BEFORE THE AGRICULTURAL LABOR RELATIONS BOARD

OF THE

STATE OF CALIFORNIA

J. R. NORTON, CO., Employer and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Petitioner and . GENERAL TEAMSTERS, WAREHOUSEMEN, AND HELPERS UNION LOCAL 890 et al, Interested Party	)	75-RC-16-M 1 ALRB No. 11

On September 2, 1975, the United Farm Workers of America AFL-CIO (hereafter "UFW") filed a petition for certification pursuant to Section 1156.3(a) of the Labor Code requesting a representation election among all the agricultural employees of the J. R. Norton Company at its Bengard-Garlinger Ranch in Monterey County, California.

The Salinas Regional Office of the Agricultural Labor Relations Board directed an election be held on Tuesday, September 9, 1975.

The ballots in that election, along with others were impounded pursuant to Board order pending determination of the multi-employer bargaining unit issue in Eugene Acosta, et. al., 1 ALRB No. 1 (1975). When the Board on the afternoon of September 17, 1975 determined that single employer units were appropriate,

it ordered the impounded ballots be counted forthwith.

That decision was conveyed by telephone shortly after 5:00 PM on September 17 to Paula Paley, Acting Regional Director of the Salinas Regional Office, who in turn attempted to serve notice by telephone on the parties that the ballot count would commence at 7:30 PM that evening in the Town House Motel in Salinas.

Beginning at about 8:30 PM on September 17, 1975 and continuing until about 4:00 AM the following morning, Board agents unsealed the previously impounded ballot boxes and tabulated the votes in the order in which the elections had been held. The results of the J. R. Norton Company election were 74 votes for the UFW, 31 votes for no union, 3 challenged ballots, and 4 void ballots.

Thereafter, the employer filed a timely petition under Labor Code Section 1156.3(c) asking the Board to set the election aside on the ground that the employer was not given adequate notice of the Regional Director's decision to count the ballots on the evening of September 17 and, as a result, the employer was precluded from having its representatives or observers present when the ballots were tallied.

At the October 21, 1975 hearing on the employer's objection petition, Donald Dressier, the employer's counsel, testified that he was in his Newport Beach, California office when he was informed by telephone at about 5:30 PM that the impounded ballots would be opened and counted commencing at 7:30 PM that evening in Salinas. Dressier stated that he was unable to reach the employer's principals at either their office

or respective homes in Phoenix, Arizona, nor could he reach anyone at employer's Salinas office since it was then closed for the day. Furthermore, he stated that he did not have access to the unlisted telephone number of the Salinas sales manager nor did he know how to reach the employees who had served as company observers during the election. Dressier testified that in a 6:30 PM telephone conversation with Paula Paley, the Board's Acting Regional Director in Salinas, he informed Ms. Paley that the employer's principals were unreachable and, in any event, could not possibly be in Salinas before the following morning. He further testified that he requested a delay in the Norton count until about 9 AM the next day but that Ms. Paley reportedly advised him that she would direct the tallies in the order the elections were held, regardless of whether company representatives were in attendance. As a result, Dressier contends, the employer had no way of knowing whether the ballot box had been mishandled since the election, whether the ballots counted were in fact those cast by J. R. Norton employees, or whether the tally of votes was correct.

UFW attorney Sanford Nathan testified as his own witness and stated under oath that he was present at the ballot count along with several other employers whose elections were tallied that same evening, as well as attorneys for some growers, the executive secretary and legal counsel of the Grower-Shipper Committee of which the employer herein is a member, plus news reporters and an audience of from 200 to 300 persons. Nathan stated that when the J. R. Norton count took place at about

10:00 PM that evening, he and Roy Mendoza, a Teamster representative, shared the same table in the front of the room from which they witnessed the entire tally process and that no one other than Board agents touched either the ballot box or its contents.

Primitivo Medrano, the UFW's election observer for the J. R. Norton election, testified that both he and the employer's observer witnessed the closing of the ballot box by Board agents at the conclusion of the voting and that both observers affixed their signature and other identifying marks to the sealing tape. Medrano testified that he examined the ballot box before it was opened on the evening of September 17 and that it appeared to be in the same condition as when he saw it last, following the completion of the voting. According to Mr. Medrano, Board agents separated and then counted ballots, the results of which coincided with the official tally.

It is the employer's position that this election must be declared invalid since the employer did not have the opportunity for its observers to be present at the opening of the ballot box and the tallying of the ballots. As support for this argument, the employer cites the mandatory language of Emergency Regulation section 20365(a) which provides in pertinent part that "Each party shall have a representative present at the time ballots are counted who is authorized to receive such tally."

Although the language of the section is couched in mandatory terms, we hold that its thrust is not directed with the view of imposing a restriction on the Board's ability to proceed with the election tally in the absence of a party's representative,

but rather is designed to impose under normal circumstances an affirmative duty upon the parties to have a person present at the tally who is authorized to accept the tally upon completion of the election so that the period for filing of objections to the election begins to run at that time. To accept the interpretation advanced by the employer would subvert the purpose of this section and create a tool through which a party could conceivably delay the tally of the ballots indefinitely.

Our conclusion is supported by the language of Emergency Regulation Section 20360 which addresses itself to the situation of impounded ballots. This section provides in part that under such circumstances "the election will not be deemed complete until the parties are served with the tally of ballots." Thus, it becomes apparent that Section 20365 contemplates a tally of ballots immediately following the election while all principal parties are still present, whereas Section 20360 relates to those special situations where an impoundment may delay the ballot count for sometime and, in anticipation of the possibility that not all parties may be able to be present, provides only that the tally will be served on the other parties.

It is obviously desirable that all parties receive adequate notice of the tally of ballots in all cases, and be given an opportunity to have an observer present. Where there is any semblance of impropriety in the ballot count, or any substantial possibility for the occurrence of impropriety, failure to give such notice may well require setting the election aside. Here, however the integrity of the sealed ballot box and

the propriety of the ballot count itself have both been substantiated beyond reasonable doubt. Accordingly, the employer's objection concerning the failure by the Board agents to give the employer adequate notice of the tallying of the ballots is dismissed.

In addition to this objection raised by the employer, General Teamsters, Warehousemen and Helpers Union Locals 890 and 898 (hereafter "Local 890") requested the Board to set aside the election on the following grounds:

> "Truck drivers, stitchers, folders, hijo [sic] operators, and mechanical harvesting machine operators were wrongfully included in the unit in that historically they have a history of separate collective bargaining and do not share a community of interest of other agricultural employees. Further, by including them in the overall unit their contractual rights have been violated."[1]

Since similar objections were filed in a number of other cases by Local 890, this issue was noticed for a consolidated hearing before the Board on October 7, 1975, and Local 890 was requested to file with the Board, prior to the hearing, a memorandum setting forth in detail the factual and legal contentions upon which it intended to rely.

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[1]The Teamsters have a collective bargaining agreement which covers the classifications in dispute here, and therefore is a labor organization having an interest in the outcome of this proceeding. Thus, it is a "person" entitled to file a petition under Labor Code Section 1156.3(c).

In response to this request Local 890 filed a memorandum applicable to this and a number of other cases, including Interharvest,[2] objecting to the inclusion of truck drivers and related classifications in the bargaining unit on two grounds: (1) that they come within the coverage of the National Labor Relations Act and are therefore not"agricultural employees" within the meaning of the ALRA; and (2) that even if they are agricultural employees, they should be excluded because of their separate history of collective bargaining and separate community of interest, asserting that inclusion would violate the employees' constitutional and contractual rights.

The Board considered similar objections in Interharvest, Inc. 1 ALRB No. 2. There, the Board concluded as to the first ground for objection that, since the number of employees in the disputed classifications was insufficient to affect the outcome of the election, it would be appropriate to certify the UFW as bargaining representative for a unit consisting of all "agricultural employees". We left the status of employees in disputed classifications to be determined by the National Labor Relations Board in proceedings currently pending before that agency or, if prompt clarification is not forthcoming from the NLRB, then through proceedings for clarification or modification of the certification before this Board. As to the second ground for objection, we held in Interharvest, Inc., supra, that the Board had no juridiction to exclude agricultural employees on

[2]I ALRB No. 2 (1975)

the basis of the arguments presented in view of the mandate contained in Labor Code Section 1145.2.

During the hearing on this issue, it became apparent that the underlying factual consideration was indistinguishable from that presented to the Board in the Interharvest case when the parties agreed that the number of employees in the truck driver classifications was insufficient to affect the outcome of the election. When this similarity is coupled with the fact that the Board has previously considered in the Interharvest decision, supra, the identical legal arguments once again advanced by Local 890, the Board finds the Interharvest holding dispositive of the truck driver issue. Accordingly, the unit to be certified will be defined as "all agricultural employees of the J. R. Norton Company at its Bengard-Garlinger Ranch" and we leave the appropriate characterization of this classification in dispute to future determination by the NLRB or this agency.

Certification issued.

Dated: November 24, 1975.