Santa Maria, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

FURUKAWA FARMS, INC., Employer, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Petitioner.	)	Case No. 89-RC-7-SAL(SM) 17 ALRB No. 4

DECISION AND CERTIFICATION OF REPRESENTATIVE

On August 10, 1990, Investigative Hearing Examiner (IHE) James Wolpman issued the attached decision, in which he dismissed Furukawa Farms, Inc.'s (Furukawa) objections to the conduct of a representation election and recommended that the United Farm Workers of America, AFL-CIO (UFW or Union) be certified as the exclusive representative of all of Furukawa's agricultural employees. Thereafter, Furukawa timely filed exceptions to the IHE's decision.

On May 5, 1989, the UFW filed a representation petition and an election was conducted on May 12, 1989. The results were as follows:

UFW	300
No Union	195
Unresolved Challenged Ballots	18
Total	513

Thereafter, Furukawa filed six objections to the conduct of the election, one of which was dismissed by the Board's Executive Secretary.[1/] The five objections set for hearing[2/] are:

> Objection No. 1 - whether the UFW, through its agents at the CRLA, made substantial misrepresentations of fact in filing a lawsuit and conducting a news media campaign in such a deceptive manner that employees would be unable to recognize the misrepresentations as mere campaign propaganda, and thereby interfered with employees' exercise of their free choice in the election;
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> Objection No. 2 - whether the CRLA made pre-election misrepresentations about the Employer that were so aggravated that the conduct tended to interfere with employees' free choice in the election even if CRLA engaged in the conduct only as an independent third party;
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> Objection No. 3 - whether the UFW breached a pre-election campaign agreement and thereby engaged in conduct requiring the election to be set aside;
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> Objection No. 4 - whether violent conduct, threats of violence, and threats of job loss created an atmosphere of fear and coercion rendering employee free choice impossible; and
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> Objection No. 6 - whether authorization card signatures were obtained by coercion tending to affect employee free choice in the election.

The Agricultural Labor Relations Board (ALRB or Board) has reviewed the IHE's decision in light of the record and the

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[1/] No request for review of the dismissed objection was filed with the Board.

[2/] California Rural Legal Assistance (CRLA) moved to intervene in the proceeding as an interested party. Its motion was granted by the IHE, but that ruling was reversed by the Board. As the Board's order did not issue until several days of hearing had taken place, CRLA participated fully up to the date of the Board's ruling but was thereafter limited to litigating its claim that some of the evidence Furukawa sought to enter was protected by the attorney-client privilege.

exceptions and brief filed by Furukawa and affirms the IHE's rulings, findings, and conclusions to the extent consistent herewith and adopts his recommendation that the UFW be certified as the exclusive collective bargaining representative of all of Furukawa's agricultural employees in the State of California.

FACTUAL SUMMARY

Furukawa grows strawberries in the Santa Maria Valley. In the years leading up to the period in question, Furukawa used sharecroppers to plant, cultivate, weed and harvest the crops. Each sharecropper, who was treated as an independent contractor, rented parcels of land in accordance with a written contract. In exchange for their efforts, Furukawa would pay the sharecroppers a set amount of money per acre and agreed to "purchase" the crop at a scheduled price. The sharecroppers were expected to hire enough employees to allow them to fulfill their responsibilities under the contracts and to assume all obligations pertaining to such employees.

In late 1987, CRLA mounted a challenge to the practice of sharecropping in the Santa Maria/San Luis Obispo area, involving both education and litigation. Others also challenged the sharecropping arrangements. The controversy heightened when, on March 23, 1989, the California Supreme Court, in S. G. Borello & Sons, Inc. v. Department of Industrial Relations (1989) 48 Cal.3d 341 [256 Cal.Rptr. 543], found that a similar arrangement did not render "sharefarmers" independent contractors, but instead reflected an employment relationship. Shortly thereafter, the Unemployment Insurance Appeals Board reached a similar result in a

case involving Furukawa sharecroppers. Not surprisingly, the Borello decision created much uncertainty among all those involved in sharecropper arrangements and became a topic of much discussion. The issue also attracted *a* great deal of media attention.

Furukawa took the position that its sharecropper contracts had been rendered impossible to perform and, therefore, were void or subject to rescission. It then proceeded to terminate the contracts and offered the sharecroppers and a specified number of their "employees" employment at $4.60 per hour and $0.70 per box. However, those who did not accept employment by April 26, 1989 would be considered new employees and would, for the first 500 hours, receive $4.00 per hour and $0.50 per box.

On April 4, 1989, 50 or 60 sharecroppers held a meeting in Nipomo to discuss possible responses to Furukawa's position concerning the contracts. They prepared a document entitled "Condiciones de Trabajo," which was to be presented to Furukawa the next day. They also decided to engage in a work stoppage in order to exert pressure on Furukawa to discuss their demands. While one witness testified that a CRLA attorney named Ilda was at the Nipomo meeting, all of the others testified that no one from either CRLA or the UFW was at the meeting. The IHE concluded that the one witness must have confused the meeting with an earlier meeting in March, at which the testimony suggests CRLA attorney Ilda Pruneda was present.

Also on April 4, a meeting was held at the CRLA office in Santa Maria and among those present were at least four of the

sharecroppers who were at the Nipomo meeting (Salvador Tirado, Enrique Ortiz, Arturo Medina, and Martine Gonzalez). The record does not reveal which meeting was held first, although the IHE credited testimony that on April 4, CRLA was unaware of both the "Condiciones de Trabajo" document and the sharecroppers' plans for a work stoppage. That afternoon, Jeannie Barrett, the Directing Attorney for the Santa Maria and San Luis Obispo CRLA offices, prepared a letter reflecting CRLA's position that the sharecropper contracts remained in effect, but Furukawa had the added obligation to comply with various California laws governing employment relationships. The letter also suggested that a meeting be held as soon as possible. Barrett arranged for CRLA Community Worker Mary Jacka to deliver the letter to Furukawa the next morning.

The Morning of April 5 at Furukawa Farms

The first thing the sharecroppers do each morning during the harvest is go to one of two locations to pick up bundles of empty boxes for the strawberries. On the morning of April 5, those sharecroppers who did not yet know of any plans for a work stoppage or who sought to work anyway were told by other sharecroppers standing near the boxes that they would be "taken out" if they tried to work. While no witnesses testified that they were physically prevented from working or otherwise harmed, all were dissuaded from securing any boxes. The IHE concluded that these witnesses reasonably feared force or intimidation if they tried to work. At the same time that they were prevented from getting boxes, most were given copies of the "Condiciones de

Trabajo" and told of the effort to get an agreement on terms and conditions of employment. The coordinated nature of the work stoppage, along with the distribution of the "Condiciones" and the fact that the two individuals named as making threats, Salvador Tirade and Jose Huitron,[3/] were at the Nipomo meeting led the IHE to conclude that the threats were part of a planned course of action undertaken by at least some of those at the Nipomo meeting.

By 7:00 a.m. on April 5, when Mary Jacka arrived to deliver the CRLA letter to Furukawa, about 100 of the sharecroppers had gathered in the yard in front of the company offices. A television crew was also present. After delivering the letter, Jacka was approached by a number of the sharecroppers and asked to stay for a meeting with Furukawa. She said she had to leave, but would return with Barrett. Andy Furukawa, employee and nephew of the owner of Furukawa, had already been given a copy of CRLA's letter and the "Condiciones" and arranged to have Furukawa's attorney present later in the morning. Barrett, whose testimony the IHE credited, stated that she did not know of the work stoppage until informed by Jacka and did not see the "Condiciones" until she and Jacka arrived at the yard together at about 9:00. By that time, the crowd had grown and additional television crews were present.[4/] At about 9:30, two UFW

[3/]More than two people were apparently making the threats, but the witnesses identified only two by name.

[4/]The television crews learned of the events at Furukawa either by scanning the police radio channel or by rumor. Witnesses from the stations testified that no one from either CRLA or the UFW contacted them.

representatives, Gilberto Rodriquez and Monica Alfaro, who heard of the work stoppage from one of the sharecroppers, arrived and stationed themselves near one of the entrances to the yard. Rodriquez testified that he gave sharecropper Enrique Ortiz a stack of authorization cards to pass out.

Shortly after Furukawa's attorney arrived at about 11:00, he and Andy Furukawa met with Barrett, Jacka and two sharecroppers, Tirado and Ortiz. The meeting concluded after approximately an hour, with little resolved except that the sharecroppers' legal position would not be prejudiced by filling out employment applications. When the meeting ended, Barrett went back out into the yard to talk to the sharecroppers, but quickly realized that the situation was too chaotic. It was then decided to meet later that day at Minami Park. That site was selected because the CRLA office was too small for such a large group and time did not allow arranging for a suitable alternative indoor location. Barrett asked Tirado, Gonzalez and several others to spread the word that the meeting was only for CRLA clients and those who might want to become clients. From the testimony, it appears that the invitation actually extended by some of the workers was to anyone who wanted more information about the legal situation.

The situation at the yard was somewhat chaotic, with sharecroppers, supervisors and the television crews milling about. There were also several documents being passed around, and the testimony shows that there was considerable confusion among those who signed them. In addition to the circulation of copies of the

"Condiciones," Ortiz circulated UFW authorization cards, while Gonzalez passed around a CRLA document called a "TOC/WOC," a form used by CRLA in processing new clients. Although the TOC/WOCs were normally used in conjunction with a retainer agreement, Gonzalez had gone to the CRLA office and secured a stack of the forms from a CRLA clerical employee and circulated them at the yard with little explanation of their purpose. They were later presented to Barrett in various states of completion.

What was said at the yard with respect to the various documents circulated is a matter of much contention. Francisco Ruiz testified that he was told that if he did not sign the "paper" and the Union won, he would lose his job. However, he also testified that the "paper" he signed had nothing to do with the Union. Luis Valencia Alvarado testified that the women from CRLA told the sharecroppers to sign Union authorization cards so the Union could file a complaint, but what he signed was one of the CRLA TOC/WOC forms. Several witnesses testified that Union organizers were circulating through the crowd, although Andy Furukawa stated that when he was present he saw the UFW representatives only near the gate to the property. Salvador Becerra also testified that the women from CRLA encouraged people to sign authorization cards so "there was going to be more strength for us, for the Furukawa workers." He also said that the TOC/WOCs were being circulated. The IHE therefore reasonably concluded that Becerra probably confused the two.[5/] Barrett and

[5/] While the UFW authorization cards were clearly marked as such, the "TOC/WOC" forms simply asked for various items of information, without mentioning CRLA or explaining their purpose.

Jacka, whose testimony the IHE credited, both denied saying anything about the Union or authorization cards. The IHE concluded that the two women did not take part in the soliciting of UFW authorization cards and that the cards were circulated not by UFW organizers, but by several of the sharecroppers.[6/]

The April 5 Meeting at Minami Park

The meeting at Minami Park began shortly after 6:00 p.m., with about 100-150 people present and seated on a grassy slope. Barrett and Jacka were present, as were UFW organizers Rodriquez and Alfaro. The vast majority of the 16 witnesses who testified about the meeting stated that Barrett and Jacka spoke, and when they were finished, they left and the UFW representatives then addressed the crowd. All but a few also testified that Barrett and Jacka did not mention the Union in their remarks or introduce the Union representatives and that authorization cards were not passed out until after they left. Barrett testified that when she noticed the UFW representatives nearby, she asked them to leave the area. There was little agreement as to how far away the UFW people moved.

Again crediting the testimony of Barrett and Jacka, the IHE contrasted it with the confused and inconsistent testimony of Furukawa's witnesses. One of the witnesses, Artemio Garcia, claimed that the women 4 or 5 times within 30 minutes urged the crowd to sign Union cards. The IHE discounted this testimony

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[6/]Ortiz corroborated Rodriquez's testimony that he gave Ortiz a stack of authorization cards. Ortiz also testified that he collected the cards at the yard and later at Minami Park, but did not give them to Rodriquez until 4 or 5 days later because the group wanted to see what CRLA could do for them first.'

because it was contradicted by so many other witnesses. Valencia Alvarado stated the women urged those who did not sign cards at the yard to sign them, but the IHE concluded that, in light of his earlier testimony concerning documents circulating that morning at the yard, the reference was to CRLA forms.

After the women from CRLA finished speaking and, by most accounts after they left the park, the UFW representatives then addressed the crowd and made their pitch for the Union. Two employer witnesses spoke of threats of job loss for not signing authorization cards that allegedly were made by the UFW representatives at the meeting. Their testimony will be discussed infra. The other witnesses all testified that no threats were made. The IHE concluded that there was no credible evidence that the workers were threatened with job loss if they refused to sign authorization cards.

CRLA asserted that the attorney-client privilege prevented the introduction of testimony of what was said at the Minami Park meeting. Consequently, there was substantial testimony about the privacy of the setting and the presence, participation and proximity of outsiders, particularly of the UFW organizers. The various witnesses placed the UFW representatives at distances from the CRLA meeting which ranged from easily within earshot to probably out of earshot. There was general unanimity that the UFW organizers did not participate in any way while the CRLA people were talking. It was not clear if any other uninvited people attended. Based on all the circumstances, along with his reading of Benge v. Superior Court (1982) 131 Cal.App.3d 336

[182 Cal.Rptr. 275], the IHE ruled that the attorney-client privilege did apply, but allowed the introduction of any statements by those conducting or participating in the meeting which encouraged or exhorted the workers to join or support the Union.

UFW Conduct Prior to the Election

The UFW succeeded in gathering sufficient authorization cards to enable it to file a Petition for Certification on April 10. However, that petition was withdrawn on April 12, ostensibly due to concerns over the status of the former sharecroppers and their eligibility to vote. The UFW filed another petition on May 5, which resulted in the May 12 election which is at issue here.

Two workers testified that on several occasions while working in the fields, they heard a broadcaster on a local Spanish language radio station announce that Furukawa workers would get $4.00 per hour and $0.50 per box. One of the workers, Maria Urbano, also testified that other workers were listening to the broadcasts. The other worker, Jose Cerda, testified that the broadcaster attributed the information to the UFW. The IHE, noting that it was impossible to determine if the broadcaster simply erred in failing to state that the rate applied only to new hires or if the workers misunderstood whom the rate applied to, refused to attribute any act of misrepresentation to the UFW.

Furukawa also introduced testimony that UFW organizers who visited the fields before the election threatened workers with job loss if they did not sign authorization cards. The IHE found

the testimony, which will be discussed in detail infra, too contradictory and confused to be reliable.

Alleged Breach of the Pre-Election Campaign Agreement

The parties had an agreement not to campaign on the date of the election, from midnight to 6:00 p.m. Furukawa alleges that the agreement was breached by radio broadcasts that falsely claimed that Furukawa was reducing wages. Only one witness, Maria Urbano, actually testified that she heard such a broadcast on the day of the election. She testified that the broadcaster stated that Furukawa was going to pay $4.00 per hour and $0.50 per box.[7] She heard no reference to the UFW, CRLA or a lawsuit. The IHE properly concluded that even if the broadcast had contained a misrepresentation, there was no evidence linking the broadcasts to the UFW.

The Lawsuit

When negotiations with Furukawa were unsuccessful, CRLA decided on April 13 to proceed with litigation. Barrett testified that she had hoped to file the complaint in Superior Court by May 1, but was delayed by the decision to plead it as a class action and by CRLA Director of Litigation William Hoerger's dissatisfaction with the way it was organized. He did not approve it until May 8 or 9, and it was filed on May 10. The IHE credited Hoerger's account of CRLA's internal procedures and the difficulties involved in preparing the complaint that resulted in the failure to meet Barrett's target date of May 1. He therefore

[7]This was, in fact, the rate paid at that time to new workers

found no evidence to support Furukawa's allegation that the filing of the lawsuit was deliberately timed to coincide with the May 12 election.[8/]

In its objections, Furukawa alleged that the lawsuit was totally lacking in merit and contained false, unsupported and misleading allegations which affected the outcome of the election. At the hearing, Furukawa focused primarily on two aspects of the suit: (1) the allegation that Furukawa had defrauded the sharecroppers by paying them under the market price for the strawberries they harvested, and (2) the filing of the suit in Superior Court when the sharecropper agreements provided for arbitration of disputes. Barrett explained that the fraud claim was based on information received from clients and could not be further substantiated until Furukawa's records were obtained through discovery. With regard to arbitration, Barrett testified that there were actually four different contracts, only two of which had arbitration clauses, and those she believed to be unenforceable.

The IHE found no support in the record for Furukawa's allegation that CRLA conducted a false and misleading media campaign in pursuing its lawsuit. Several radio and television reporters testified, and all stated that their coverage of the effects of the Borello decision and the CRLA lawsuit was initiated by themselves and not by CRLA. Furukawa relies on the following

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[8/]There was no evidence of any communications between CRLA and the UFW concerning the lawsuit.

alleged misrepresentations: (1) a statement by a broadcaster that the CRLA attorneys he had just interviewed were "with the government;" (2) Barrett's statement that a preliminary injunction would be sought, even though it had already been determined by CRLA that such relief was not available; and (3) statements on the radio that wages would be reduced to $4.00 per hour and $0.50 a box.

The IHE found no basis for attributing to CRLA any misinformation that may have been disseminated by the media. The IHE reasoned that since the reporter made the "with the government" statement just before signing off, the CRLA attorneys, if they were still listening, would not have had the opportunity to correct him. Although Hoerger testified that he had decided by April 13 that injunctive relief was not available, he acknowledged that Barrett and others disagreed with him. The IHE observed that the complaint, as initially filed, did include a prayer for injunctive relief. Therefore he concluded that, at the time Barrett made the statement, a final decision not to seek injunctive relief had not been made.

Richard Quandt, an attorney who represents growers in the area, testified that on May 11 he heard a radio interview in which Barrett stated that Furukawa had breached its agreement with employees and was reducing their wages. The transcripts from the radio segments that ran that day on the station Quandt was listening to simply indicate where Barrett's taped comments were to begin. However, since the lead-in to one taped comment reads, "She says even the new workers are getting a raw deal . . . .",

and Barrett's testimony indicated that she was aware that the lower rate applied only to those hired after April 26, the IHE concluded that it was most likely that Quandt simply misunderstood Barrett to say that the lower rate applied to all workers.

DISCUSSION

Agency

Furukawa asserts that the IHE failed to fully address the various arguments it submitted in support of Objection No. 1. While the IHE's analysis is somewhat sparse, for the reasons that follow we believe he correctly found that Furukawa failed to establish an agency relationship between CRLA and the UFW. Section 1165.4 of the Agricultural Labor Relations Act (ALRA) states:

> For the purpose of this part, in determining whether any person is acting as an agent of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

The above language, consistent with the interpretation of identical language under section 2(13) of the National Labor Relations Act, has been construed to make common law principles of agency applicable to agency issues arising under the statute. (NLRB v. Local 64, Carpenters Union (6th Cir. 1974) 497 F.2d 1335 [86 LRRM 2670]; San Diego Nursery Co., Inc. (1979) 5 ALRB No. 43.) An agency relationship may be based upon actual or apparent authority. Actual authority involves an express grant of authority from the principal to the agent. Furukawa does not

argue here that such an express agency relationship existed between the UFW and CRLA. Its theory is instead based upon apparent authority.

Apparent authority is implied through conduct of the principal and the purported agent vis-a-vis third parties. The Restatement Second of Agency, section 8, states:

> Apparent authority is the power to affect the legal relations of another person by transactions with third persons, professedly as agent for the other, arising from and in accordance with the other's manifestations to such third persons.

In other words, the "agent" must either purport to act on behalf of the principal or the third parties must reasonably believe such a relationship exists, and the principal must act in a manner consistent with the existence of such a relationship. (See generally Morris, The Developing Labor Law (2d ed. 1983) pp. 236-239.) As Furukawa argues, the consent of the principal may be manifested by various kinds of conduct, including ratification or acquiescence.

Here, Furukawa insists that an agency relationship existed because the UFW, rather than repudiating CRLA's misconduct, adopted it as part of its own organizational campaign. This argument fails for several reasons. First, as will be discussed below, the evidence that Furukawa presented was insufficient to establish that CRLA engaged in any misconduct that would tend to interfere with employee free choice.[9/] Second, and

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[9/]As the party filing objections to the election, Furukawa carries the burden of proof. (Bright's Nursery (1984) 10 ALRB No. 18.)

most importantly, there is no evidence upon which to base a finding that CRLA ever purported to be acting on behalf of the UFW, or that it acted in a fashion that would have reasonably led the workers to conclude that it was.

CRLA's efforts on behalf of sharecroppers working for Furukawa began before the UFW appeared on the scene. There is, moreover, no indication that those efforts were in any way altered specifically to benefit the UFW's organizational campaign. Also, as the IHE found, there is no convincing evidence that anyone from CRLA urged the workers to support the Union.[10/] During the time in question, the only contact between the UFW and CRLA that was proven was that which occurred on April 5 at Minami Park when Barrett asked the UFW organizers to leave the area during her meeting with those interested in CRLA's legal action against Furukawa. Moreover, Enrique Ortiz, who obtained the authorization cards from the UFW and distributed them on April 5, testified that the intent of the group was first to see what CRLA could do for them, and then turn to the UFW if necessary. That is why he did not give the signed cards to the UFW until 4 or 5 days later. This supports the IHE's conclusion that CRLA's and UFW's efforts were independent and distinct. Thus, it has not been demonstrated that CRLA either purported to act on the UFW's behalf or acted in

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[10/]The record provides no basis for overturning the IHE's crediting of the testimony of CRLA attorney Jeannie Barrett and CRLA Community Worker Mary Jacka. While Furukawa points to inconsistencies or contradictions in their testimony, these relate only to insignificant or immaterial details, such as where Barrett was when Jacka contacted her about coming out to Furukawa Farms on April 5. As to critical matters, their testimony is consistent and believable.

a manner that would have led the workers to believe that it was so acting.[11/]

Where there is no reason why third parties would reasonably believe that the conduct was on behalf of the principal, there is no apparent agency relationship which may be given legal effect through ratification or adoption. (3 Cal.Jur.3d, Agency, sec. 70, pp. 96-97.) Moreover, we find that Furukawa failed to prove that the UFW acted in a manner that could be described as ratifying or adopting CRLA's conduct. All that was shown was that the UFW's campaign propaganda claimed that Furukawa was lying to the workers and giving them a raw deal. There is no evidence that the UFW ever mentioned the CRLA suit in its campaign or took credit for, or claimed to have played any part in, the suit. The UFW undoubtedly took advantage of the controversy surrounding the Borello decision, a controversy that was heightened by CRLA's efforts, but such actions alone do not constitute conduct improperly influencing the election. Therefore, we conclude that in this case no agency relationship between CRLA and the UFW was proven and we concur that Objection No. 1 must be dismissed.

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[11/]It is also important to note that in these circumstances, the interests of the two organizations did not necessarily coincide. CRLA's legal position was that the sharecropper contracts were enforceable, albeit with the added statutory protections of employee status. At the outset, CRLA sought to negotiate a resolution of the Borello controversy that would have preserved the sharecropper contracts arid may have included agreement on various additional terms and conditions of employment. Such a result easily could have undermined any organizational drive by the UFW.

Third Party Conduct

Having found that Furukawa failed to establish an agency relationship between CRLA and the UFW, CRLA's conduct must be analyzed as that of a third party. The standard for third party misconduct is a difficult one to meet. An election will be overturned only where the conduct was so aggravated that it made it impossible for employees to express their free choice. (Agri-Sun Nursery (1987) 13 ALRB No. 19.) We find that Furukawa failed to prove that CRLA engaged in misconduct which would satisfy the above standard.

While this Board does not condone the threats made on April 5 to those who wanted to work during the work stoppage, the record fails to indicate that CRLA had any involvement in that conduct. The record indicates that neither Jacka nor Barrett knew of the work stoppage until it had already begun. One witness placed a CRLA attorney at the sharecropper meeting in Nipomo the day before the work stoppage, but all of the others testified that no one from CRLA was there. The IHE reasonably concluded that the one witness confused the April 4 meeting with meetings that took place in March which were attended by CRLA attorney Ilda Pruneda. Even if CRLA was in some way involved with the work stoppage, we fail to see how that event interfered with employee free choice in the UFW election which took place five weeks later. The evidence reflects that there was no UFW presence until it learned of the actions already planned for April 5. Moreover, there was no evidence presented of any threats of physical harm by the UFW during its organizing campaign that would serve to link its

efforts to the April 5 work stoppage or otherwise cause any rejuvenation of the threats that took place on that date.[12/]

We believe the IHE properly gave little credence to the allegation that CRLA was responsible for a broadcaster's misstatement at the end of his broadcast that the CRLA attorneys he had just interviewed were "with the government." No evidence was presented which would indicate that CRLA misled the broadcaster into thinking they were with the government. Furukawa's allegation that Barrett misrepresented that a preliminary injunction would be sought when it had already been decided by CRLA not to seek such relief also was properly rejected. Hoerger did testify that by about April 13 he thought he had convinced Barrett and the rest of the CRLA staff that a preliminary injunction would not be obtainable. However, the complaint filed on May 10 did contain such a prayer. Therefore, it may *be* presumed that the internal debate was still continuing at the time Barrett made her statement. In any event, we do not see how Barrett's claim that such relief would be sought, even if inaccurate, would have any impact on listeners in addition to that of her broader, and clearly accurate, statement that a complaint would be filed.

While we do not reject outright Richard Quandt's testimony that Barrett stated on a radio program on May 11 that Furukawa would be reducing wages from $4.60 plus $0.70 a box to

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[12/]See T. Ito & Sons Farms (1985) 11 ALRB No. 9; Westwood Horizons Hotel (1984) 270 NLRB 802 [116 LRRM 1102] (where threats are remote in time from the election, the objecting party must show that the threats were "rejuvenated" at or near the time of the election).

$4.00 plus $0.50 a box, we do not believe it is of substantial significance. Quandt testified that he heard the broadcast, which was in English, between 5:00 and 6:00 p.m. on the evening before the election. As the IHE observed, the transcript of the radio broadcast contains a lead-in to Barrett's taped comments which reads, "She says even the new workers are getting a raw deal . . . ." This is some evidence that Barrett made a distinction in the pay rates for new workers. Since it was true that Furukawa paid new workers a lower wage, her comments, even if accurate, could have been easily misconstrued. While this does not completely negate the weight of Quandt's testimony, it does raise the question of whether what he heard accurately reflected the context of Barrett's comments. In any event, we cannot conclude that this incident tended to affect the election since there was no evidence presented as to how many, if any, Furukawa employees heard this particular broadcast.

As the IHE found, the record is devoid of any evidence to indicate that CRLA actively undertook any kind of media campaign in support of its legal efforts on behalf of sharecroppers. While CRLA responded to media inquiries, all evidence indicates that the media initiated all contacts. In fact, television broadcaster Linda Brasheers testified that she had asked Barrett to let her know when the lawsuit would be filed, but Barrett never called. Brasheers therefore had to call CRLA regularly to find out the status of the lawsuit.

We also agree with the IHE that it was not shown that CRLA engaged in any misconduct with regard to the lawsuit.

Furukawa argues only that the manner in which the suit was pursued was objectionable, but the record fails to indicate that CRLA did anything unusual or unnecessary in pursuing such a suit. As discussed above, there is no evidence that CRLA made any effort to increase the amount of publicity surrounding its suit. It simply responded to media inquiries. Although Furukawa claims not to be objecting to the content of the suit, it also points to the allegations of fraud as misrepresentations. In any event, there is no basis in the record for overturning the IHE's crediting of Barrett's explanation of the basis of the suit. In sum, CRLA's efforts in pursuing litigation in response to the Borello decision may have helped increase the workers' existing concerns, but Furukawa failed to prove that CRLA acted improperly in doing so, or that it acted in a manner calculated to benefit the UFW's organizational drive.

Alleged Violence, Misrepresentations and Threats of Job Loss By the UFW

This Board will set aside an election based upon party misconduct where the party objecting to the election meets its burden of proving that misconduct occurred and that the misconduct would tend to interfere with employee free choice to such an extent that it affected the outcome of the election. (Mann Packing Company, Inc. (1990) 16 ALRB No. 15; Bright's Nursery (1984) 10 ALRB No. 18.)

As discussed above, there *is* no convincing evidence linking CRLA or the UFW to the threats to "take out" those who tried to work during the work stoppage on April 5. Moreover, the

connection to the election five weeks later, particularly since the UFW organizational campaign had yet to begin, is tenuous at best. Furukawa does not explain how these threats, even if made by UFW agents, would have affected the election, and no connection is apparent.

Furukawa's claim that the UFW falsely represented that Furukawa was reducing wages is based on the testimony of Jose Antonio Cerda. Cerda testified that 3 or 4 days before the election, while working in the fields, he heard a broadcaster say that Furukawa was reducing wages to $4.00 per hour and $0.50 a box. He further testified that the broadcaster attributed this information to "the union." Cerda also testified that the announcer did not further identify "the union" and that the announcement was part of a regular news announcement that the station repeated often. Cerda stated that he did not ask anyone from the company about a decrease in wages. In addition, Cerda stated that others in his crew were listening to their radios, but he did not know what stations they were listening to.

The IHE concluded that it would not be appropriate to attribute any misrepresentation to the UFW because it was impossible to determine whether the broadcaster simply erred in failing to state that the rate applied only to new hires or whether Cerda misunderstood to whom the rate applied. We believe the IHE is correct that the evidence is inconclusive. Misinformation provided to the broadcaster by the UFW is but one

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of several possible interpretations of the evidence.[13/] We also note that Cerda was apparently not concerned enough about the information to discuss it with others or make any inquiries as to its accuracy, nor did he know if any other workers heard the broadcast.

Furukawa contends that it has presented evidence establishing that workers were told, both at the Minami Park meeting and in the fields prior to the election, that they would lose their jobs if they did not sign Union authorization cards. Furukawa argues that these threats were nearly identical to those found sufficient to set aside an election in Triple E Produce Corporation v. ALRB (1983) 35 Cal.3d 42 [196 Cal.Rptr. 518]. While we view the threats alleged here as serious, we point out that in Triple E the employees were threatened with job loss if they did not vote for the union and the evidence revealed that they believed that the union would know how they voted. Moreover, when the relevant testimony here is viewed in context, it is too uncertain and inconsistent to be accorded substantial weight.

With regard to Minami Park, Furukawa relies in part on the testimony of employee Felicitas Esparza. However, Furukawa misreads her testimony, as she actually testified that she heard the threats in the fields, not at Minami Park. This distinction is important, as Furukawa argues that the IHE erroneously found Esparza[1]s testimony contradictory because he compared what she

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[13/]The objections did not allege that any third parties other than CRLA, if not an agent of the UFW, engaged in misconduct. Nor is there an allegation that the media were acting as agents of the UFW. Therefore, misstatements by the media itself are not encompassed in the objections at issue in this case.

heard at Minami Park with what she heard in the fields. In reality, Esparza never stated that she heard such threats at Minami Park. All of her testimony regarding threats related to what she heard in the fields.

Furukawa relies on Esparza's statement at Reporter's Transcript volume 5, page 19, that a UFW organizer in the fields told her crew that "the ones that we didn't join them [sic], we won't have work." On page 40, when asked to repeat what the organizers said, she stated, "That if we joined, we will win." On page 41, when asked if the Union representatives threatened to cause employees to lose their jobs if they did not sign cards, she replied, "I don't know." Based on these contradictions, the IHE found her testimony unconvincing. Contrary to Furukawa's assertions, the questions at page 39 shifted back from the events at Minami Park to what Esparza heard in the fields.

A look at Esparza' earliest testimony concerning the comments of Union representatives in the fields further reduces the usefulness of her testimony in supporting Furukawa's allegation of coercion. At id. at page 18, she answered in response to being asked what the Union representatives said about signing cards, "That if we signed them, so we all get together and we win." When asked what else they said, she stated, "That if the union win [sic], that we have to join them." It is then, when asked what they said would happen if the workers did not join, that Esparza said, "The ones that did not join them, we won't have work." Thus, when placed in context, the testimony on which Furukawa relies more likely refers to an explanation of the

possible obligation to join the Union after it wins the election, and not to any threat of job loss for not signing an authorization card prior to the election.[14/] Consequently, the IHE correctly found that Esparza's testimony is of little help to Furukawa.

A close look at Theresa Garcia Arevalo's testimony supports the IHE's refusal to accord it much weight.[15/] First, her testimony concerning what was said by Union organizers at Minami Park is far from clear. She first testified that she and her friends arrived at the meeting when it was almost over, but later said that the meeting was over when she arrived. She further testified that she stayed no more than ten minutes, she didn't actually hear the meeting, and other people told her what had gone on. Consequently, it appears she did not personally hear the comments she testified to. Nevertheless, her description of what the Union organizer said is revealing. At one point she stated that they were told that they would lose their jobs if they did not sign the cards. However, in further explaining what was said, she stated that she was told that voting for the Union would guarantee their jobs because Furukawa couldn't fire them if they had union backing. She also claimed that she was told that if she signed for the Union and the employer found out about it, he would take away her job. That such a counterproductive statement would

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[14/]Section 1153, subdivision (c) of the ALRA allows a union to negotiate with an employer for an agreement to require maintenance of membership in the union as a condition of employment.

[15/]The IHE discredited Arevalo's testimony in part because of her admitted bias against unions. In our evaluation of her testimony, we rely solely on its content.

be made by a union organizer is hard to believe, but if true, it would not coerce the signing of cards, but discourage it.

Arevalo also testified as to comments made by UFW organizers in the fields prior to the election. She said her crew was asked to sign authorization cards, and when she said she did not want to vote, she was told that she would have the right to vote whether she signed or not, and that signing the cards did not mean they were necessarily voting for the UFW. She then stated that she was told that if the Union happened to come in, it could take their jobs away if they did not sign. She went on to claim that she was told she would have to attend every union meeting or lose her job or be fined.[16/] This testimony the IHE found implausible since such statements by a union organizer would obviously tend to discourage people from voting for the union. On cross-examination, Arevalo described what the crew was told in the fields by UFW organizers as, "We needed to sign the cards or vote union or else our jobs would be taken." She later responded affirmatively to the question, "The first organizer told you that if the Union came in and you refused to join the Union that you would be fired?"

We do not find Arevalo's testimony sufficient to establish that UFW organizers threatened to have workers fired if

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[16/]UFW organizer Ifrael Edeza, who entered the fields on several occasions prior to the election to speak with the workers, testified that he assured them that it was not true that they would be fined if they did not go to union meetings. He further claimed that it was the company that had warned the workers of such fines.

they did not sign authorization cards. While portions of her testimony can be interpreted in that vein, other portions reflect benign statements by UFW organizers that are inconsistent with threats of job loss for failing to sign authorization cards. Consequently, when we view her testimony in its entirety, we can not conclude that it establishes that such threats actually took place. We also note that other witnesses, including some who worked in Arevalo's crew, testified that they heard no such threats from Union organizers in the fields.

Finally, Furukawa points to the testimony of Francisco Ruiz-Gonzalez. He testified that he was told at the yard at Furukawa Farms on April 5:

> That is [sic] the union win [sic], that if we don't fill out those papers, we were going to be out. They were going to take away our work. We were going to lose it. (Id. at p. 89.)

This statement, according to Ruiz, was made by a Union person, i.e., someone wearing a UFW pin, as he was passing out papers to sign.[17/] Ruiz signed one of those "papers," but later testified that what he signed had nothing about the UFW on it. Later, when shown a UFW authorization card, he confirmed that it was not what he signed. Moreover, when asked to repeat what he was told by

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[17/]As Furukawa points out in its brief, the National Labor Relations Board has reversed earlier precedent and has held that union supporters who are given authorization cards to distribute are union agents for the purpose of that distribution. (Davlan Engineering (1987) 283 NLRB 803 [125 LRRM 1049].) Therefore, it is unnecessary to identify whether those who urged Ruiz to sign the "paper" were regular UFW representatives or merely supporters, If, in fact, they were passing out authorization cards, their actions in that capacity could be attributable to the UFW.

those passing out the "papers," he stated, "That if the company wins, all of us that stay, we were going to be out."

Later, Ruiz's testimony became thoroughly confused. At one point, when asked what the people who gave him the papers said about the Union, he stated:

> There was to have for the strength of the union and the-- and that the ones that they didn't sign them, was going to be out if the union wins. (Id. at pp. 103-104.)

Given the confused nature of Ruiz's testimony, coupled with the fact that what he signed was not a UFW authorization card, we must agree with the IHE that his testimony also fails to satisfy Furukawa's burden of proving that employees were threatened with job loss by the UFW if they did not sign authorization cards.

Credibility Determinations

Furukawa claims that the IHE selectively, and without basis, credited the testimony of UFW and CRLA witnesses and discredited the testimony of Furukawa witnesses. In short, Furukawa claims that the IHE discredited its witnesses due to inconsistencies or contradictions in their testimony, but credited the testimony of UFW and CRLA witnesses whose testimony exhibited similar failings. The IHE expressly credited the testimony of several CRLA witnesses based both on their demeanor and the consistency and believability of their testimony. As stated earlier, the record provides no basis for overturning those determinations.[18/] With the exception of Theresa Arevalo, the IHE

[18/]The Board will not disturb credibility resolutions based on demeanor unless the clear preponderance of the evidence demonstrates that they are in error. (See, e.g., Ranch No. 1, Inc. (1986) 12 ALRB No. 21; Armstrong Nurseries, Inc. (1983) 9 ALRB No. 53.)

discredited the testimony of Purukawa witnesses not due to perceived bias, but due to the unclear or inconsistent nature of their testimony when viewed in the context of the record as a whole. As noted above, we do not rely on Arevalo's dislike of unions in evaluating her testimony. We otherwise agree with the IHE that the evidence presented by Furukawa is insufficient to carry its burden of proof. Therefore, we do not believe that Furukawa was prejudiced by improper credibility resolutions.

Request to Reopen the Record

Furukawa requests that should the Board find that the record evidence is insufficient to justify finding an agency relationship between CRLA and the UFW, the record be reopened to allow additional testimony concerning what was said by the CRLA attorneys concerning unionization at the Minami Park meeting on April 5. Furukawa thus takes exception to the IHE's conclusion that the attorney-client privilege applied to the meeting. Furukawa argues that the meeting could not have been privileged because, due to its setting in an open park, it was not held "in confidence" and non-essential third parties were present, namely UFW organizers. Furukawa argues that the testimony establishes that the UFW organizers were within earshot. Furukawa asserts that it was prejudiced by the IHE's ruling, even though he allowed testimony involving the encouragement of the workers to join or support the Union. It claims that it could not fully cross-examine the CRLA witnesses to determine the basis for their denials of encouraging unionization, as illustrated by the IHE's ruling cutting off further testimony after Barrett began to tell

how she responded when she was asked what the effect of signing union cards would have on CRLA's representation.

We agree with Furukawa that the IHE's ruling that the Minami Park meeting was covered by the attorney-client privilege was in error, but we do not believe that Furukawa was prejudiced by the ruling. The IHE relied on the case of Benge v. Superior Court, supra, 131 Cal.App.3d 336, which we find to be distinguishable. A central requirement of the attorney-client privilege is that the communication must be intended to be confidential, that is, the communication, as far as the client is aware, must not be in the presence of nonessential third parties. In Benge, the meeting in question included only members of a union who worked at a particular site, a doctor, and two attorneys who were there to discuss the members' legal rights involving lead poisoning on the job. Some, but not all, of the members subsequently retained one of the attorneys. The court, observing that the doctor's presence was necessary and that the privilege extends to giving legal advice regardless of whether the attorney is thereafter retained, concluded that no nonessential third parties were present.

Here, although there is evidence that the CRLA attorneys intended the meeting to be confidential and instructed the workers on who should attend, two UFW representatives were in attendance. Though Barrett asked them to move away from the area before she began the meeting, the evidence indicates that the UFW people, at least part of the time, were within earshot of the meeting. Thus, unlike in Benge, the meeting was not effectively restricted only

to clients or potential clients. Further, because the meeting was held, albeit out of necessity, in an open park, it is questionable whether the workers considered their communications to be in confidence. Despite what may have been the best intentions of the CRLA attorneys, we do not believe that sufficient efforts were made to ensure the confidentiality of the communications so as to make them privileged.

Nevertheless, we agree with the IHE that his ruling was of little import, because he allowed testimony as to any communication that encouraged or exhorted the workers to join or support the UFW. As he observed, this allowed the introduction of those communications which were relevant to Furukawa's objections. The IHE did rule that the privilege covered testimony that Barrett began to give concerning her response to a question from one of the workers who asked how signing a union card would affect CRLA's representation. While this constituted error by the IHE, it was not prejudicial. If Barrett had replied that it would interfere with CRLA's representation, that would have undermined Furukawa's agency theory. If she had replied, however, that it would not interfere, that would have been innocuous in terms of establishing agency. Even if in her response she had encouraged the workers to join the Union, in light of the dearth of other evidence

establishing an agency relationship, we find that such evidence would be insignificant.[19/] Consequently, in light of the record

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[19/]In testimony credited by the IHE, Barrett insisted that she did not encourage anyone to sign Union authorization cards at the Minami Park meeting.

as a whole, we do not believe that the IHE's ruling was prejudicial. Therefore, the request to reopen the record is denied.

CONCLUSION AND CERTIFICATION

While, as noted, we do not agree with every finding made by the IHE, we agree that Furukawa failed to prove that the UFW or CRLA engaged in conduct which tended to interfere with employee free choice to such an extent that the election should be set aside, whether the various objections are viewed individually or cumulatively.[20/] This conclusion is based primarily on the failure to establish an agency relationship between the UFW and CRLA and on the inconclusive nature of much of the evidence as to individual instances of alleged misconduct, as well as the margin of victory. We therefore order that the results of the election conducted among the agricultural employees of Furukawa Farms, Inc. on May 12, 1989 be upheld and that the United Farm Workers of

[20/] Where individual objections are found to be insufficient, an election may still be set aside if the cumulative effect of the conduct underlying the objections created an atmosphere that prevented employees from voting freely. (See, e.g., Harden Farms (1976) 2 ALRB No. 30.)

America, AFL-CIO, be certified as the exclusive collective bargaining representative of those employees.

DATED: March 27, 1991

BRUCE J. JANIGIAN, Chairman[21/]

IVONNE RAMOS RICHARDSON, Member

JIM ELLIS, Member

JOSEPH C. SHELL, Member

[21/] The signatures of Board Members in all Board decisions appear with the signature of the Chairman first, if participating, followed by the signatures of the participating Board members in order of their seniority. Member Nielsen did not participate in this matter.

CASE SUMMARY

Furukawa Farms, Inc. (UFW)

17 ALRB No. 4
Case No. 89-RC-7-SAL(SM)

Background

Furukawa filed objections to the conduct of a representation election held on May 12, 1989. The UFW prevailed in the election by a vote of 300 to 195, with 18 unresolved challenged ballots. The objections alleged that the UFW and CRLA, acting as the agent of the UFW, made substantial misrepresentations of fact that interfered with the employees' free choice in the election. The objections also alleged that even if CRLA was not acting as an agent of the UFW, CRLA's conduct as a third party was so aggravated that it warranted the setting aside of the election. Additionally, the objections alleged that the UFW breached a pre-election campaign agreement, engaged in threats of violence and threatened job loss for failure to sign authorization cards.

For several years prior to April of 1989, Furukawa used sharecroppers to plant, cultivate, weed and harvest the crops. However, after a similar arrangement was found by the California Supreme Court to be an employment relationship in S. G. Borello & Sons, Inc. v. Department of Industrial Relations (1989) 48 Cal.3d 341 [256 Cal.Rptr. 543], Furukawa voided the sharecropper agreements and hired the former sharecroppers as hourly employees. The Borello decision and the CRLA's efforts thereafter received a great deal of media attention. CRLA, which had been an active challenger to sharecropping arrangements, filed suit against Furukawa on May 10, 1989 on behalf of many of the sharecroppers. The allegations of CRLA misconduct involve its pursuance of the lawsuit, including numerous interviews with the media. The UFW, upon learning of the dispute at Furukawa, sought to organize former sharecroppers. The UFW filed its first representation petition on April 10, 1989, but later withdrew it. Another petition, which resulted in the election at issue, was filed on May 5, 1989. Furukawa alleged that the UFW, in addition to making its own misrepresentations and threatening workers with job loss if they did not sign authorization cards, was responsible for CRLA's alleged misconduct because the UFW adopted or ratified CRLA's actions as part of its organizational campaign.

The IHE's Decision

The IHE rejected the allegation that an agency relationship between the UFW and CRLA was established. The IHE found no evidence of any coordination or consultation between the two organizations. Instead, the IHE viewed the two organizations as carrying out their own distinct functions. The IHE concluded that Furukawa failed to prove that CRLA engaged in any misconduct and,

therefore Furukawa clearly failed to satisfy the stringent requirement of showing that third party misconduct was so aggravated that it rendered free choice impossible. (Agri-Sun Nursery (1987) 13 ALRB No. 19.)

The IHE rejected the claim that the UFW breached a pre-election campaign agreement because the radio broadcast that formed the basis of this objection was not attributable to the UFW. He likewise rejected the allegations that the UFW misrepresented, through the media, that Furukawa was reducing wage rates, because the evidence was insufficient to show that the UFW was the source of any misinformation broadcast by the media. The IHE found that the threats to "take out" anyone who tried to work during a work stoppage on April 5 were carried out by an autonomous group of workers who had no relationship with the UFW at that time and who acted without the knowledge of CRLA. The IHE dismissed the allegations of threats of job loss for failing to sign authorization cards because the testimony in support of those allegations was too confused, contradictory and inconsistent to be relied upon in finding that such threats indeed occurred.

The Board's Decision

Applying common law principles of agency, the Board affirmed the IHE's ruling that Furukawa failed to demonstrate an agency relationship between CRLA and the UFW. The Board found that the evidence failed to show that CRLA purported to act on behalf of the UFW or that it acted in a manner that would have reasonably led the employees to believe that it was so acting. Therefore, the UFW, which the record shows did not expressly adopt or ratify CRLA's actions as part of its organizational campaign, also had no duty to repudiate any of CRLA's conduct. The Board noted that the UFW, in the timing of its efforts to organize Furukawa employees, clearly took advantage of the controversy surrounding the Borello decision and CRLA's legal efforts, but that in itself does not constitute improper conduct.

The Board also agreed with the IHE that the evidence as to specific allegations of misconduct by CRLA and the UFW was generally inconclusive and, thus, insufficient to substantiate Furukawa[1]s objections. Specifically, the Board found that there was no evidence linking the threats during the April 5 work stoppage to either CRLA or the UFW, or that the threats could have affected free choice in the election held five weeks later. The Board found the evidence of misrepresentations to be inconclusive, as it was not proven that any misinformation disseminated by the media was the result of false information supplied by either CRLA or the UFW. Finding that CRLA did nothing unusual or unnecessary in pursuing its lawsuit, and finding no evidence that CRLA's efforts were calculated to aid the UFW organizing campaign, the Board agreed that no misconduct surrounding the lawsuit was shown. Carefully examining in context the testimony relied on by

Furukawa in support of its allegations of threats of job loss, the Board agreed with the IHE that the testimony was too ambiguous and inconsistent to establish that such threats took place. However, unlike the IHE, the Board did not rely on Theresa Garcia Arevalo's admitted dislike of unions in evaluating her testimony.

The Board reversed the IHE's ruling that a meeting held by CRLA in an open park on April 5 to discuss legal options with present and potential clients was covered by the attorney-client privilege. The Board found that the presence of UFW organizers within earshot of the meeting, along with the open setting, prevented the meeting from having the confidential nature required for the privilege to attach. However, because the IHE allowed testimony of any communication that encouraged or exhorted the workers to join or support the UFW, the Board found that the ruling was nonprejudicial and denied Furukawa's request to reopen the record.

* * *

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:	)	
	)	
FURUKAWA FARMS, INC.,	)	Case No. 89-RC-7-SAL(SM)
	)	
Employer,	)	
	)	
and	)	
	)	
UNITED FARM WORKERS OF AMERICA, AFL-CIO,	)	
	)	
Petitioner.	)	

Appearances:

Charley M. Stoll Finkle,
Hersh & Stoll Irvine,
California for the
Employer

Emilio Huerta
United Farm Workers of America, AFL-CIO
Keene, California
for the Petitioner

DECISION OF INVESTIGATIVE HEARING EXAMINER

DECISION OF INVESTIGATIVE HEARING EXAMINER

JAMES WOLPMAN, This case was heard by me in Santa Maria, California, over a period of ten hearing days, between September 12 and November 2, 1989.

On May 5, 1989, the United Farm Workers of America, AFL-CIO, ["UFW"] filed a Petition for Certification, seeking to represent all of the agricultural employees of Furukawa Farms, Inc. ["Furukawa"]. (Official Exhibit A-l.) On May 12, 1989, the Agricultural Labor Relations Board conducted an election among those employees. (Official Exhibit A-6.) The results were:

UFW	300
No Union	195
Unresolved Challenged Ballots	18
Total	513

(Official Ex. A-4)

Thereafter Furukawa filed a number of timely objections to the conduct of the election. (Official Ex. B.) On July 21, 1989, the Executive Secretary of the ALRB issued his Order setting five of those objections for hearing and dismissing one. No Request for Review of the dismissed objection was taken to the Board. As a result, the following objections are before me:

> Objection No. 1: Whether the United Farm Workers of America, AFL-CIO (UFW) through its agents at California Rural Legal Assistance (CRLA), made substantial misrepresentations of fact in filing a lawsuit and conducting a news media campaign in such a deceptive manner that employees would be unable to recognize the misrepresentations as mere campaign propaganda, and thereby interfered with employees' exercise of their free choice in the election.

Objection No. 2: Whether the CRLA made pre-election misrepresentations about the Employer that were so aggravated that the conduct tended to interfere with employees' free choice in the election even if CRLA engaged in the conduct only as an independent third party.

Objection No. 3; Whether the UFW breached a pre-election campaign agreement and thereby engaged in conduct requiring the election to be set aside.

Objection No. 4; Whether violent conduct, threats of violence, and threats of job loss created an atmosphere of fear and coercion rendering employee free choice impossible.

Objection No. 6; Whether authorization card signatures were obtained by coercion tending to affect employee free choice in the election.

Shortly before the hearing, California Rural Legal Assistance, Inc. ["CRLA"], a non-profit California Corporation organized to provide legal services for persons of low income, filed a Petition to Intervene in the proceeding. (Official Exhibit K.) The Employer objected, and the matter was assigned to me for ruling. (Official Exhibit M.) I determined that CRLA should be allowed to intervene, but certified the matter to the Board as presenting a novel and significant legal issue. By Order dated October 24, 1989, the Board reversed my ruling and denied the Petition.[1]

Both the UFW and Furukawa participated fully in the hearing, and both were given an opportunity to file post hearing briefs.

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[1] The Board's Order did not issue until several days after the hearing had begun; during that time CRLA was allowed to participate. Thereafter, its role was confined to litigating its claim that certain evidence which the Employer sought to introduce involved privileged communications between CRLA and Furukawa workers who had formed an attorney client relationship with CRLA.

Only Furukawa did so.

Upon the entire record, including my observation of the witnesses, and after careful consideration of the arguments submitted, I make the following findings of fact and conclusions of law.

FINDINGS OF FACT I.

Jurisdiction

Furukawa Farms, Inc. is an agricultural employer within the meaning of section 1140.4(c) of the Act. The United Farm Workers of America is a labor organization within the meaning of section 1140.4(f).

II. The Employer's Operation

Furukawa grows strawberries in the Santa Maria Valley. It produces two varieties, Selba and Chandler. Selbas are planted in March and April and harvested anywhere from July to December, depending on the weather pattern; Chandlers are planted in late October and early November and harvested anywhere from February through early September.

In recent years, Furukawa and many other companies in the Santa Maria/San Luis Obispo area carried on their operations by using "sharecroppers" to plant, cultivate, weed, and harvest their crops. Sharecroppers were not considered employees, rather they were to be independent contractors who rented parcels of land from a "shipper" such as Furukawa. Each sharecropper entered into a formal written contract spelling out his or her rights and obligations. In Furukawa's case, the contract

provided that the sharecropper would be furnished plants, water, fertilizer, fumigants, plastic mulch, and irrigation facilities; in return, the "grower", as he was termed, agreed to plant the strawberries when instructed to do so by the shipper, and to cultivate and care for them in a "workmanlike fashion". The contract also contained detailed requirements to which the grower was to adhere in harvesting and packing the strawberries, and it contemplated their sale to the shipper in accordance with a prearranged pricing schedule.[2]

Growers were required to hire enough help to carry out their obligations under the contract; most appear to have done so by utilizing family members. The grower, and not the shipper, was responsible for these employees.[3]

Furukawa and the other farming operations who utilized sharecroppers thus considered themselves free from any obligation to provide Workers Compensation Insurance, to contribute to Federal Social Security or State Unemployment Insurance programs, to pay minimum wage, or to provide sanitary facilities or other State or Federally mandated employee protections.

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[2] The contract contained a provision permitting the grower to sell the crop on the open market, but to do so, the grower was required to purchase a substantial amount of liability insurance and had to pay 50% of the proceeds of the sale back to Furukawa.

The above is only a brief summary of the contents of the independent contractor agreements, but it is sufficient for our purposes. Copies of the entire agreements for 1987, 1988 (including a midterm modification), and 1989, each running approximately 25 pages are attached as Exhibits to the Complaint which CRLA eventually filed in Santa Barbara Superior Court. (Employer's Exhibit No. 39.)

Little wonder that the sharecropper arrangement came under serious and concerted attack both from governmental agencies which administer some of those laws and from CRLA, a legal services corporation which assists farm workers.

III. **The Borrello Decision**

In late 1987, CRLA mounted a campaign against sharecropping in the Santa Maria/San Luis Obispo area where its use was far more widespread than anywhere else in the State. (X:77.) The campaign involved both education and litigation. There were community presentations, leaflets, radio and television reports, in both Spanish and English, and there was litigation.

The legal issue first surfaced at Furukawa in an unemployment proceeding which began in late 1987 and resulted in an ALJ decision favorable to the company in October 1988; the decision was appealed to the Unemployment Insurance Appeals Board in November 1988. (See Petitioner's Exhibit 19.) CRLA began representing some Furukawa workers in September or October 1988.

Matters moved quickly to a head after March 23, 1989, when the California Supreme Court, having taken the unusual step of ordering review sua sponte, reversed a decision of the Court of Appeal for the Sixth District in which sharecroppers, or "sharefarmers" as they were termed, had been found to be independent contractors and not employees. (S.G. Borrello & Sons, Inc. v. Department of Industrial Relations, 48 Cal.3d 341.) The Supreme Court began its decision by noting the considerable interest generated by the case (Id. at Fn. 2), and then went on

to reject the Court of Appeal's rigid application of common law agency principles, adopting instead the policy oriented approach taken in a number of other jurisdictions:

> [Whose] decisions emphasize that the growers, though purporting to relinquish supervision of the harvest work itself, retained absolute overall control of the production and sale of the crop. Moreover, the cases note, the workers made no capital investment beyond simple hand tools; they performed manual labor requiring no special skills; their remuneration did not depend on their initiative, judgment, or managerial abilities; their service, though seasonal, was rendered regularly and as an integrated part of the grower's business; and they were dependent for subsistence on whatever farm work they could obtain. Under these circumstances, the authorities reason, the harvesters were within the intended reach of the protective legislation.
>
> (Id. at 355.)

Less than a week later, the Unemployment Insurance Appeals Board reached a similar result in the case of the Furukawa sharecroppers which CRLA had earlier appealed. (Petitioner's Exhibit #19.)

Because of its importance to agriculture throughout the Santa Maria/San Luis Obispo area, the Borrello decision—and its possible repercussions—received considerable attention in the local press and on radio and television (Petitioner's Exhibit No. 20; VIII:108).[4] Michael Blank of CRLA was invited to participate on several occasions in a community affairs program regularly broadcast on Radio Pantera, a local Spanish language station

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[4]Indeed, the matter was of Statewide interest. Petitioner's Exhibit 20 includes articles from the Los Angeles, Fresno, and Bay Area press, and William Hoerger of CRLA testified to widespread inquiries he received from the news media.(X:77-78.)

(IX:17, X:64-65).[4] CRLA prepared and circulated additional leaflets (Petitioner's Exhibits Nos. 5, 6 & 7), and ran public service announcements on both Radio Pantera and another Spanish language station, Radio Canon, all concerned with the effects of Borrello. (Petitioner's Exhibits Nos. 8 & 9.)

While the decision clearly held that sharecroppers were employees, it left unanswered the question of what the terms and conditions of their employment were to be. Were their independent contractor agreements void? Voidable? Had they been transformed into employment contracts? What, if any, responsibility did the "shippers" have to family members who worked the land but were not signatory to the agreements? Were they also now employees? If so, what were the terms and conditions of their employment?

Those were not abstract questions; they were immediate and pressing. (See Petitioner's Exhibits #10(2) and #11(2).) The Selba planting was already under way and the Chandler harvest had begun. What went on in April and May—and what is at issue in this proceeding--was shaped more than anything else by the manner in which Furukawa and its former sharecroppers chose to confront those questions.

IV. The Response to the Borrello Decision at Furukawa

Almost immediately after the Supreme Court and the Unemployment Insurance Appeals Board decisions came down, the

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[S]The transcripts of those programs were introduced into evidence. (Petitioner's Exhibits Nos. 10 & 11.)

Employer undertook to convert its workforce from sharecroppers to employees. It sought to do this by, first of all, terminating its sharecropper agreements (Petitioner's Exhibit No. 12); and, second, by advising its sharecroppers that they [and a specified number of their "employees"] could apply for work as Furukawa employees, but that they would compensated differently--$4.60 per hour and $0.70 per box[6]—and would have different terms and conditions of employment. (Employer Exhibit #5; Petitioner's Exhibits #13 and #14.) Sharecroppers were given until April 10th to accept the new arrangement; thereafter, the Employer indicated that it would begin hiring outsiders and that everyone hired after April 26th would be considered a new employee earning only $4.00 per hour and $0.50 per box for the first 500 hours of employment. (Employer Exhibit #4.)

Fifty or sixty sharecroppers gathered on April 4th at a home in the nearby town of Nipomo to discuss possible responses to the Company's position. (IV:11; VII:78-79; VIII:114; X:8-9.) According to those who were present, neither the UFW nor CRLA was represented at the meeting (IV:11; VII:57,78;VIII:114-115; X:8-10).[7] What emerged was a written list of conditions--

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[6]And that General Field Labor would be paid for at $6.00/hr.

[7]There had been an earlier meeting, in March, at the same location which was attended by a CRLA attorney named Ilda, at which a number of sharecroppers signed agreements authorizing CRLA to represent them. (IV:23-25,32-33; X:24-25.) In view of the substantial evidence that Ilda was not present at the April 4th meeting, I reject the testimony of the single witness who placed her there (11:66; see Employer's Post Hearing Brief, p. 5); he appears to have confused the two meetings.

"Condiciones de Trabajo" (Employer Exhibits #8 and #34.)--which were to be submitted to the Company on the following day. The manner of their dissemination was discussed, and it was agreed that copies would be prepared and distributed among sharecroppers the following morning and that, at the same time, they would be asked not to begin work until there had been an opportunity to negotiate the terms of the Condiciones with the Company. According to those attending the meeting, nothing was said about pressuring the other sharecroppers into joining the planned work stoppage. (VII:60; VIII:114; X:13-14.)

On the same day, April 4th, a meeting was held at the CRLA office in Santa Maria to determine how best to respond, from a legal point of view, to the Company's position. (IX:84-86; X:68-70.) At least four workers were present who attended the Nipomo meeting [Salvador Tirado, Enrique Ortiz, Auturo Medina, and Martine Gonzalez], but there is no indication that the CRLA attorneys were made aware that the Condiciones would be, or had been, drawn up by the workers at the Nipomo meeting.[8]

CRLA's legal position was embodied in a letter prepared that afternoon by Jeannie Barrett, the Directing Attorney for the Santa Maria and San Luis Obispo Offices. The letter stated that the Borrello decision did not invalidate the sharecropper agreements; they remained in full force and effect, but it did obligate the Company to comply with the various California laws

[8]The record does not disclose which meeting occurred first.

governing the employee-employer relationship.[9] (Employer Exhibit #7.) The letter went on to suggest that a meeting be held as soon as possible to resolve the issue. Copies were given to Mr. Tirado and Mr. Gonzalez and, later that evening, Ms. Barrett arranged with Mary Jacka, a CRLA Community Worker, to hand deliver it at the company offices the following morning. (IV:117-118.)

Additionally, CRLA encouraged its sharecropper clients to protect their status as employees by filling out the employment applications which the Company was circulating. (X:71.)

V. The Events of April 5th

a. The Work Stoppage

The first order of business each morning of the harvest is to obtain bundles of empty boxes for the strawberries to be picked that day. Furukawa normally distributes them at two locations, one near the main yard and the other about a quarter of a mile away. It is not entirely clear whether boxes were available at both locations on April 5th at 6:00 a.m. when sharecroppers began arriving. (V:68.) However, it is clear that, as they attempted to pick up their boxes, many of those who wanted to work were told that they would be "taken out [of the

[9]Furukawa's legal position is to be found in its counsel's April 6 response to Ms. Barrett's letter. (Petitioner's Exhibit #18.) In it, the Company took the position that Borrello rendered the agreements impossible of performance and, therefore, either void or subject to rescission by the Company.

fields]" if they attempted to do so.[10] It is also clear that they reasonably understood those words as threats to use force or intimidation to prevent them from working. At the same time, most were also were given copies of the Condiciones and told that the stoppage was part of an effort to obtain an agreement from Furukawa over the employee status and benefits for sharecroppers. (V:65; VII:76; VIII:137; IX:126.) While those threatened were, for the most part, unable—or perhaps unwilling—to say who threatened them, two names were mentioned: Salvador Tirado and Jose Huitron. (111:52; V:65, 78.) Both had participated in the meeting in Nipomo on the previous day. Their involvement, the coordinated nature of the stoppage, the explanations given to those who were threatened, and the distribution of the Condiciones all serve to convince me—despite protestations to the contrary (e.g., VIII:117.)--that the threats were part of a planned course of action undertaken by at least some of the sharecroppers who attended at the Nipomo meeting.

b. The Gathering at the Yard

After waiting awhile at the locations where boxes were distributed, sharecroppers began congregating in the yard in front of the Company's offices. By 7:00 a.m., when Mary Jacka arrived with the letter from CRLA, there were about 100 workers in the yard, others were in parked cars nearby, and a television crew had appeared. (IV:122-124.) After delivering the letter at

[10]See: 1:87-89; II:8; III:11-13, 104-105; V:36, 67, 75-77; VI: 3.

the office, Ms. Jacka was approached by a number of workers, Salvador Tirado and Martin Gonzalez among them, who asked her to stay for the meeting with Furukawa which was to be held later that morning. (IV:102-103.) She explained that she had to leave, but would return with Ms. Barrett. (IV:104.)

Andy Furukawa had already been given the Condiciones and a copy of CRLA's letter and been told that the workers wanted a meeting. (VI:70.) He contacted his attorney, Charlie Stoll, who arranged to be present later in the morning. (VI:71-72.) He also called the Sheriff's Office to deal with the road congestion cause by the stoppage. (VI:89.)

Ms. Barrett testified that she first learned of the work stoppage that morning when Ms. Jacka called and that she first saw the Condiciones about 9:00 a.m. when she and Ms. Jacka arrived at the yard. (IX:88-89.) By that time, the crowd had grown to 150-200, and representatives from three local television stations had appeared (1:109; III:21, 90; IV:105).[11] While waiting for Mr. Stoll, she—with Ms. Jacka acting as interpreter--discussed the situation with some of the sharecroppers and worked out the position they would take in the upcoming meeting. (IV:105-107; IX:91.) While this was going on, copies of the Condiciones were being distributed (VII:58) and, evidently, some sort of a petition written in a notebook was being circulated for

[11]The TV stations learned of the work stoppage either by scanning the police radio channel or by rumor; they were not alerted by either CRLA or by the UFW. (VIII:82, 84-5, 90, 103-5.)

signatures. (III:25.)

At about 9:30 a.m., two UFW representatives, Gilberto Rodriguez and Monica Alfaro, arrived and stationed themselves near one of the entrances to the yard where they remained for some time, speaking to workers. (VI:71, 89.) This was the first appearance of the UFW at Furukawa since October 1988, when it abandoned an earlier organizational effort.[12] (Employer Exhibits #12 and #13.)

Mr. Rodriquez explained that he first learned of the work stoppage early that morning from a sharecropper who came by the Union office. (X:37.) While at the yard, he specifically recalls talking with "Enrique" [Ortiz] and giving him a stack of union authorization cards to distribute. (X:26, 38-39.) Ms. Barrett was aware that UFW representatives were present, but she had no occasion to speak with them until later that afternoon at Minami Park. (IX:44.)

Mr. Stoll arrived at about 11:00 a.m., and shortly thereafter he and Andy Furukawa met with Ms. Barrett, Ms. Jacka, and the two workers—Salvador Tirado and Enrique Ortiz--who had informally been selected to represent the assembled sharecroppers. (IV:107; VI:72.) Ms. Barrett explained to the

[12]At that time the employee status of sharecroppers was very much in doubt. On October 21st an ALJ for the Unemployment Insurance Appeals Board ruled that they were independent contractors and on October 24th the UFW withdrew its Petition for an election. (See: Petitioner's Exhibit #19 and Employer's Exhibit #13.)

Company representatives that 40 to 50 sharecroppers had authorized CRLA to represent them and that more were expected to do so over the next few days. (VI:76.)

When the meeting concluded, about noon, the only understanding reached was that the workers would fill out employment applications and that doing so would not prejudice their position. (Employer's Exhibit #9.) The status of the sharecropper agreements, the rate of pay, and the other terms and conditions of their employment remained unresolved.

While the meeting was in progress, Martine Gonzalez had taken it upon himself to go to the CRLA offices where he obtained, from one of the clericals, a stack of forms, referred to as TOC/WOCs, used by CRLA for processing new clients. (IV:141-142; VII:38-41, 64; Petitioners Exhibit #2.) The forms were meant to be used in conjunction with a normal retainer agreement (Employer's Exhibit #36), but were now being circulated, by themselves, with little or no explanation of their function or purpose. Gonzalez eventually presented Ms. Barrett with a stack of more or less completed forms. (VII:42.)

When she emerged from the meeting, Ms. Barrett needed to tell the sharecroppers what had gone on, to explain the legal implications of their situation, to answer their questions, and, hopefully, to determine upon a course of action. She quickly realized that the situation in the yard was far too chaotic for her purposes. (11:39; IV:145-147.) The group was large and disorganized, any number of different documents were being

circulated, TV crews were filming the gathering, supervisors were mingling with sharecroppers, and UFW representatives had stationed themselves close by.

After consulting with a few of the sharecroppers, it was decided that a meeting with the workers was essential, but because the CRLA office was too small for the expected group and because there was no time to arrange for an indoor location, that it would have to be held outside. (11:38-39; IV:147-148.) Minami Park was suggested and agreed upon, and a starting time of 6:00 p.m. was announced. (11:38-39; IV:145.) Ms. Barrett then asked Mr. Tirado, Mr. Gonzalez, and several others to let the group know that the meeting was only for sharecroppers who were already clients of CRLA or who might be interested in becoming clients, and that they should be on the lookout for supervisors and others who did not belong. (11:38; IV:155.) The invitation they extended was arguably more inclusive: They invited all sharecroppers who wanted more information about the legal situation.[13] Before leaving the yard, Ms. Barrett once again attempted to let everyone know that they should go ahead and sign employment applications, and she recommended that they resume

[13]Raul Garcia Vega gave the clearest description of the invitation: "Co-workers, what I see in this thing is that we need that the lady attorney tell us what in reality is that we are going to do and for that we need information. So, it's necessary that everybody we know that are interested in this case go to Minami Park so she tell us what our rights are and so she tell us in reality what are we going to receive from the Company." (IV:70.)

work the following day. (IX:63-64.) Because her Spanish was sketchy, Ms. Jacka and one or two of the workers who understood English translated her comments. (IV:109.) Ms. Jacka also answered some of the workers questions, and she undertook to translate their comments to the TV crews filming the gathering (IV:109).[14]

There is no question that there was considerable confusion among some workers both as to the documents being circulated and the comments being made. Francisco Ruiz testified that he and others were told that, if the union won, they would lose their jobs unless they signed "a paper", but then he went on to testify that the paper he signed had nothing to do with the union. (V:89, 106.) Luis Valencia Alvarado testified that the women from CRLA told workers they had to sign authorization cards so that the union could file a complaint on their behalf, but it turned out that what he signed was a TOC/WOC form authorizing CRLA to file a complaint. (111:21; VIII:59-60.) Both he and Mr. Ruiz also testified that union representatives were circulating in the crowd (111:58; V:22-23), but this was contradicted by Andy Furukawa's more convincing testimony that they remained at the south gate throughout the day. (VI:71, 89.) Alvarado also testified that he was pressured into signing a petition in a notebook, but he could not say who pressured him or what the

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[24]In this regard she credibly testified that the statements made by her to Linda Brasheers of KEYT Television (Employers Exhibit #21) were not her own words but her translation of comments made by workers. (IX:117-118.)

petition said. (111:24-25, 66-68.) Likewise, Salvador Becerra testified that the two women encouraged workers to sign authorization cards so "there was going to be more strength for us for the Furukawa workers" (VI:12), but he went on to say that TOC/WOCs were also being circulated at the time (V:132-134; VI: 8-9), leaving open the possibility that he confused the one with the other. He also contradicted Mr. Furukawa's testimony by asserting that union representatives were circulating in the crowd collecting cards. (VI:16.)

The testimony produced by the Employer, with its loose ends and inconsistencies, does not compare favorably with that presented by Ms. Barrett and Ms. Jacka (pages 12-16, supra) and the other workers who were present.[15] Their testimony is clear, more consistent, and comports better with the logic of the situation. For those reasons, I find that CRLA representatives did not encourage the workers gathered in the yard to sign union authorization cards; at most, they indicated the advantages of authorizing CRLA to pursue legal action on their behalf. I also find that union representatives were not on the premises circulating and collecting authorization cards; rather, those cards, along with TOC/WOC forms, copies of the Condiciones, and some sort of petition, were being handed out by other workers.[16]

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[15]See: 11:69; VI:7-14; VII:5-11, 26-28, 42-44, 58-59, 63-67; VIII:111-112, 122; X:14-16, 26-27.

[16]Enrique Ortiz testified that he received about 100 union authorization cards from Gilberto Rodriquez of the UFW and that he circulated them in the yard and encouraged workers to sign and return them to him. (X:15-17.) His testimony was corroborated by

It may well be that some workers misunderstood what was being said or circulated that day in the yard. It may even be true that some workers made false or misleading statements or exerted undue pressure to sign one or the other documents. But there is no credible evidence that either CRLA or the UFW was involved in coercing or misleading workers, or in fostering their misunderstanding of the situation.

c. The Meeting at Minami Park

In all, sixteen witnesses were called to describe the meeting that evening; and, as one would expect, no one has it quite like anyone else. There is general agreement that when the meeting began, shortly after 6 p.m., between 100 and 150 persons were present; that most were situated on a grassy slope overlooking the playing field; that those conducting the meeting stood below on the field where they could be seen and heard; that Ms. Barrett and Ms. Jacka were present[17] and spoke first; that, at some point, UFW representatives Gilberto Rodriguez and Monica Alfaro arrived; and that they spoke to the group afterwards. Beyond that, however, there is a wide variation in the testimony over the degree to which the meeting was restricted to Furukawa workers who had retained CRLA or who wanted more information so they could decide whether to do so, over the extent to which the

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Rodriquez (X-.38-39) and, in part, by Andy Furukawa himself. (VI:72-73.)

[17]Barrett testified that CRLA attorney Ilda Pruneda was present as well. (II:42.)

UFW agents removed themselves from the meeting while CRLA representatives were speaking, over what was said both by CRLA and by the UFW, and over the timing and manner in which union authorization cards were circulated.

The witnesses presented by the Petitioner and by CRLA [in connection with its claim that what went on was privileged] described the meeting as follows: Ms. Barrett began by announcing that it was for Furukawa workers who wanted to learn their rights and were either represented or interested in being represented by CRLA. (11:40; IV:16-18, 76, 115, 134-136.) At her earlier request, Tirade, Gonzalez and several others saw to it that supervisors and other persons who did not belong there were kept away. (11:51.) Before getting into the substance of the meeting, she noticed the UFW representatives and went over to Ms. Alfaro to express her concern about their continued presence. (11:40, 56; IV:112-113, 132.) As a result, they moved away (11:41, 56; VIII:20-26; IV:18, 38-39, 74, 79, 89-92).[18] At no time did Ms. Barrett introduce the UFW representatives to the assembled group, and at no time did she or any other CRLA representative encourage workers to support the union or sign authorization cards. (IV:18, 96, 115-116; VIII:122-123, 141; IX:4-5, 8, 45-46.) No cards were circulated while she was present. (IV:19, VIII:15.) Only after she and Ms. Jacka left did

[18]The testimony of the witnesses produced by the Petitioner and by CRLA on where they went and how far away they stayed varies, but it does indicate that they remained apart until CRLA had finished its presentation.

Union representatives begin speaking to the group and soliciting their support.

The testimony presented by the employer differs in significant respects and varies considerably from witness to witness. The most potentially damaging testimony came from Artemio Garcia. He has Barrett announcing to the crowd--no less that five times during the thirty minutes he was present--that "They needed like 40 more cards ... to get into the union." (1:97.) None of the four other witnesses presented by the Employer substantiated the repeated urgings he testified to, and, among them, only Luis Valencia Alvarado indicated that the women had encouraged workers to sign cards. But his testimony, "They said that ones that they didn't sign the cards at the yard, to sign them there at the meeting" (VIII:60), when read in the context of his earlier testimony about what was said at the yard (see page 16, supra), refers, in all likelihood, to the TOC/WOC forms authorizing CRLA to file a complaint, and not to the cards authorizing the union to seek an election. Alvarado and Salvador Becerra have the women remaining alongside the union representatives after their portion of the meeting had concluded and while authorization cards were being circulated (111:29; VIII:3, 11); whereas, Employer witness Juan Ferreira has them leaving before the union spoke and the cards were circulated (11:22,24-26, 29-30, 75), and Felice Esparza has them leaving before the union

representatives had finished speaking with workers (V:30-31).[19] Most employer witnesses placed the Union and CRLA representatives close together during the meeting, but Ferreira has them standing 8 meters apart (11:22).[20]

The lack of consistency among the Employer's witnesses --especially on the crucial issue of whether CRLA representatives actively campaigned on behalf of the UFW--leads me to accept, in its basic outlines, the Petitioner's account of the events.[21]

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[19]Additionally, Becerra's testimony that he witnessed the entire 2 or 3 hour meeting was called into question by Pedro Paes Navarro, a witness for the Petitioner, who testified that he left the area after about 30 minutes. (VIII:3Q-31.)

[20]There were other areas in which the testimony of Employer witnesses conflicts with that of witnesses presented by the Petitioner or CRLA: Whether the CRLA representatives introduced the UFW organizers, whether non-workers were present, whether union representatives removed themselves an adequate distance. However, those circumstances were introduced in connection with the evidentiary issue of whether the content of the meeting was protected by the attorney-client privilege, and have little relevance to the substantive issues raised by the objections.

While I ruled that the meeting was privileged, I also ruled that any statement(s) made during the course of the meeting, either by those who conducted it or by those who participated in it, encouraging or exhorting workers to join or support the Union were outside the ambit of the privilege and could be introduced. Since that ruling essentially opened the door and permitted the Employer to come forward with all of the evidence about the meeting which was relevant to its objections, it is unnecessary to devote any extended discussion to the issue of privilege. The considerations which led to my ruling were drawn primarily from the Court of Appeals decision in Benge v. Superior Court (Mac Machines) (1982) 131 Cal.App.3d 336, and are to be found at VIII:47-52. [Note; I have marked the Offer of Proof submitted by the Employer and mentioned in my ruling as Official Exhibit V.]

[21]I was especially impressed by the objectivity with which Mary Jacka testified. She was forthright in indicating not only what she saw and heard but also in admitting what she missed or did not recall.

The meeting did not end when the CRLA representatives left the park at 7:00 or 7:30 p.m. UFW representatives stayed on for another half an hour or so explaining to the workers that the union could provide both legal assistance in their pending dispute and better pay and benefits as their bargaining representative. (11:63.) One employer witness--Felicitas Esparz--testified that they said, "The ones that we didn't join them, we won't have work" (V:19), but in cross examination she could only remember their saying, "That if we joined, we will win." (V:40.) Another employer witness--Theresa Arevalo--testified that the Union Representative told her, "[I]f we didn't sign that we were going to lose our jobs...." (11:86); but later admitted that she had never left her car and was merely recounting what she had heard from others (11:109),[22] The other witnesses who were there all testified that no threats were made. (VIII-.141-142; IX:5, 133; X: 17-18, 42.) I therefore conclude that there is no credible evidence that workers attending the meeting were threatened with the loss of their jobs if they refused to join the union.

Authorization cards, some of which had been handed out earlier that day at the yard, were signed and collected. Enrique Ortiz, the worker who was most active in obtaining cards, testified that, although he collected a number of them that

[22]There were other problems with her testimony as well: She admitted to harboring a strong bias against the unions of any kind (11:91-92), and her memory was poor--alone among all the witnesses she has the meeting occurring on a weekend. (11:85.)

evening, he did not turn them over to the Union. (X:20.) Instead, he kept them for some days, "[B]ecause we wanted to know what CRLA can get for us." (X:20.) If CRLA were unable to get anything, "[W]e were going to see if we can get something with the Union." (X:20.) Gilberto Rodriquez of the UFW confirmed this and testified that it was not until four or five days later that he received the cards from Enrigue (X:42).[23] This testimony is revealing in that it indicates that there was an independent and self-reliant group of workers, controlled neither by CRLA nor the UFW and sophisticated enough to weigh and consider available options.

VI. The Law Suit and the Election Petitions

CRLA and Furukawa were unable to resolve their differences (Petitioner's Exhibit #18), and so, on April 10th, the company proceeded to reclassify those sharecroppers who had filed employment applications as employees. (VI:84-85.) Two days later, they began working as members of harvest crews, receiving the pay and benefits which Furukawa had established in its initial offer. (Employer's Exhibits #5 and #18; X:99.)

Meanwhile, the UFW's organizing drive gained momentum. More authorization cards were gathered, and these, together with the cards turned over by Ortiz, permitted the UFW to file a Petition for Certification on April 10th. (Employer Exhibit #14.)

[23]This would account for the filing of the UFW's first petition for an election a full five days later, on April 10, 1989. (Employer's Exhibit No. 14.)

However, it was withdrawn on April 14th because, according to Gilberto Rodriquez, "There was something going on about the Borrello case, and we didn't know if the sharecroppers were eligible [to vote] during that time." (X:46; Petitioner's Exhibit #10(2), page 6; Employer's Exhibit #30) The Union continued to campaign and, on May 5th, it filed the Petition which resulted in the instant election, held May 12th. (Official Exhibits A-l and A-3.) Union conduct which occurred after April 5th and which is the subject of pending objections is described in Section VI(b), below.

a. The Law Suit

Meanwhile, the number of sharecroppers represented by CRLA had grown to over 100.[24] When negotiations with the Company proved unsuccessful, the decision was made, on April 13th, to proceed with litigation. (X:75.) Ms. Barrett hoped to have a complaint ready by May 1st, but it was delayed, first, because of the decision to plead it as a class action and, then, because of dissatisfaction with the way it was organized (X:75-76).[25] As a

[24]Although, between early and mid April, upwards of 140 persons had signed documents indicating an interest in being represented by CRLA (11:37), formal authorizations were actually obtained from about 100. (See: CRLA's Petition to Intervene, dated September 8, 1989, and Employer's Exhibit #10.)

[25]It was not until May 4th, that CRLA wrote letters to those who had expressed interest in pursuing the matter to obtain formal authorization to act as their counsel. (Employer's Exhibits 10, #35, and #41.) [Note; CRLA objected to the admission of those letters into evidence, claiming that they were subject to the attorney client privilege. I denied the claim because the manner in which TOC/WOCs were circulated in the yard on April 5th was too haphazard permit a finding that those who signed them understood their purpose. Since an authorization letter was sent to anyone

result, it was not ready until May 6th or 7th, and approval from CRLA's Director of Litigation was not forthcoming until May 8th or 9th. (X:75-76.) Finally, on May 10th, CRLA filed its Class Action Complaint for Damages, Declaratory Relief and Preliminary and Permanent Injunction in the Santa Maria Branch of the Superior Court for Santa Barbara County. It ran 46 pages, included 19 causes of action, and was brought on behalf of four distinct classes of workers. (Board Exhibit S.)

Mr. Hoerger's account of the preparation of the complaint, the problems and difficulties along the way, and the internal procedures followed in securing approval for its filing was careful, detailed, and thoroughly believable. (X:75-76.) The same is true of his testimony and that of other CRLA personnel denying any communication or coordination with the UFW. (IX:49; X:77.) I therefore give no credence to the Furukawa's unsubstantiated contention that the filing of the lawsuit was deliberately timed to coincide with the election on May 12th.

In its objections, Furukawa mounted a broad challenge to the lawsuit as "totally lacking in merit" (Formal Exhibit B, page 6.), as containing false, unsupported and misleading allegations (Id. pages 5, 7-8), and as legally deficient (Id. pages 6-7).

However, at hearing it attacked just two aspects of the lawsuit: (1) allegations that Furukawa had defrauded its sharecroppers by representing that it was paying them the market

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who executed a TOC/WOC, the ensuing letters could not be considered confidential.]

price when it was actually paying considerably less, and (2) CRLA's resort to Superior Court when the sharecropper agreements themselves provided that disputes be resolved through arbitration.

With respect to the fraud claim, Ms. Barrett explained:

> "I had information received from clients based on their own investigations and observations. I had documents received from [Furukawa by] my clients which indicated the prices they had been receiving."
>
> "There's a telephone number you can call for market information from that source. We also checked with other strawberry sharecroppers working in the Santa Maria Valley dealing with the same crop at approximately the same time to see whether their receipts complied with the receipts that the Furukawa people were getting." (IX:76.)

She went on to say that it would not be possible to further substantiate the fraud claim until Furukawa's own records had been obtained in the course of the formal discovery. (IX:77.)

With respect to the failure to resort to arbitration, Ms. Barrett explained:

> "There are four classes that are involved in that suit based on four different contracts. The first two contracts do not have arbitration clauses in them. The third contract was in fact an addendum to the existing contract. The arbitration clause appeared in that sometime after the sharecroppers had begun that season and....
>
> "The fourth contract did have an arbitration clause that had been in the contract from the beginning. So two of my classes has nothing to do with an arbitration clause.
>
> "[M]y best legal judgment was that the arbitration clauses that did exist [in the contracts covering the latter classes] were not enforceable for a variety of reasons. The major cause of action for all four classes was the minimum wage recovery. There is a statute that specifically said that minimum wage causes

of action can be brought in court notwithstanding an arbitration clause.

"So that [in] two classes...the arbitration clause didn't apply at all. The other two classes it didn't apply to the minimum wage cause of action definitely. And as to the other causes of action, I believe that the arbitration clause was unenforceable as adhesionary and unconscionable, based on a number of factors. The fact that there was a take-or-leave-it contract negotiated between parties of widely differing negotiating positions, and the fact that my clients on the whole were uneducated in the legal system and had no idea what they were giving up when the agreed to this multi-page contract that they had this arbitration clause in, the fact that their financial position made the cost of arbitration prohibitive[26] -- all of those things put together, I believe, made the clause unenforceable even to the last class in which the contract had it from the beginning.

"As to the other class, the contract -- the addendum added that the clause in mid-season, after they had already put in significant work on their plots, I felt that particular one clearly unenforceable and adhesionary." (IX:50-52.)

In its objections the Employer also contended that CRLA representatives, in the course of preparing the suit, communicating with workers, and publicizing the litigation in the media, made statements which were blatantly false, misleading, and deceptive. (Official Exhibit B, pages 5, 8-10.)

First of all, the Employer accuses CRLA of using its May 4th letter to the sharecroppers who had expressed an interest in being represented to convey false information "including false representations that Furukawa owed its employees money, and that Furukawa had cheated the employees." (Employer's Post Hearing Brief, p. 13.)

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[26]See IX:82-83.

The letter reads:

> "There is going to be a claim made against Furukawa Farms to collect the money that is owed to you. We are asking the court to review the bookkeeping of Furukawa Farms and (also) yours for the past three years to see how much you worked. The claim will ask that he pay you the hours he owes you and to correct the amount he owes you from when the strawberries were sold for more money than what he told you." (Employer's Exhibit #10, paragraph 1.)

At hearing, Furukawa--whose burden it is to prove that false representations were made—failed to offer any evidence to establish that it had no liability as a result of the imposition of the minimum wage to its former sharecroppers and their employees. For its part, CRLA was candid in acknowledging the difficulty of ascertaining what the total amount of damages might eventually be; but, based on financial information it had received from its clients, it had a legitimate basis for believing that there would be damages and that they would be substantial. (See Employer's Exhibit #25(2).) As for the so-called "cheating", Ms. Barrett's explanation for believing that Furukawa sold its strawberries for more than it told its workers is set forth above. Again, the Employer offered no evidence to rebut her claim.

Furukawa next argues that CRLA conducted a media campaign in conjunction with the filing of its lawsuit, and that, during the course of that campaign, it promulgated false and misleading information about the company.

At hearing, however, the Employer was unable to produce any evidence that CRLA conducted a "media campaign". All of the

radio and television representatives who testified corroborated the testimony of CRLA representatives that they, and not CRLA, initiated the media coverage of the lawsuit. (VIII:79-82, 94-96, 105; IX:23; X:64-65.)

In its brief, the Employer pointed to three alleged misrepresentations: (1) A statement by the host of a Spanish language public affairs program that the CRLA attorneys he had just interviewed were "with the government" (Employer's Exhibit 25(2), page 15); (2) Ms. Barrett's statement during a radio interview on May 11th that a preliminary injunction would be sought after it had already determined that injunctive relief was not available (Petitioner's Exhibit 16; IX-.92-93); and (3) statements on the radio that the wages of Furukawa employees would be lowered.

The statement that CRLA attorneys were "with the government" was made by the host of the public affairs program as he was signing off, too late for the CRLA attorneys to jump in and correct him, if indeed they were still listening. Mr. Hoerger of CRLA did testify that, as early as April 13th, he had concluded that injunctive relief was not available; but he also testified that several staff disagreed and that "ultimately"--he does not say when--he prevailed. (X:79-80.) The complaint, as approved by CRLA's director of litigation and filed on May 10th, does include prayers for injunctive relief, so the most reasonable interpretation of the events is that he did not prevail until after that.

Richard Quandt, an attorney who represents growers in the Santa Maria area, testified that, while driving home on the evening of May 11th, he heard a news broadcast on Station KUHL in which the broadcaster, after briefly describing the situation at Furukawa, played a tape in which Ms. Barrett stated that Furukawa had breached its agreement with its employees and reduced their wages to $4.00 an hour and $.50 a box (II:122).[27]

The petitioner subpoenaed the transcripts of the two stories which ran that day on KUHL. (Petitioner's Exhibits #15 and #16.) Both indicate the spot where Ms. Barrett's taped comments [which were not transcribed] were to appear. In one, the "lead in" to her comment reads: "She says even the new workers are getting a raw deal...." This suggests that when she spoke of $4.00/hr and $.50/box she was talking about the rate which Furukawa had indeed established for workers hired after April 26th. (X:61.) A careful reading of her own testimony about what she saw on the blackboard in front of the Furukawa office indicates that she was aware that they would be receiving less than former sharecroppers.[28] Thus the Employer--and Mr. Quandt--appear to have misunderstood her to say that the wages of all employees were being reduced when, in

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[27]On April 10th, Furukawa implemented its initial proposal calling for those hired before April 26th to receive $4.60 per hour and $0.70 per box, and those hired after that to receive $4.00 per hour and $0.50 per box for the first 500 hours of employment.

[28]There is some confusion because of her testimony that the message she saw on the blackboard differed from that found in the photograph of the blackboard produced by the employer (Employer's Exhibit #42); but even so, it is evident that she was aware that the lower rate applied only to new employees.

fact, what she said was that new employees would be earning less than others.[29]

Two workers--Felicitas Esparza and Salvador Becerra--testified to hearing a broadcast on Radio Pantera near the time of the election in which attorneys stated that they had filed a lawsuit against Furukawa for an amount in excess of a million dollars (V:7, 110); Ms. Esparza recalled the attorneys identifying themselves as being from CRLA. (V:7.)

The filing of the lawsuit by CRLA and the amount sought were accurately reported and, as pointed out earlier (supra, pages 25-27), legally justified. There was nothing wrong with bringing those matters to the attention of affected workers.

b. UFW Conduct Leading Up to the Election

Two workers—Maria Urbano and Jose Cerda—testified that shortly before the election they heard, on more than one occasion., a broadcaster on the local Spanish language station, Radio Pantera, announce that Furukawa workers would be earning $4.00/hr. and $0.50/box. (1:71-72; 11:115.) Ms. Urbano testified that no source was given for the information and indicated that other workers were listening to the same broadcast (1:81); Mr. Cerda said that the announcer ascribed the information to the UFW, but did not know if other workers were listening. (11:116.)

[29]Contrary to Mr. Quandt's testimony, the transcripts do not indicate that the upcoming election was mentioned, and Ms. Barrett specifically denied mentioning it.

I believe that Urbano and Cerda accurately stated the rate they heard. It is, however, impossible to say whether the announcer mistakenly applied the rate to all employees, or whether he mentioned that it affected only new employees and, if so, whether he made it clear that new employees were those hired after April 26th and not those who had been sharecroppers but only recently became employees. (See Employer's Exhibits #5 and §18.) In any event, it would be improper to fault the UFW for something which may well have been due to a misinterpretation by a radio announcer or a misunderstanding on the part of his listeners.

The Employer introduced copies of two union leaflets. (Employer's Exhibits #11 and #33.) Both are written in the fullblown rhetoric of union organizational literature, but neither goes beyond the permissible limits of campaign "puffing"; in fact, the reference to "stealing 70 cents for each box" [in Employer Exhibit #11] seems to undercut the Employer's argument that the union was misrepresenting the rate to be 50 cents per box.

The Employer also introduced testimony concerning alleged threats made by the union representatives who visited the fields to speak with workers just before the election. One worker, Felicitas Esparza, testified that she and 60 other workers were told by a short, slim UFW representative with a moustache that if

"we didn't join them, we won't have work."[30] (V:19.) But later in cross-examination she was asked:

> "On any one of these days when the union organizers went out to your crew during the noon hour, did the union threaten to cause any employees to lose their jobs as a result of not signing the authorization cards?"

And she replied: "I don't know." (V:41.)[31]

Another worker--Theresa Arevalo--testified that twice a day throughout the campaign her crew of 60 or 70 workers was visited by a UFW organizer who told them:

> "...that [it] didn't matter, [whether] we sign or not, that wouldn't give us, that wouldn't take away our right to vote." (11:87.)

And also repeatedly told them:

> "...that if we didn't sign that the union could take away our job because it was either no union or union and if the union happened to come in the union would take our jobs....
>
> "...that we had to go to every single [union] meeting they had. If we didn't go to a meeting that we would be fined or our jobs could possibly be taken away. They had other ways of punishing but those were the most likely." (11:88.)

I find it difficult to accept Ms. Arvelo's testimony. The

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[30]The employer contends Monica Alfaro' identified the speaker as Lupe Castillo, and goes on to argue that Castillo's failure to appear and deny the statement constitutes an admission. (Employer's Post Hearing Brief, p. 18.) But the identification is questionable: Esparza described the person who made the statement as "a little shorter, slim and with a moustache". (V:19.) Ms. Alfaro described Castillo as slender, light complected and boyish looking (X:3-4); she said nothing about his being short or having a moustache.

[31]Just prior to that she likewise repudiated her earlier testimony that she had heard a similar threat at Minami Park. (V:40; see page 21, supra.)

Union representatives who testified all denied threatening workers with loss of employment if they failed to sign cards or attend meetings, and their testimony was corroborated by two witnesses who were working in the crews they visited. Furthermore, no organizer in his right mind would tell prospective members that they could be fined or fired for failing to attend every union meeting. Nor does it make much sense for an organizer tell workers that signing a card does not require them to vote one way or the other, while, at the same time, threatening them with loss of employment if they fail to support the union.

I find that Ms. Arevalo's admitted antagonism toward unionization[32], her poor memory[33], and the difficulties inherent in understanding and comprehending the obligation of workers to become members where a union has been certified[34], all colored her recollection of the events, rendering her testimony unreliable.

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[32]See footnote 22, page 21, supra, and 11:91-92.

[33]Shehad the Minami Park meeting occurring on the weekend (11:85) and testified that she was paid only $0.25 per box. (11:96.)

[34]The legal complexities of the NLRA's union shop provision and the ALRA's "good standing" provision are such that workers can easily misunderstand their obligation to become union members and the power of the union to discipline them if they fail to do so. See: NLRB v. General Motors Corp (1963) 373 U.S. 734; Pattern Makers League of North America v. NLKB (1985) 473 U.S. 95, 105 S.Ct. 3064; Pasillas v. ALRB (1985) 156 C.A.3d 312; Beltran v. State of California (S.D.Cal. 1985) 617 F.Supp. 948, revs'd on other grounds, 857 Fed.2d 542 (9th Cir. 1988.)

c. Alleged Breach of the Pre-Election Campaign Agreement

On May 10th the parties agreed not to campaign "on the date of the election, May 12, 1989, from midnight to 6:00 p.m." (Employer's Exhibit #32.) The employer asserts that the radio broadcasts described above constitute a violation of that agreement.[35] However, it offered no proof that the UFW was responsible for the broadcasts[36], that it supplied the information to the broadcaster after midnight on May 12th[37], or that it knew the broadcasts would air on election day. Absent some such showing, I can conclude no more than Radio Pantera was acting independently in carrying out its normal broadcast function of reporting on matters of public interest to the Spanish language community in the Santa Maria Valley. It was not a party to the campaign agreement, nor was it functioning as a tool of the UFW.

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[35]Only Maria Urbano testified that she heard such a broadcast on the day of the election; Jose Cerda testified that it occurred three or four days before the election. (11:115.) The broadcasts containing information attributed to CRLA would only be relevant if it were shown that an agency or collaborative relationship existed between CRLA and the UFW. No such showing has been made.

[36]Indeed, when Ms. Urbano--the only witness who indicated that the broadcast occurred on the day of the election--was asked: "Did the voice on the radio say anything at all about where the information had come from that there was going to be a different price per box--per hour?" she answered: "No, they didn't say anything."(I:81.)

[37]That Mr. Cerda heard the same information 3 or 4 days before the election that Ms. Urbano heard on the day of the election would indicate that Radio Pantera obtained it long before the election.

ANALYSIS AND CONCLUSIONS OF LAW

It has long been the rule that:

> "The burden of proof is on the party seeking to overturn an election to come forward with specific evidence showing that unlawful acts occurred and that these acts interfered with employees' free choice to such an extent that they affected the results of the election." (TMY Farms (1976) 2 ALRB No. 58, citing NLRB v. Golden Age Beverage Co. (5th Cir. 1969) 415 Fed.2d 26 and NLRB v. Mattison Machine Works, (1961) 365 U.S. 123; see also, Bright's Nursery (1984) 10 ALRB No. 18; Agri-Sun Nursery (1987) 13 ALRB No. 19.)

For the reasons explained below, I conclude that the Employer has not met its burden.

I. The Relationship Between CRLA and the UFW

The centerpiece of the employer's case is its assertion that the election campaign was the collaborative effort of the United Farm Workers and California Rural Legal Assistance. In the preceding sections of this decision I have considered the evidence adduced in support of this contention and found it wanting. I therefore conclude that, throughout the campaign, each organization was pursuing its own distinct interests. That the filing of the law suit coincided with the election was not due to any synergistic scheme; it was the natural result of two organizations working as quickly as they could to carry out their own separate and distinct functions in the wake of the California Supreme Court's decision in S. G. Borrello & Sons, Inc. v. Department of Industrial Relations.

To be sure, the decision itself--and especially its timin--endowed the situation with considerable notoriety and created an

unusual degree of urgency. But union organizing seldom occurs in a vacuum; often it comes in response to a real or perceived injustice. One cannot criticize an election because the voters feel strongly about the issues; indeed, the genius of the election is that it provides a real and effective outlet for their convictions.

I therefore recommend the dismissal of Objection No. 1 because the Employer has failed to satisfy its burden of proving that California Rural Legal Assistance or any of its representatives acted as agents of the United Farm Workers.

II. CRLAs Conduct during the Election Campaign

An election will only be set aside because of conduct attributable to third parties where it is so aggravated as to render it impossible for employees to express their free choice in the selection of a collective bargaining representative. (Agri-Sun Nursery, supra; Ace Tomato Company (1986) 12 ALRB No. 20; NLRB v. 1199, National Union of Hospital & Health Care Employees (4th Cir. 1987) 824 Fed.2d 318, 322; NLRB v. Idab, Inc. (11th Cir. 1985) 770 Fed.2d 991, 999.)[38]

The Employer has alleged three areas of misconduct on the part of CRLA: (1) that it was aware of and involved in planning the work stoppage on the morning of April 5th in which employees were threatened when they attempted to obtain packing boxes;

[38]It is also probably true that stronger proof is required where the third party is not a union supporter, but a person or entity with no direct involvement in the campaign; for example, a newspaper or public official.

(2) that it filed a lawsuit which was totally lacking in merit; and (3) that it conducted a media campaign in which false and misleading information was promulgated about the company.

The employer was unable to produce any evidence linking CRLA to the threatening conduct which occurred on the morning of the work stoppage. No CRLA representative was present at the meeting in Nipomo where the stoppage was planned (pages 8-9, supra); CRLA did not obtain a copy of the Condiciones which were prepared at that meeting until the following day (page 12, supra); and Ms. Barrett credibly testified that she first learned of the stoppage when Ms. Jacka called her on the morning of April 5th, after the threats had occurred (page 12, supra).

As for the lawsuit, CRLA provided a satisfactory explanation for every specific allegation which was called into question, and the Employer offered no evidence to rebut those explanations. (Pages, 25-27, supra.)[39] And the same is true of the letter which CRLA wrote to prospective clients. (Pages 27-28, supra.)

As for the false and misleading media campaign, there was, first of all no "media campaign" in the derogatory sense used by the Employer. All of the evidence, both from representatives of

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[39]The filing of a lawsuit, involving as it does the constitutional right to petition for the redress of grievances, has been accorded special protection in cases where its filing is alleged to have intimidated employees in violation of the unfair labor practice provisions of the NLRA. Bill Johnson's Restaurants v. NLRB (1983) 461 U.S. 731. There is good reason to afford similar protection to lawsuits which, like this one, are filed during a representation election; especially, when, as here, they are filed by a third party who is acting independently of the parties to the election.

the media and from CRLA, indicates that the impetus for the reporting of the stoppage, the lawsuit, and the company's response came from the media itself, and not from CRLA. To the extent that CRLA representatives participated in public affairs programs, they were operating well within the CRLA's mission of providing necessary information to the constituency it was created to serve.

Of the three specific misrepresentations alleged, one--that CRLA attorneys were "with the government"--came not from CRLA but from the radio broadcast host and had nothing to do with the election; another--that a preliminary injunction would be sought--was both trivial and unrelated to the election; and the third--that "new workers" would receive $4.00/hr and $0.50/box--was accurate, though it may have been misunderstood by listeners.

In NLRB v. 1199, National Union of Hospital & Heath Care Employees, supra, a news anchor inaccurately described an election in progress in a manner which could have deterred some employees from voting. In upholding the election and consequent certification, the Court Appeals said:

> "In particular, we decline to hold an election hostage to every stray piece of public commentary on it. There is no indication that the free choice of employees was compromised." 824 Fed.2d at 322.

In U.S. Gypsum (1949) 81 NLRB 1259, an employee sued his employer for assault and imprisonment; and, on the day before the election, the local newspapers publicized the lawsuit. The Board dismissed the Employer's objections, saying:

> "The main burden of the employer exceptions relate

> to the Regional Director's finding that the publicity attendant upon the filing of suit by an employee against the Employer, and claimed by the Employer as inhibiting free choice of bargaining representatives, did not constitute a basis for setting aside the election. Although we have on occasion set aside an election where statements publicly made on the eve of 1the election were coercive in character, we fail to see that the publications herein concerned were in fact coercive, or that they prevented the free choice of bargaining representatives among the employees in the appropriate unit." (Id. at 1260.)

The same can be said about the misrepresentations here alleged.

I therefore recommend the dismissal of Objection No. 2 because the Employer has not carried its burden of proving that CRLA made misrepresentations about the employer, let alone that they were aggravated or tended to interfere with employee free choice.

III. UFW Conduct during the Election Campaign

a. Alleged Misrepresentations

The Employer's contention that the election should be set aside because of campaign misrepresentations relies heavily on the "deceptive misrepresentations" attributed to CRLA which, according to the Employer, went beyond the tolerance accorded to typical campaign misrepresentations by the NLRB in Midland National Life Insurance Co. (1982) 263 NLRB 127, because they came from a third party who had concealed its agency relationship with the UFW and who used the judicial proceedings in which it was involved to endow its misrepresentations with a false legitimacy.

Since I have concluded that CRLA is not the agent of the UFW[40], much of them Employer's argument falls by the wayside, leaving only the misrepresentations attributed directly to the UFW: The statement that the rate would be $4.00/hr and $0.50/box made by an broadcaster on Radio Pantera which one worker said was attributed to the UFW, and possibly the allegations contained in one or the other of the union leaflets. (Employer's Exhibits #11 and #33.)

In Midland National Life Insurance Co., supra, the NLRB reversed earlier precedent and refused to inquire into the truth or falsity of campaign statements. It held that elections would no longer be set aside because of misrepresentations or misleading statements, but it did say: "We will, however, intervene in cases where a party has used forged documents which render the voters unable to recognize propaganda for what it is." (Id. at 133.)[41]

The misstatements attributed directly to the UFW are clearly not objectionable under the Midland standard; however, the ALRB has yet to accept or reject Midland as applicable NLRB precedent. (See Inland and Western Ranches (1985) 11 ALRB No. 39, p. 15, fn. 4.) As matters presently stand, our Board will set aside an election due to a campaign misrepresentation whenever the

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[40]And, furthermore, that it engaged in no impermissible conduct. (Pages 37-40, supra.)

[41]Furukawa's original argument was that CRLA's sham judicial machinations were tantamount to forgery.

misrepresentation is serious enough to prevent employees from expressing "a free and uncoerced choice of a collective bargaining representative." (Sakata Ranches (1979) 5 ALRB No. 56; D'Arrigo Bros, of California (1977) 3 ALRB No. 37.) This standard falls somewhere between Midland Insurance and the NLRB's earlier Hollywood Ceramics[42] standard. Under it, the Board does not close its eyes to truth or falsity (Midland), but neither does it concentrate on an examination of the accuracy of the statement, divorced from its effect on the outcome of the election (Hollywood Ceramics). (See also Triple E Produce Corp. v. ALRB, (1983) 35 Cal.2d 42, 49.)

The campaign rhetoric of the leaflets, which was more in the nature of argument than of factual assertion, was not such as would prevent workers from expressing their free and uncoerced choice. With respect to the radio announcement, it is impossible to determine whether the announcer mistakenly applied the rate to all employees, or whether he mentioned that it affected only new employees and, if so, whether his listeners misunderstood him to refer to former sharecroppers rather than workers hired after April 26th. (Pages 31-32, supra.) To fault the UFW for something which may well have been due to a misstatement by a radio announcer or a misunderstanding by his listeners would indeed be, "to hold an election hostage to every stray piece of public commentary on it." NLRB v. Local 1199, National Union of Hospital

[42]140 NLRB 221, 224 **(1962).**

etc. Employees, supra; see also, U.S. Electrical Motors (1982) 261 NLRB 1343, 1344 [No violation where a reporter mixed accurate information from the employer with his own editorial interpretation that the plant would close if the union won].

b. Threats Made to Those Desiring to Work on April 5th

The threat to "take out" those who sought to pick up boxes early in the morning of April 5th came from an autonomous group of workers who had no relationship to the UFW at the time, and who were attempting to obtain concessions from their employer which had nothing to do with union representation. (Pages 10-11, 12-13, 22, supra.) It was not until after the threats were made that the UFW appeared on the scene; and, even then, its representatives did not enter the property. Moreover, the conduct occurred five days before the filing of the first election petition [which was later withdrawn] and more than five weeks before the election.

In Exeter Packers, Inc. (1983) 9 ALRB No. 76, the Board refused to set aside an election involving more serious violence, occurring closer to the date of the election:

> "The allegations of pre-election violence relate to two incidents, both occurring at Exeter's ranches in the King City area on September 23, 1982, two weeks before the representation election. Both incidents involved a strike or work stoppage aimed at securing a pay increase. All witnesses to the incidents denied observing any banner, pins or other paraphernalia identifying the perpetrators of the misconduct as being connected in any way with the UFW. Neither is there any evidence of contemporaneous UFW-sponsored strike activity in the area, [citation omitted.] The only testimony relating to UFW involvement in the work stoppage or the misconduct was properly discredited by the IHE. Because there is no credible evidence that

> the union had even begun organizing the employer's work force at the time of the field rushing incidents or that the perpetrators of the misconduct were involved in the union's organizing campaign, we cannot infer that employees' free choice was reasonably likely to have been affected at the election two weeks later." (Id. pp. 4-5.)

I therefore conclude that the threats which occurred on April 5th, both because of their timing and their lack of relationship to any organizational effort on the part of the UFW,[43] did not interfere with employee free choice in the election.

c. Threats of Job Loss for Failure to Support Unionization.

Proven threats, made to a number of employees by an union organizer, that those who fail to sign authorization cards will lose their jobs, would justify setting aside an election. (Select Nursery (1978) 4 ALRB No. 61.)

In the Findings of Fact, above, each threat about which testimony was introduced has been considered, evaluated, and found wanting: The very confusing testimony, with its loose ends and inconsistencies, about what occurred in the yard on the morning of the April 5th (pages 16-17, supra); the self contradictory and hearsay testimony about what was said by union representatives at Minami Park (pages 21-22, supra); and the unreliable testimony of one witness (pages 33-34, supra) and the unrecollected testimony of another (pages 32-33, supra) as to

[43]Situations like this and like that presented in Exeter Packing suggest that the standards for judging non-party threats as set forth in Westwood Horizons Hotel (1984) 270 NLRB No. 116 (adopted by the ALRB in T. Ito & Sons Farms (1985) 11 ALRB No. 36) should include a consideration of the degree to which the threat was related to the union election, rather than to some other end.

what was said by the Union organizers who visited the crews before the election.

Based on the conclusions reached in sections III(b) and (c), above, I recommend the dismissal of Objections No. 4 and No. 6. The Employer has failed to satisfy its burden of proving that authorization card signatures were obtained by coercion or that violent conduct, threats of violence, and threats of job loss created an atmosphere of fear and coercion rendering employee free choice impossible.

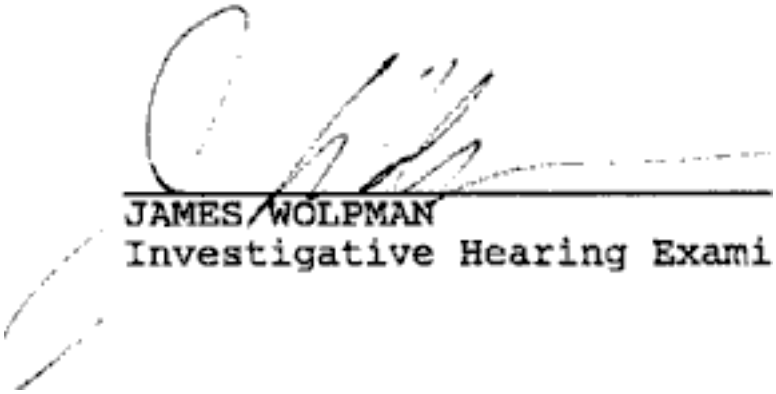
IV. The Alleged Breach of the Pre-Election Agreement

Because the radio broadcast on Radio Pantera is not attributable to the UFW, either factually (supra, pp. 34-35) or legally (U.S. Electrical Motors, supra, 261 NLRB at 1344), and because CRLA was not an agent of the UFW, I find that there was no violation of the no campaign pledge in the Pre-election agreement. I therefore recommend that Objection No. 3 be dismissed.

CONCLUSION

Having determined that each of the Objections set for hearing should be dismissed, I further recommend that the election conducted among the agricultural employees of Furukawa Farms, Inc. on May 12, 1989 be upheld and that the United Farm Workers of America, AFL-CIO, be certified as the exclusive collective bargaining representative for those employees.

DATED: August 10, 1990.



JAMES WOLPMAN
Investigative Hearing Exami