BEFORE THE AGRICULTURAL LABOR RELATIONS BOARD

OF THE STATE OF CALIFORNIA

SAMUEL S. VENER COMPANY, Employer, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Petitioner.	)	No. 75-RC-3-R 1 ALRB No. 10

The employer in this matter objects to certification of an election won by the United Farm Workers of America, AFL-CIO (hereinafter, "UFW"), claiming that certain misconduct by the union, this Board, and another state agency affected the outcome of the election. Labor Code § 1156.3 (c).[1] We disagree for the reasons stated herein, and certify the election.

This election was held on September 8, 1975 among all the agricultural employees of the employer, pursuant to a UFW petition. Of the approximately 245 eligible workers, 202 voted for the UFW and 19 chose "no union". There were 22 challenged ballots and 3 void ballots.

The employer filed a timely objections petition, pursuant to section 1156.3 (c), raising five issues. Two of these were set for an evidentiary hearing; the other three were dismissed by the Board through its executive secretary. At the hearing, the employer made offers of proof concerning two of the dismissed objections;

[1]Unless otherwise indicated, all statutory references are to the Labor Code.

the hearing officer refused to permit an offer of proof concerning the third. Thereafter, the employer sought reconsideration of the dismissals, claiming that the Board lacked power to dismiss allegations in an objections petition, and that -- at any rate -- each of the dismissed claims was valid. The Board agreed to consider the request for reconsideration, based on the record of the hearing and on briefs submitted.

We turn now to the objections. The employer's first claim is that the union engaged in a misrepresentation of material facts by distributing a leaflet which falsely stated that the union had no initiation fee when the UFW constitution apparently requires such a fee.[2] The employer contends this conduct warrants setting the election aside on the basis of applicable NLRB precedent, in particular Hollywood Ceramics, 140 NLRB 221 (1962), in which the NLRB held that in order to preserve the "laboratory conditions" deemed essential to a fair election, an election should be set aside where there has been "a misrepresentation or other similar

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[2]The flier was in question and answer form; it stated in Spanish:

> "Question: Does one have to pay anything to join the Union. Answer: No! There is no fee for entering the Farm Workers Union. When we have negotiated a union contract here, you are going to pay only two percent of what you earn per month."

Article X, Section 2 of the UFW Constitution, adopted at its 1973 convention, provides:

> "Commencing January 1, 1974, each applicant for membership shall be required to pay an Initiation Fee of $25.00. An applicant who cannot immediately pay the Initiation Fee may sign an authorization for his employer to deduct the fee from his paycheck within seven days. However, the National Executive Board may waive or decrease the required Initiation Fee for agriculture laborers desiring to join an Organizational Committee in an area where there are no collective bargaining agreements. Persons obtaining Union membership by reason of full-time Union service shall be exempt from an Initiation Fee."

campaign trickery, which involves a substantial departure from the truth, at a time which prevents the other party or parties from making an effective reply, so that the misrepresentation, whether deliberate or not, may reasonably be expected to have a significant impact on the election". Id. at 224.

There is serious question at the outset whether this Board is bound by or should follow the Hollywood Ceramic rule in its entirety. The "laboratory conditions" analysis upon which that rule is premised takes as its model "a laboratory in which an experiment may be conducted, under conditions as nearly ideal as possible, to determine the uninhibited desires of the employees". General Shoe Corp., 77 NLRB 124 (1948). If the "nearly ideal" conditions are found to be lacking, then the election is set aside and the "experiment" conducted anew. That model may have limited application, however, to agricultural employment. The typically seasonal and often transitory nature of that employment makes repetition of the experiment difficult, particularly if the harvest season in which the original election was conducted is over by the time the election is reviewed. Setting an election aside in the context of agricultural employment thus carries implications beyond those involved in the normal industrial situation.

Even if we were to apply the Hollywood Ceramics criteria, however, we would not set this election aside on the basis of the union's leaflet. Although testimony was conflicting, it appears that the UFW flier was first distributed two or three days before the election to workers coming across the Mexican border. A copy of one such leaflet was found in the company parking lot.

The union contended that misrepresentation had occurred because/ despite its constitution, it does not charge an initiation fee. Scott Washburn, director of the UFW's San Ysidro office, testified that he had worked for the union in the San Diego area since March, 1974; during that time initiation fees had not been collected from workers joining the union. This testimony was corroborated by a worker at a neighboring ranch, who stated that neither he nor other workers whom he knew at that ranch and at the Samuel Vener Company had been required to pay a fee upon joining the UFW. Finally, a copy of a letter to a Board agent signed by Cesar E. Chavez, president of the UFW, was introduced. It stated: "On December 21, 1973, the National Executive Board of our Union voted to authorize me, as President, to grant exemptions in special circumstances to the $25 initiation fee to new members. In practice, with the tacit approval of the National Executive Board, the initiation fee has never been collected."[3]

On this record, we find that the employer failed to sustain its burden of proving that a misrepresentation occurred. No evidence was presented that the UFW in fact charges an initiation fee, contrary to the representation in its leaflet. The employer showed only that the union's constitution provides for such a fee, a provision which apparently has not been enforced.

As an alternate position, the employer contends that if the union was not charging an initiation fee, its waiver of those fees constitutes an unfair inducement to employees in violation of the Act, and represents a "promise of benefit" precluded by Labor

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[3]The employer objected to admission of the letter citing the hearsay and best evidence rules. Such objections might be well

(fn. cont. on p. 5)

Code Sections 1154(a) (1) and 1155. The employer relies, in that regard, upon the United States Supreme Court's decision in NLRB v. Savair Mfg. Co., 414 U.S. 270 (1973). In Savair, however, the waiver of fees was offered only to workers who joined the union before the election, thus providing an improper economic inducement to support the union which is lacking here, where the waiver apparently remains effective after the election. [4] Indeed, in Savair the Supreme Court specifically suggested that an unconditional fees waiver which remains open after the election is valid and does not constitute an unlawful promise of benefits. 414 U.S. at 274, n. 4, 279, n. 6. Since Savair, that distinction has been recognized by both the courts and the Board. NLRB v. Stone & Thomas, 502 F. 2d 957 (4th Cir. 1974); B.F. Goodrich Tire Co., 209 NLRB No. 182 (1974).

The employer's second objection was that four cars with UFW slogans were visible from the voting booths. The testimony

fn. 3 cont.

taken in a judicial hearing. However, section 20390 of the Board's emergency regulations provides that hearings on elections objections are "investigative hearings" where "Strict rules of evidence shall not apply". The purpose of that rule is to permit the Board the widest scope of investigation into election proceedings. In considering evidence inadmissible under the formal rules of evidence, however, the Board may take note of the objections in deciding what weight to accord such evidence. Here the Chavez letter was consistent with the testimony of the union's witnesses; the Board accepts the letter as corroborative evidence.

[4]It is possible, as the employer argues, that in the future the UFW may begin enforcing the fees provision of its constitution. However, we decline to set aside an election based on such speculation.

indicated that the vehicles were 30, 50, 75 and 100 feet respectively from the polls, and that each displayed a bumper sticker bearing the slogan, "Ahora es cuando" ("Now is the time") and a black eagle, the UFW symbol. The cars belonged to employees and were parked in the parking lot where the election was being held. A company representative admitted seeing similar bumper stickers on workers' cars in the lot during the weeks preceding the election. The employer had proposed the lot as the site for the voting.

We hold that the presence of these four bumper stickers was not prejudicial to the fair conduct of the election. Herota Brothers, 1 ALRB No. 3 (1975). Although in Herota, the union bumper sticker was not visible from the polls, the National Labor Relations Board has repeatedly upheld elections where comparable material was brought into the polling area. E.g., NLRB v. Crest Leather Mfg. Corp., 414 F. 2d 421 (5th Cir. 1969), enforcing 167 NLRB No. 155 (1969). Obviously it is preferable if electioneering materials are not

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evident in the voting area, but we do not think that voters are so easily swayed that their free choice will be overriden by glimpsing a few slogans.[5]

We turn to the objections which we dismissed, and which we agreed to reconsider in response to the employer's request. We are first confronted with the contention that we lack power to dismiss any allegations in an objections petition. In support of this claim, the employer relies on section 1156.3(c) of the Labor Code, which provides that upon receipt of such a petition, "the Board, upon due notice shall conduct a hearing to determine whether the election should be certified". The employer contends that the use of "shall" makes this provision mandatory, requiring the Board to set a hearing on all allegations.

We disagree. According to that view, we would be required to hold hearings on claims, for example, that the election should be overturned because all the voters had black hair or because the Agricultural Labor Relations Act or various of our regulations are alleged to be unconstitutional.

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[5]As the employer points out, our Representation Case Guidelines and Manual of Procedure provides that "No electioneering will be permitted at or about the polling place during the hours of voting". (Page 63.) The purpose of the Manual is to instruct Board agents on how to create the best conditions for conducting an election. However, minor violations of these guidelines, which do not materially interfere with voter free choice, will not be grounds for invalidating an election. A similar conclusion has been reached under the NLRA. See NLRB v. Laney & Duke Storage Warehouse Co., 369 F. 2d 859 (5th Cir. 1966), enforcing 151 NLRB No. 28 (1965).

The NLRA cases cited by the employer do not support its position that any electioneering in the polling area requires invalidation of the election. In Mutual Distributing Co., 83 NLRB No. 74 (1949), the Labor Board refused to set aside an election at which a union official stood silently within sight of the employees as they voted. Milchem, Inc., 170 NLRB No. 46 (1968), involved prolonged conversations between a union representative and prospective voters.

We do not think the Legislature intended such futile exercises. The use of the word "shall" makes a provision mandatory "unless the context otherwise requires". Labor Code, §§ 5, 15. The statutory scheme in Chapter 5 of the Agricultural Labor Relations Act evidences a legislative intent to streamline the elections process, as is appropriate because of the seasonal nature of agriculture. See Interharvest, Inc., 1 ALRB No. 2, n. 1 (1975). Thus, the Act provides that an election must be held within seven days of the filing of a petition [section 1156.3(a)] and that objections must be filed within five days after an election is completed. §§ 1156.3(c), (d). This legislative purpose would be frustrated if certification could be needlessly delayed by hearings on objections which could not constitute grounds for setting aside an election.

We therefore reaffirm our authority to dismiss objections alleging conduct which would not warrant overturning the challenged election or which are in the nature of challenges to the Act or our regulations. However, in this case, we agreed to reconsider whether these objections were properly dismissed, and we do so now.

The first claim was that agents of the UFW unlawfully trespassed on the employer's property to solicit votes for the election. The offer of proof consisted of proposed testimony that from August 20, 1975 until the election on September 8, 1975, UFW organizers entered the lunch area on the employer's premises, which was posted against trespasssing, talked to workers, distributed leaflets, and obtained signatures on authorization cards as the workers ate lunch. There was no evidence that the union's conduct was other than peaceful.

The activity alleged was less intrusive than that in Retail Store Employees, Local 1001, 203 NLRB No. 75 (1973) , where union representatives entered a company luncheonette in violation of the employer's no solicitation rules and distributed union leaflets and authorization cards to workers during lunch. Upon being requested to leave, the organizers refused, threatened to file legal action against the company, and engaged in an hour-long verbal exchange with the police, who were called to eject them. The Labor Board there found that because the organizers were peaceful and did not disrupt production, their conduct did not restrain and coerce employees within the meaning of section 8(b)(1)(A) of the NLRA. 29 U.S.C. § 158(b)(1)(A).

Though we recognize that the function of an unfair labor practice proceeding is different from that of an objections proceeding, we think the reasoning of Retail Store Employees applies here. The question in reviewing conduct affecting an election is whether the activity interfered with workers' ability to make a free choice concerning a collective bargaining representative. Peaceful, non-disruptive organizational activity, even if accomplished through an arguable trespass, generally has no such effect. In fact, as we determined in adopting our access regulation (8 Cal. Admin. Code, § 20900), a limited right of access to an employer's premises to talk with employees concerning the benefits of unionism is essential to the exercise of the organizational rights granted by our Act. § 1152.

We note that the employer did not allege that the organizers' conduct here exceeded the boundaries of our access rule.[6] We conclude that the election should not be set aside on this ground.

The employer's next objection is directed at the use of symbols on the ballots in the election. By regulation, this Board has provided that any labor organization with a distinctive emblem may have it displayed on ballots in elections in which the union is a party. To designate the choice of "no union", we adopted a symbol consisting of a circle with a diagonal slash through it, with the word "no" written in the center. 8 Cal. Admin. Code, § 21000. That rule was adopted after a hearing at which witnesses testified that a significant proportion of farm workers were illiterate in all languages, and would not have any way to understand the choices on the ballot.

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[6]We express no opinion as to the circumstances under which organizers' entry onto the employer's property beyond that permitted by the rule may be grounds for setting aside an election.

During most of the relevant period here, union organizers did not have an enforceable access right, either because our access regulation had not yet been adopted or because the Board had been enjoined from enforcing it. Consequently, we assume for purposes of argument that the employer might have sought to have the UFW organizers arrested under Penal Code, section 602. That fact, however, does not control our determination here. In this matter we are concerned only with whether the organizers' conduct interfered with voters' free choice. See Retail Store Employees, Local 1001, supra. On the facts presented, we hold that it did not.

We adhere to the reasoning which led us to adopt the regulation and reaffirm our dismissal of the employer's objections to the use of symbols. First, we reject the notion that permitting the UFW to have its eagle on the ballot constituted electioneering by the union in the polling area. As we noted, the Board determined that the use of symbols is necessary to allow illiterate workers to vote. Since each of the choices on the ballot is represented by a symbol, the rule does not favor one party over another. NLRB decisions, cited by the employer, which prohibit distribution of sample ballots marked to indicate a particular choice (e.g., Allied Electric Products, Inc., 109 NLRB No. 177 (1954) are therefore distinguishable.

Second, we disagree with the contention that the employer should have been permitted to use its symbol to indicate the "no union" choice. The company is not synonymous with "no union". A worker may feel loyalty to his or her employer but still wish to be represented by a union. Use of a company trademark on the ballot might confuse voters who do not realize that by marking the box indicated by the company symbol, they are voting against union representation.

Third, we cannot accept the employer's claim that the symbol chosen to represent a vote for "no union" is unclear. The circle with a diagonal slash is a long-standing, internationally recognized symbol for "no" which would be familiar to voters, particularly those from foreign nations. Finally, we reject the argument that symbols were unnecessary in this election because only 12 of the 240 voters were illiterate. Those 12 workers had an equal right to vote; use of symbols allowed them to understand

the ballot. The literate employees could hardly have been prejudiced by the use of symbols since, even if they did not recognize one or more of the emblems, they could read the ballot.[7]

The employer's final objection was that, during three unidentified weeks in 1975, personnel of the California Employment Development Department (EDD) in San Ysidro referred farm workers applying for state financial assistance to the UFW office there for help in filling out forms required to obtain financial aid, and that the union used this opportunity to solicit the workers' signatures on the authorization cards. The hearing officer refused to permit an offer of proof on this matter. However, we adhere to our dismissal of this allegation on the ground that the declaration submitted in support thereof failed to establish a prima facie case of conduct affecting the outcome of the election. Emergency Reg., § 20365(a).

First, insofar as the allegation relates to the gathering of the union's showing of interest, the matter is not review-able in a post-election proceeding. Emergency Reg., § 20315(c). Furthermore, nothing in the petition or declaration draws any connection between the conduct complained of and this election. There is no suggestion that any of the workers referred by EDD

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[7]We also reject the employer's argument that a hearing was necessary to determine whether the UFW eagle constituted a "distinctive symbol or emblem", as required by the regulation. That contention directly contradicts the employer's claim that it was prejudiced by the use of symbols because the UFW eagle symbol had been publicized for ,a long time, whereas the employer had no similar opportunity to acquaint workers with the "no union" symbol. We agree that the black eagle has long been a distinctive logo of the UFW, and take official notice of that fact. Evid. Code, § 451(f).

was ever employed by this employer, or voted in this election. Nor are we even told when in 1975 this activity occurred.[8] Consequently, there is no showing that the conduct had any effect on this election.

The United Farm Workers of America, AFL-CIO is certified as the bargaining representative of all the agricultural employees of the employer.

Certification issued.

Dated: November 25, 1975

Roger M. Mahony, Chairman

LeRoy Chatfield

Joseph R. Grodin

Richard Johnsen, Jr.

Joe C. Ortega

[8]The supporting declaration, signed by the owner of a ranch near the Samuel Vener Company, stated in pertinent part:

> On or about August 26, 1975 I had a conversation with Mr. Les Tachiki, who is a representative of the California Employment Development Office and Farm Labor Information at 443 East San Ysidro Boulevard, San Ysidro, California. I have dealt with Mr. Tachiki for approximately five (5) years. His job involves referral of farm labor workers to growers for employment. My conversation with Mr. Tachiki took place at the Otay Ranch in Chula Vista, California.
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> In my conversation with Mr. Tachiki he informed me that for at least three (3) weeks earlier this year his office has been directing farm worker applicants for State of California financial assistance to the United Farm Workers Union office in San Ysidro to obtain the financial assistance; but that the Union, at the same time had used this opportunity to have the farm workers sign Union authorization cards. Mr. Tachiki mentioned that many hundreds of workers had been sent to the Union office in this way.