workers, with the pickers." (II: 7.) I take it that the Employer wants me to infer from the bare fact that a meeting was scheduled at this time that Gaspar must have urged employees to vote for the Union at it. I decline to do so. Not only is there no evidence that the planned meeting even took place, but also, even assuming that it did take place, I cannot simply assume from its occurrence, what took place during it.

⁹ The significance of this will soon be apparent.

radio and "do as planned." When the employees returned to the fields, they discovered that work had been stopped. Ana put it: "We decided right there and then we were all going to the park." (IV:202.) Someone was sent to ask Miguel Loza to come to the meeting "since [Cauley] didn't want to negotiate with [them.]" "We decided all to go to the park and get the union organizers and have . . . them talk to the people as to what steps to take next." (IV:202-203.) Bermudez had little to say about this meeting other than that the organizers did talk to the crews, that sometime during the meeting company supervisor Estanislao Reyes came to the meeting, spoke to Aldaco (who went to meet him), and told him that the crews could return to work the next day.

According to Bermudez and Aldaco, Aldaco otherwise took no part in the meeting. According to Olguin, Gustavo did speak at this meeting, saying that "the Union was good" and that he knew because he had worked for another company which was represented by the Union.¹⁰ Santiago Rodriguez also testified that Aldaco spoke at a "second" meeting in the park at which he urged employees to vote for the Union.¹¹ I think it more likely than

¹⁰ Aldaco testified he worked for General Vineyard Services under a Union contract and that he was a member of the ranch committee for a number of years.

¹¹ Given the number of meetings in the park and the vagueness of Rodriguez's testimony it is difficult to attribute particulars statements to particular meetings. However, since Rodriguez testified that insurance was discussed at the "second" meeting and since, according to the testimony of the Union's witnesses, the only meeting in the park at which insurance could

(continued...)

not that Aldaco did express himself at the meeting: his crew had just been laid off abruptly (and presumably him along with it), judging from his past, he was more likely than not pro-union, and, in such circumstances, a man of settled opinions is likely to offer them.

However, I do not credit Rodriguez's testimony that Aldaco urged employees to "vote for the Union." Once again, the remark is premature: the Petition for Certification would not even be filed for a few more days; indeed, as Bermudez and Loza testified the Union used the opportunity to circulate authorization cards. It just makes no sense to me that Aldaco would speak of "voting" for the Union when it was still trying to obtain a showing of interest.

It is also a separate question how many people heard Aldaco's remark. Olguin speaks (1) of Aldaco's talking to "almost all of us in his crew [of approximately 30]," thus indicating that he spoke to a group somewhat smaller than 30 members, and (2) of Aldaco's "talking to everybody." Though not free of ambiguity, I do not believe this means Aldaco addressed the entire crowd,¹² but talked to however many people ("in his

¹¹(... .continued)

have been discussed was the meeting which took place after the second meeting with Cauley, I am construing Rodriguez's testimony with that of Bermudez to construct a coherent chronology.

¹² Otherwise, at least two crews of 80-85 people (1:21.) have shrunk to the size of "almost", that is "less than," the size of one crew (of 30).

crew") were near him. This finding accounts for why some heard him and others did not.

It seems most likely that the pace of the Union's "organizing campaign" picked up after this meeting and that the Employer's witnesses' vague references to the activities of Aldaco and the Bermudez sisters "two weeks" before the election refers to the period after this meeting. Thus, Olguin testified that Aldaco would continually speak in favor of the Union "two weeks before the election," and that he typically spoke whenever the Union organizers took access, following their presentation with one of his own. Aldaco denied doing anything of the sort and Loza and Bermudez supported his denials.

I credit the Union witnesses on this matter. I have repeatedly pointed out the vagueness of the testimony of the Employer's witnesses although I have also credited them when in the context of the whole record their testimony persuades me that they are describing specific events as opposed to impressions. However, testimony such as that of Olguin to the effect that Aldaco "always" spoke after the Union organizers did, strikes me as no more credible than Aldaco's, Loza's and Bermudez's denials that he "never" did so. The Employer has failed to carry its burden of proof.

Olguin testified that four or five days before the election, Aldaco said something to the effect that he would lay off anyone who revealed his pro-union activities to the Employer before he [Aldaco] could be laid off. According to her,

Aldaco also repeated the "threat" after the election when, apparently suspecting that his activities would be revealed, he told the crew, "he knew that some people had ill will against him, but . . . the first person that . . . pointed his finger at him would be the first person . . . laid off" (I:33-34, 80.) Olguin understood him to be referring to her.

Aldaco was never asked whether he made such statements. This might be conclusive if I had not otherwise generally discredited Olguin as a witness on the grounds that her testimony does not fit with the record as a whole, and that she was hostile to Aldaco. I do not credit this aspect of her testimony.

Two additional matters remain to be discussed in connection with the objection relating to campaign activities: the extent of the Employer's own campaign activities and Aldaco's status. Olguin testified that the Employer conducted an active no-union campaign through a labor consultant named Joe Sanchez³⁻³ who "would counsel us about the increase we would have. He said if we wanted to go ahead and vote for the Union, that was up to us, but then the costs would freeze and we would not have the increases that we wanted." (I:74.)

The significance of Aldaco's campaign activities turns upon the Employer's contention that he was a supervisor. The evidence bearing on this question may be quickly related. Olguin testified that Aldaco was the one who laid her off at the

¹³ James Bogart, an attorney for the company, identified Joe Sanchez as a labor consultant.

end of one season and called her to come back at the start of the next; that he was the one who distributed paychecks and who "assigned" machines and whom she asked when she wanted time-off. Further, Aldaco also advised the crew to do the "job right or he would lay them off." Santiago Rodriguez, who drove a tractor in Aldaco's crew, testified that Aldaco told him when "work was going to start" and Aldaco was the one whom he asked about taking time off. I am not sure that this evidence would be sufficient to establish supervisory status.¹⁴ However, I do not need to ponder its weight in view of Aldaco's testimony that he "hired" some people. I find him to be a supervisor.¹⁵

Having determined that at one meeting Aldaco spoke in favor of the Union to some members of his crew, I turn to consider the effect of this conduct on the election. The Employer argues that "under both the ALRA and the NLRA, elections will be set aside where there is a showing of possible

¹⁴ This is so because the test for supervisory status requires "significant exercise of independent judgment" (Morris, Developing Labor Law (2d ed. 1989) page 1454), and not merely "routine" or "clerical" authority. Telling the crew when a job ended and when the next would start and that they had to do the job right is not necessarily proof of exercise of independent judgment.

¹⁵ While I am on the subject, I should point out that although I declined to find that Pacheco made the remarks which Reyes attributed to him, the Employer has failed to establish that Pacheco was a supervisor. As noted, Gustavo Aldaco specifically admitted hiring some people (and distinguished, in the process, those in his crew "who were sent to him"). I cannot find on the basis of my finding of Aldaco's supervisory authority that foremen in other crews must have possessed coordinate authority. The Employer's proof of turnover in Pacheco's crew is irrelevant on the "hiring" question.

objectionable effects" from supervisory campaigning. Generally speaking, however, the courts and the NLRB require more than evidence of pro-union activity to find that objectionable effects were "possible". As the Court said in Wright Memorial Hospital v. NLRB (8th Cir. 1985) 771 F.2d 400:

Supervisory support for the union will invalidate a union's majority only when the supervisor's activities (1) cause the employees to believe the supervisors are acting on behalf of the employer and that the employer favors the union; or (2) led the employees to support the union because they fear future retaliation by the supervisors.

See also NLRB v. Island Film Processing Co., Inc. (9th Cir. 1986) 784 F.2d 1446; Stevenson Equipment Co. (1969) 174 NLRB 865, 866. Our Board has adopted this standard. (Bright's Nursery (1984) 10 ALRB No. 18.)

The first prong of the test is not satisfied in this case: since it is clear that the Employer conducted an active anti-union campaign, employees were not likely to be confused into believing that it desired unionization. This leaves only the second prong to be explored. Since I have refused to credit Olguin's testimony that Aldaco threatened to either lay off or fire anyone who "told on him", there is no evidence of anything that could be construed as an overt threat of retaliation. Though some cases hold that pervasive pro-union activity of a supervisor is inherently coercive (See, e.g., Flint Motor Inn Company (1971) 194 NLRB 733; Delchamps, Inc. (1974) 210 NLRB 179.) I do not believe that a single pro-union comment can be considered pervasive pro-union activity.

I recommend that Objection No. 2 be, and hereby is, dismissed.

II. BOARD AGENT MISCONDUCT

A. Alleged Misconduct Before the Election

The day before the election, Mike Silva, one of the Employer's supervisors, took Board agents Harry Martin and Jesus Barroso out to the crews to notice the upcoming election. Martin and Barroso testified that Silva was asked to remain out of earshot while they spoke to the crews. Both agents also testified that he did so. Silva, however, testified that he remained close enough to hear (some of) what Martin, who was doing the talking, told one of the crews.

Because Martin spoke in Spanish, Silva related the Spanish words he heard. Those words were translated as follows: "Vote to have your own representation." Silva was then asked "What [he] understood [Martin] to [mean]" (II:93). He answered, "I understood [sic] him to say, 'Vote so you could have proper representation."

Silva sensed that Martin knew he said something wrong since, according to him, Martin approached him selfconsciously¹⁶ after the meeting and observed "how poorly

¹⁶ Silva explained :

As soon as Harry finished he came directly to me like he had done something

* * *

(continued...)

informed the irrigators were and that if they went union ... he wanted to inform them what the union could actually do for them."

Martin and Barroso placed Silva between 80-100 feet away from them and thus in no position to have heard what Martin said. Both men also denied that Martin made any of the Spanish statements attributed to him.¹⁷ According to Martin, he first read the Notice and Direction of Election to the crew and explained what it meant and finally asked if there were questions. He was taken by surprise by what followed. Some of the employees asked: "What is a Union?" Martin explained that "it's an organization that the employees belong to and they participate in it, and it exists for the purpose of handling problems or dealing with an employer or concerning their working conditions, any problems, grievances." (III:248.) Someone then asked: "What is an election." Martin replied:

The precise words I can't remember now, but I know that I directly answered what they were asking me ...

* * *

I explained to them that an election ... is where employees are going to vote on a matter, and an

¹⁶(...continued)

He was just like he knew I heard something -in people's faces you can tell and he just came right to me

(II:93.)

¹⁷ I should point out that on cross-examination Silva provided another version of what Martin said. When asked to repeat Martin's exact words, he now related "Vota para su tengan a propia representacion." This is pidgin Spanish. The possessive "su" (your) precedes a verb, "tengan", (you (pi.) have) which is followed by what in this case is the meaningless preposition "a" (to). Martin testified he is fluent in Spanish.

election with the ALRB is on representation, whether they want to belong to a union or not.

(III:248-249)¹⁸

Martin continued:

[T]hey apparently didn't know anything I may have touched on even the election process.

* * *

What an election is ... how it is conducted, because they didn't know. And I ... answered only the questions they [were] asking me ... and ... they must have asked, "Well, what is this, the election? How do you go about it?" or something.

(III:249)

Martin acknowledged that after he and Barroso concluded their presentation, he commented to Silva that he was "perplexed" that ranch hands, "not just . . . field hands that might [have] come up from Mexico . . . didn't know what a union was and didn't know what an election was all about." (III:253.)¹⁹

Silva's testimony raises two related questions: (1) Did Martin imply to the crew that a vote for the Union would assure "proper" representation? and (2) Did Martin admit to Silva that he wanted to inform the employees what a Union could do for them?

¹⁸ Martin later expressed some uncertainty whether he actually used the word "representation".

¹⁹ Barroso recalled the "gist" of Martin's remarks to Silva as conveying "astonishment that these people were . . . ignorant about the election process." (III: 231,232.)

- (1) Did Martin imply to the crew that a vote for the Union would assure proper representation.

The question may be addressed on a number of different levels. It may be treated as a question of credibility on the basis of Martin's and Barroso's testimony that Silva was in no position to hear what Martin said. In this context, it is suggestive (1) that Silva could only remember one sentence of everything that Martin said, and (2) that Silva changed his testimony about what he remembered, testifying initially that Martin said, "Votan para su propia representacion" and next, "Votan para su tangan a propia representacion."

Since Martin himself testified that he found himself explaining the relationship between a union, employees, and an election I conclude that he must have said something about "representing" or "representation." But what did he say? It seems to me that Silva's highly selective memory combined with the fact that his Spanish did not stay the same, provides the key for resolving this question.

I have already pointed out that the words Silva initially testified to Martin's saying were translated as, "Vote so you can have your own representation," and that Silva testified he "understood" Martin to be saying, "Vote so you can have proper representation." What will not be obvious to anyone not literate in Spanish is that this discrepancy turns upon the correct translation of the Spanish word "propia" in the original version "Votan para su propia representacion." The Spanish word "propia" has as its first meaning (and as it was translated by

the interpreter) "own", not "proper", though in appropriate circumstances, and probably when it follows a noun, it may also mean "proper."²⁰ Even if Martin used the phrase, "propia representacion", then, Silva's "understanding" of what he meant by it would be a misinterpretation. This possibility is even more likely if, as Silva also testified, nothing else in what Martin said caught his attention so that the words themselves were deprived of all context.

Furthermore, if Martin said something about "voting for" your "own" representation, he would have been doing nothing more than describing what the ALRA is about. The Board's own Handbook describes the Act as providing farm workers the right "a seleccionar a sus propios representantes", a phrase strikingly similar to what Martin is supposed to have said. Recall, also, Martin's description of a labor union as an organization that "employees belong to and they participate in and which exists for the purpose of handling problems or dealing with an employer", which is roughly the definition of "labor organization" in the ALRA. Accordingly, I conclude that Martin did not imply that the employees should vote in order to have proper representation, but merely attempted to describe the election process under the Act as providing the chance to vote for one's own representative.

²⁰ Simon and Schuster's Diccionario Internacional lists "proper, suitable" as the eighth definition for "propio"; Velasquez's, Spanish/English Dictionary lists it as the second definition. When used in the non-possessive adjectival sense, the word will follow the noun, not precede it.

- (2) Did Martin admit to Silva that he informed the employees what the union could do for them?²¹

Since Martin admitted describing to Silva his "perplexity" about how little the employees understood, I take it the two men had some sort of conversation in which Martin described what he had been doing. Silva, however, says that Martin told him directly that he explained what the Union could do for the employees. In determining if Martin said this, I consider in addition Silva's testimony that when he asked Martin whether it was the state's job to inform employees of what the Union could do for them, Martin said either (1) "it actually isn't his job" (I:94), or (2) "No, we're not supposed to do -- we're not doing -- we're not supposed to do that" (I:105).

The first thing to note in the last-quoted part of Silva's testimony is that in the second version of Martin's remarks, Silva has Martin on the verge of denying the accusation that he was informing the employees of what the Union could do for them: "No, we're not supposed to do -- we're not doing [that]" In view of my previous conclusion that Silva either misunderstood, or took Martin's remarks out of context, I further find that he has presented a highly colored version of Martin's remarks to him because he cannot see any distinction between describing the function of a labor organization under the Act,

²¹ It might seem peculiar to treat the credibility of the purported admission after I have decided what Martin said. I regard the arguments in the present order because I believe that Silva's initial "misunderstanding" aids in construing all of his testimony.

and advising employees that they ought to choose to be represented by one.

I recommend this objection be, and hereby is, dismissed.

II.

MISMANAGEMENT OF THE ELECTION

The election took place the next day. The Employer alleges two kinds of objectionable conduct on the part of Board agents: (1) condoning certain conduct or activities on the part of Gustavo Aldaco and Ana Bermudez, and (2) "mismanaging" the election in other ways independent of anything either Bermudez or Aldaco did.

1. Aldaco's and Bermudez' Conduct

a. The Presence of Gustavo Aldaco at the Adobe Site

It is undisputed that Gustavo Aldaco transported some of his crew to the first voting site (Adobe) and waited in his car while they voted. Olguin testified that Aldaco was "looking at all of us" as the crew voted, but then, in apparent explanation, she said "since we were out in the field, he was just looking at who was going by." (I:29.) Larry Santos testified that Aldaco was "staring directly at people waiting to vote." (I:156.)

Since it is not clear to me that Olguin regarded Aldaco's "looking" in quite the same way as Santos did, I decline to find that there was any special force in his gaze. In any event, since it seems to me that one of the things that someone who was waiting to take people away after they voted would do, would be

to look at them as they waited to vote, I refuse to find anything out of line in Aldaco's "looking" or "staring" at people waiting to vote.

I take it, however, from the Employer's reliance on Electric Hose and Rubber Company (1982) 262 NLRB 186, that it is not so much complaining about any particular "quality" in Aldaco's looking, but that his being there was objectionable in itself. In Electric Hose, the Board set aside an election when, in the absence of any explanation for a supervisor's being "stationed" outside the voting area, the Board concluded that he could have been only there to convey to employees the impression they were being watched. But in this case, there is an explanation as to why Aldaco was there: he brought employees to vote. Unless Aldaco's transporting of workers to the polls can be shown to require setting aside an election, I can't see that his waiting while they voted requires it. Since our own Board has refused to set aside an election for the first reason, I decline to set this one aside for the second. (Agman, Inc. (1978) 4 ALRB No. 7.)

I recommend this objection be, and hereby is, dismissed.

b. Ana Bermudez' Conduct

The Employer alleges a variety of misconduct on Bermudez's part from the wearing of campaign materials to abusing her role as an observer. I will consider the question of her "buttons and badges" first.

1.

Bermudez was a permanent observer and, as such, present at every voting site. According to Olguin, Bermudez wore a UFW button ("a little round thing . . . that had the eagle of the Union on it, red") (I:32); Santiago Rodriguez and Larry Santos saw it, too (I:130). Bermudez denies wearing one and Board agents Trevino and Sanchez did not recall seeing her wear one.

There is no question, however, that Bermudez wrote the word "Union" across her observer badge. She did so, she explained, because someone asked her at the first Yankee site whom she represented. Believing that the question was prompted by the fact that the badge did not identify the UFW in Spanish, she wrote the word "Union" with a felt tip pen across it. (The word means the same in Spanish as it does in English.) She did this sometime during the trip between the first and second voting site at the Yankee ranch and she admitted asking no one for permission to do it.

Since Bermudez admits that she wore an observer badge with the word "Union" on it,²² the only real factual dispute about her "buttons and badges" is whether she was wearing a UFW button also and I don't believe it is necessary to resolve this dispute in view of her admission that she wrote the word "Union" on her observer badge. To the extent the Employer is correct that the

²²There are some discrepancies between both Santos' and Estella Reyes' descriptions of the badge and between both of their descriptions and that of Bermudez, but I believe all the witnesses are describing the same badge.

observer badge may be treated as campaign material,²³ it seems to make little difference whether she displayed one piece or two.

I begin consideration of this issue by noting that our Board has consistently followed the NLRB in holding that the wearing of campaign insignia by election observers is not grounds for overturning an election. (Chula Vista Farms (1975) 1 ALRB No. 23.) As the NLRB puts it:

[T]he identity of election observers, as well as the fact that they represent the special interests of the parties, is generally well known to the employees." The identity and special interests of employer observers may not reasonably be presumed to be less well known than that of the union observers. We are of the opinion that the impact on the voters is not materially different whether the observers wear pronoun or antiunion insignia of this kind. Moreover, we do not consider this type of conduct to constitute the kind of electioneering at or near the polling place which affects the results of an election.

Pillsbury Co., Larkwood Farms Div.
(1969) 178 NLRB 226.

However, as the Employer correctly points out, the Board's Election Manual not only appears to condemn observer's wearing campaign materials, but also appears to require Board agents to seek to remove such material. To the extent the Employer's argument turns on the prohibition in the Manual, the

²³The Employer also argues that writing on an official badge is objectionable in itself and not just because the writing can be considered as campaigning. Under such an argument, even writing one's name on the badge would have been objectionable. Since that result seems absurd, I will consider the objection as turning upon construing the writing as a form of "campaigning." I also cannot regard writing on an official badge as falsely implying that the Board was pro-union. Observer badges always identify "party affiliation."

Board has repeatedly held that it will not set aside an election merely because an agent doesn't follow the Manual. (Harden Farms (1976) 2 ALRB No. 30; Driscoll Ranch (1982) 8 ALRB No. 9.) Indeed, the NLRB has held that an observer's violating a Board agent's specific instructions not to wear campaign materials does not warrant overturning an election. (See Larkwood Farms, supra; The Nestle Company (1980) 248 NLRB 732, 742.)

So far I discussed the mere wearing of the badges as grounds to overturn the election, and I have shown that our Board has declined to treat it so, but the Employer also argues the Board agent's failure to require Bermudez to remove the badge shows Board agent bias. Larry Santos testified that when he complained to a Board agent, possibly Bill Lenkeit, about Bermudez's wearing of the badge, (he did not complain about her wearing a button), Lenkeit said "it wasn't necessarily campaigning." By what alchemy the failure of a Board agent to put an end to conduct which by itself does not warrant overturning an election becomes grounds to overturn an election is not clear to me.

I recommend this objection be, and hereby is, dismissed.

c. The Board Agents Breached a Stipulation Between
The Parties Resulting in the Disenfranchisement of
a Substantial Number of Voters

The election was held at various ranches farmed by the Employer. The first voting site was the Adobe Ranch where voting was scheduled to begin at 7:30. The polls then moved to Yankee Ranch which also had three separate sites. Voting was to begin

at the first Yankee site at 9:15. After Yankee, voting was to move to the Borzini Ranch at 11:15 a.m. From Borzini, voting went to the Frew Ranch at 12:30 p.m.; to the Mann Ranch at 1:15 p.m.; and finally to the shop area in King City at 4:15. Polls were to remain open at the last site until 5:00 p.m. At each ranch, voting was to continue until the crews working at each ranch had finished voting. The idea behind keeping the polls open until 5:00 p.m. at the shop was to provide a "catch-all" site where anybody who did not vote at any of the other sites could vote.

At 6:00 a.m. the Board agents left the Board's office in Salinas for the trip to Adobe ranch: they did not arrive until shortly after the polls were scheduled to open. They were late because, driving caravan-style, the lead car not only got lost but also the agents had to stop to pick up election materials which had blown out of one of the vehicles. Martin testified that the agents completed setting up the first site no later than 7:45; Jorge Vargas, another agent, testified they were set up shortly before 8:00 a.m.

Once going, everything went smoothly; indeed, the Employer's attorney, James Bogart, testified that everything was going so smoothly that he and the two union representatives foresaw a good deal of dead time between the conclusion of voting at one site and the start of voting at the next. Bogart testified that he suggested to the Union representatives that the agents conclude the voting at each site and leave behind an agent to direct any late arriving voters to the next one. Bogart then

made the same suggestion to Board agents and Martin, who was in charge of the election, agreed to follow it. At the last site, Bogart asked Martin if agents had been left at each site. Martin told him "No".

Jorge Vargas testified that he had a conversation with Bogart and Edeza about being so far ahead of schedule that they could avoid dead time by moving to the next site, leaving an agent behind to direct stragglers. Vargas understood Bogart to be referring to the Yankee site and he and Regional Director Kerry Donnell did stay at that site for about 30 and 40 minutes, seeing no one. Harry Martin testified that Bogart and Edeza approached him with an idea about leaving an agent at the Yankee site to catch stragglers. Martin thought Bogart actually used the words "this ranch" or "Yankee Ranch" and according to him, he agreed to such a procedure for that site alone.

There is thus a factual dispute about whether or not the Board agent "agreed" to leave an agent at each site or at only one site. General Counsel contends that, at worst, there was a misunderstanding between Bogart and the agents about what he was proposing. The Employer contends that the Board agents failure to abide by the "agreement" disenfranchised voters.

Since, if whatever the agents did in fact disenfranchised voters, it would make no difference whether or not the result flowed from a misunderstanding, I will consider the question of "disenfranchisement" first. The Employer argues: "the election . . . was scheduled to begin at 7:30 a.m. but due to

the negligence of Board agents, it did not commence until at least 8:00 a.m. resulting in the possible disenfranchisement of 80 of the 483 employees eligible to vote." (Post-Hearing Brief, p. 24.) So far, the argument is pure speculation.

However, the argument does not end there: "in a sorry attempt to remedy the situation [the late opening of the polls] the Board agents entered into an agreement with the parties whereby an agent would be left behind at each voting site to direct late coming voters." (Post-Hearing Brief, p. 25.) It is difficult to take seriously the contention that the "agreement" to leave behind an agent was "a sorry attempt to remedy [an already bad] situation" when the only evidence on the reason behind the proposal to leave agents behind arose because the election was running smoothly.

In implying that the failure to leave agents behind must have been the cause of the failure of at least some of the eighty employees who didn't vote not to vote, the Employer ignores the evidence of its own witnesses who plainly testified that the reason they didn't get to vote was because they arrived too late to do so. Thus, Simon Lopez and Consuelo Alfaro testified they arrived at 10:45 and 11:00 respectively at the Yankee site and were unable to vote.²⁴ Since by that time, the election was

²⁴Lopez's testimony specifically puts him at the outer limits of Vargas' and Donnell's vigil at the Yankee site. Even assuming the two agents left before the two employees arrived, as opposed to the employees' being mistaken as to the time, or the two groups failing to recognize the significance of each other's presence, it is difficult to fault the agents for regarding 30-40 minutes as a reasonable time to wait for stragglers.

scheduled to be at another site, unless the Employer is prepared to argue that no matter how late a voter arrives, a Board agent must be present to conduct him or her to a voting site, it is difficult to find the agents responsible for "disenfranchising" anyone.

I recommend this objection be, and hereby is, dismissed.

d. Barroso's Conduct During The Election

Everyone agrees the day was particularly windy; so windy, indeed, that one of the voting booths blew over (which led to another objection soon to be discussed), but more often just windy enough to blow open the flaps on the voting booths, like wash blown over a line. Not infrequently, someone was inside when the flaps blew open. Board agent Jesus Barroso testified that an occupied booth blew open perhaps 25 to 50 times during the day. When Barroso saw this occur and he "was not standing too far away[,] I'd reach over with my arm and grab the curtain and try to cover him up -- cover up the -- either the back or the -- or to cover up the booth. [To make] sure that the curtain . . . more or less makes a seal at the corner. . . . (111:207.) He may have done this up to 25 times; other agents may have done the same.²⁵

The Employer argues:

It is difficult to imagine conduct during an election which is more intimidating than

²⁵In response to a question from the Employer's counsel, "I assume that there were other agents that did the same thing . . .", Barroso answered "I guess you could assume."

(III:210.)

what occurred here. The Board agent, a physically large individual, was only inches away from each of the 25 to 50 workers who voted in these circumstances, and his presence was obviously felt by them as they voted. They could not ignore seeing his hand or hearing it as he grabbed on to the curtain immediately behind them. This conduct would be equally intimidating to those workers waiting to vote, who watched it as it occurred. These workers would reasonably believe the Board agent could see how the employee inside the booth was voting. (Post-Hearing Brief, pp. 22-23.)

I cannot construe Barroso's or any agent's holding down the curtain as a violation of privacy. Just as anyone changing clothes in a changing room would be likely to appreciate the actions of someone who closed a curtain which had opened behind him, so I believe a voter would have appreciated someone's holding down the curtain in this case. As Holmes remarks somewhere in The Common Law: "Even a dog knows the difference between being stumbled over and being kicked."²⁶

I recommend the objection be, and hereby is, dismissed.

- e. The Board Agents Inside The Booths And The Fallen Over Booth.

Larry Santos testified that during voting at the Borzini Ranch "there was a fellow inside the voting booth who apparently had a question" and "the State Representative ... he went over to answer his question, but instead of escorting him out of the booth, he proceeded inside the booth to answer his

²⁶Neither of the cases relied upon by the Employer provide any support for its objection. In both *Royal Lumber Company* (1957) 118 NLRB 1015 and *Imperial Reed & Rattan Furniture Company* (1957) 118 NLRB 911, there was evidence that the voting was subject to observation by others.

question,²⁷ instead of bringing him to me to answer his question so I could . . . observe what was being said." (I:168.) Santos identified the Board agent as Barroso.²⁸ (I:170.) Barroso denied the incident took place.

During the hearing, a voting booth was set up and a demonstration took place to determine whether it would be possible for Barroso (large enough in the Employer's description to be intimidating merely by holding down a curtain from the outside) to fit "inside" an already occupied booth. I conclude it would be difficult, depending upon what Santos' description of the agent's being "inside" really means.²⁹ However, I decline to deal with the objection on this basis; rather, I will reserve judgment for the moment until I take up the question of Santos' general credibility in connection with the next objection.

At another point, a gusty wind started to tip a booth. According to Santos, both he and one of the Board agents sought to right it. The agent who did this was carrying a sheaf of unmarked ballots which he placed inside the booth during the

²⁷According to Santos, Barroso pushed aside the curtain with his whole upper body and remained "inside" the booth conversing with the voter for about a minute. (I:171.)

²⁸It seems unlikely then, that Santos is referring to an incident in which Lenkeit admitted entering a booth to put in a new pencil. Since the Employer does not rely on the Lenkeit incident in its Post-Hearing Brief, I will not address it further than to say that ministering to the mechanics of voting cannot reasonably be considered objectionable conduct.

²⁹Respondent offered to provide the manufacturer's specification for a typical NLRB/ALRB voting booth and in fact did so after the hearing. I accept it into evidence, in case the Board wishes to consider it.

effort. As the agent emerged from the booth, Santos noted that a ballot had been left in the booth. Santos immediately alerted the agent who upon retrieving the ballot, remarked that "these people aren't smart enough to figure out that they could have voted twice." (II:173.)

Jesus Barroso described the same incident, except that according to him, the booth actually fell over and Santos helped him pick it up. He agreed that he had a stack of ballots in one hand during the process and that he left one of the ballots in the booth. Both he and Santos realized this at the same time and he reached in to retrieve the ballot. As he did so, Santos remarked that someone could have voted twice and Barroso said something like "you would have to be pretty sophisticated to do that" with so many people around or "you'd have to be pretty quick." (III:195.)

I reserved consideration of "the two people in a booth incident" until I was ready to consider the immediately preceding incident because I believe the latter provides a standpoint from which to consider Santos¹ testimony. In Santos' testimony about the second incident, the Board agent spontaneously reacts to the "embarrassment" of leaving a ballot in a voting booth by attacking the intelligence of voters. In Barroso's testimony, he is directly responding to a suggestion by Santos that such an event could have untoward consequences. Since I believe the second version makes more sense, it follows that Santos' version is not only incomplete, but also represents an almost aggressive

misinterpretation of Barroso's remarks. I find him an untrustworthy witness and I decline to credit him over Board agent denials in connection with any testimony.

I recommend both objections be, and hereby are, dismissed.

f. Ana Bermudez's Questioning Of Voters

Estella Reyes testified that while at one of the voting sites (Borzini), Ana Bermudez sat in the middle of the eligibility table and would ask voters if they had another surname or another name or how long they had been working for the company; if a voter's name was not on the list, the lady from the State would then tell them to go aside. Later, Reyes testified "Ana was the one that talked the most"; that Board agent Shirley Trevino would tell the voters "to go over to where the other agents from the State were -- to fill out the [challenges]. (II:155.)

Bermudez testified that at the Borzini site a great many people who appeared to vote were not on the list and that in an effort to help out the Board agents in processing the challenges, she asked three or four voters their names:

A. Okay. When the people were coming up to vote, you -- Shirley would ask them their names, or sometimes they would just bring up their card and she would just check the list and make sure they were there, and a lot of them weren't on the list, so she would ask them, "Are you going under a different name, or do you -- have you worked with a different name somewhere else," and then they would say, you know -- sometimes they would say yes or no, and she would check the list.

And then sometimes they would speak kind of low and you couldn't really hear what was going on, what they were saying. So then I would sometimes ask, "What did you say your last name was again," and then they would say

it. And then Shirley and I would double check the list, and Manuel was on the other side and he was checking the list, and that's what I was asking. (IV:179.)

Shirley Trevino testified she always sat in the middle of the eligibility table (IV:45), but that in a couple of instances Bermudez did question some voters. She explained:

A. Well, voters come to the table and -- , you know, in general, they -- they use their mother's name or their father's name or three other names, and so sometimes they'll say, let's say, for example, Felipe Martinez, but they don't say Felipe Martinez Medina, and so when he said Felipe Martinez, you know, I'd look for the name and couldn't find it, and she asked on two or three occasions, "Do you -- are you using another name?" (IV:48-49)

Relying on Alco Iron & Metal Company (1984) 269 NLRB 590, the Employer argues that permitting Bermudez to sit in the middle of the table and to play so active a role gave voters the impression the Union was running the election. I am not persuaded by the Alco analogy: in that case a board agent who spoke no Spanish asked the Spanish-speaking union observer to explain the procedure to eligible voters. The board explained how, in the circumstances of that case, the impression that the union was running the election was created:

The first or second employee to vote at the election was a Spanish-speaking employee. The Board agent handed him a ballot and explained voting procedures to him in English. When the employee did not understand the instructions, the Board agent asked both Diaz and Kantor whether either could speak Spanish and explain to the voter what to do with the ballot. Diaz stated that he could, and the Board agent asked him, "[W]ould you translate the procedure of voting to these employees?" Diaz spoke in Spanish to the employee, who then voted.

Of the next 12 voters, Diaz initiated conversations in Spanish with 8 or 10 of them, the conversations generally ranging in duration from 30 seconds to 1 1/2 minutes, with one conversation lasting approximately 2 minutes. The Board agent did not participate or speak to any of these voters, but merely handed them a ballot after Diaz finished speaking. Kantor then complained to the Board agent that Diaz¹ conversations were too lengthy, that the Board agent should explain voting procedures to Diaz, and that Diaz should interpret the Board agent's words to each individual voter. The Board agent then instructed Diaz to repeat her instructions in Spanish. Five to seven employees voted under this arrangement, each conversation lasting approximately 15 to 20 seconds.

(269 NLRB 590-591.)

The board characterized the agent as having "systematically turned over the running of the election to the observer." (269 NLRB 591 at n. 2.)

In this case, it is not clear from Reyes' testimony that such a picture can be drawn for, as Reyes testified, Trevino was not inactive; indeed, it was Trevino who directed the employees to the challenge table, thus demonstrating she was in charge.

I recommend this objection be, and hereby is, dismissed.

g. The Question Of Confidentiality Of Challenges

Estella Reyes testified that during the voting at Borzini she observed that challenged voters were directed to another Board agent and she "wanted to be able to see and hear what [the Board agents] were saying to them." When she first told this to Trevino, the latter did not respond; when Reyes persisted, Trevino stopped the election and told Reyes she would have one of the agents taking the declarations explain "what he was doing." (IV:46.)

Jorge Vargas recalled Trevino bringing an observer to him who told him that "she had been instructed by the company to observe anything that was going on and hear everything that we do ... and she wanted to listen into the whole challenge procedure." (III:16.) Vargas explained to the woman that the procedure was confidential. According to Reyes he told her she had no right to listen. There is no real factual dispute about what happened: an observer, attempting to follow her Employer's instructions, asked to sit in on the taking of challenge declarations and was told she could not.³⁰

³⁰Vargas explained the process this way:

When -- when an individual's name does not appear on the list or for X reason somebody decides to challenge this individual, then he's set to one of us who is designated to take challenges, and in that instance he'll be sent to me or to any Board agent, and we'll take him aside, get him away from the table and conduct the interview with him or her. (III:18)

A. We have a challenged ballot declaration form, and basically it's kind of fill in the blanks, name, address, how long has he worked with the company, where does he live, social security number if he has any, driver's license if he has any, I.N.S. card, identification card if he has any, how long has he worked there, how much he earns, what type of work does he do, who's his foreman, work crew he works with.

And its in English and Spanish, so depending on an individual if he was Spanish speaking, we would either do it in Spanish or in English. And he subscribes to it that under penalty of perjury the above information we'd taken was true and correct to the best of his knowledge, and we sign off-- and he signs it and we sign it and date it. (III:17.)

In his testimony, Vargas believed he was following the instructions in the Board's Representation Case Manual in treating the procedure as confidential. (III:45.) The Employer correctly points out that nothing in the Elections Manual enjoins the confidentiality of the process. It further argues that the Manual implicitly treats the declarations as non-confidential when it advises that the challenge table be located close enough to the eligibility table to allow easy communication between the Board agent at the eligibility table and at the challenge table.

I have some difficulty in treating instructions which appear designed to facilitate communication between Board agents as strongly implying that what passes between a Board agent and a challenged voter must be public knowledge. Nevertheless, that implication is the only authority advanced by the Employer in support of its Objection. It may be that the agents would not have erred in letting someone overhear what is, at that point, essentially an administrative investigation; but that in no way implies that the agents abused their discretion, let alone did anything that prejudiced the election, in not permitting it.

I recommend this objection be, and hereby is, dismissed.

h. The Man In Black

A number of witnesses agreed that a man clothed in black garments and wearing gold chains was at some election sites during the day. The witnesses disagreed, however, about where he appeared and how frequently, and what he was doing when he appeared. Larry Santos testified that when he arrived at the

Mann Ranch, he saw the man in black "standing there conversing with all the workers [approximately 35 or 40] And . . . as soon as we arrived, this man came over and started talking to the permanent union observers . . . pretty far away for quite some time." (I:176-177.) When the man spoke to the observers, Santos managed to hear him asking "how things were going, where they were going next." (I:178.)

When the voting moved to the second site at Mann, Santos again saw the man talking with the crew and then with the Union observers. (II:179.) He reappeared at the third site at Mann doing the same thing, speaking first with the crew and next with the Union observers. Though Santos agreed that he initially left when asked to, he returned midway through the voting and stood next to his van about 20 feet from where the voting was taking place.

Jorge Vargas testified that at the third Mann site he observed a man wearing gold chains pull up in a big truck and "that's as far as he got, because we were starting to announce to the people, 'You have to leave the area now. We're going to open the polls,' and he got back in his truck and left." (III:27.) Santos testified that the man in gold left when everyone else did at the first two Mann sites, but that he stayed at the third site. (II:42.) Bill Lenkeit testified that he saw the man at the first Mann site, but that he left before the workers even arrived at the site. (III:108.) Lenkeit saw him again at either the second or third site but "pretty much pulling out when we

pulled up." (III:109.) Even in Santos' telling there is no evidence that the man in black did anything objectionable.

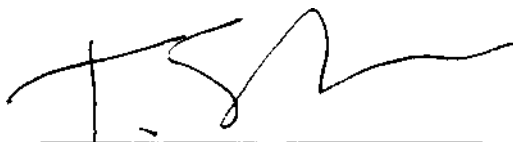
I recommend that this objection be, and hereby is, dismissed.

i. Board Agent Bias

Finally, Larry Santos testified that the Board agents directly showed favoritism when they tolerated the shouting of pro-union slogans as the crew arrived to vote at the third Mann site, "doing nothing to tell them that there was no campaigning . . . and to keep quite. But I do remember there was one rebel who yelled out, "No Union' and the state immediately took him aside and told him there was to be no campaigning." (I:183.) Board agent Javier Sanchez recalled a good deal of partisan shouting from both sides at the third site as the voting line was forming and he testified that he instructed everyone not to shout. I have previously indicated I believe Santos was a highly partisan witness. I do not credit his version over that of Sanchez.

I recommend this objection be, and hereby is, dismissed. I further recommend the Board certify the results of the election.

DATED: September 20, 1991

A handwritten signature in black ink, appearing to read 'T. Sobel', written over a horizontal line.

THOMAS SOBEL
Investigative Hearing Examiner