BEFORE THE AGRICULTURAL LABOR RELATIONS BOARD

OF THE STATE OF CALIFORNIA

TOSTE FARMS, INC., Employer, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Petitioner.	)	No. 75-RC-11-S 1 ALRB No. 16

After a Petition for Certification was filed by the United Farm Workers of America (UFW) and pursuant to a Direction and Notice of Election/ an election was conducted on the employer's premises between the hours of 7:00 a.m. and 9:00 a.m. and 4:30 p.m. to 7:00 p.m. on September 17, 1975. Fifty-one votes were cast for the UFW, five voted no union and sixteen ballots were challenged.

The employer filed a timely Petition of Objections under Section 1156.3(c) of the Labor Code and a hearing on the objections was held on October 17, 1975.

The objections are directed to certain improper conduct of the Board Agent and of the UFW which allegedly affect the outcome of the election. 1. Board Agent's Conduct

The employer claims that the Board Agent

> "failed to keep a proper tally of the challenges and did not allow the Toste Farms, Inc., observers to keep such a tally."

The only significant testimony on this issue was developed by Mrs. Elena Martinez, the wife of the labor contractor and one of the employer's observers, who stated that she was in the car with the Board Agent and the two UFW observers en route to the school where the

ballots were to be counted. At one point, they stopped for gas and she left the car for two to three minutes. When she returned, she saw the Board Agent rummage in the trunk of the car, remove some papers and take them to the driver's seat where he counted the number of challenged ballots and entered the total on the bottom of a page.

There is no claim that the challenged ballots were in any way tampered with or that the number of these ballots noted by the Board Agent was different from the actual number challenged at the election site. There is no evidence that Mrs. Martinez or Mr. Duarte, the other observer, was forbidden to keep a tally as stated in the objection. In any event, the challenged ballots were not sufficient to affect the outcome of the election. This objection is dismissed.

The second objection to the Board Agent's conduct of the election is that,

> "proper identification was not required of the voters in the election thereby creating an opportunity whereby noneligible voters may have voted without challenge."

The Board Agent permitted voters to identify themselves by payroll check stubs or UFW membership card. Title 8 California Administrative Code § 20350 provides that the Board Agent may, in her discretion, determine the adequacy of identification supplied by prospective voters. The Board Agent and the employer's observers carefully checked the identification of each voter against the official eligibility list. One of the employer's observers testified that one voter had four UFW cards and the name of the cards did not match any name on the official list.[1] The ballot was challenged. The other

[1] It is not clear whether these cards were all the same or bore different names. The record does not reflect the nature of the card used.

observer for the employer claimed that two voters appeared with identification which bore names other than the name the observer claimed was their real name. The observer recognized the voters as employees eligible to vote. Recognition of an employee by an observer may, at the discretion of a board agent, constitute adequate identification. There is no evidence that the Board Agent abused her discretion.

2. Alleged UFW Misconduct

a. The employer claims that the union's conduct in the past distorted normal employment trends of farm workers in the area so that those who voted were not representative of the unit in question. The employer testified that in August, 1974, more than a year before the election, groups of UFW pickets threw rocks at employees of Toste Farms and therefore, according to the employer, about twenty employees, who would have voted against the union, did not return for the 1975 harvest season. The evidence is too speculative and the incident too remote to be regarded as conduct affecting this election.

b. The employer claims that eleven employees were "planted" by the union on the payroll in order to affect the outcome of the election.

No suggestion was made that these employees were on two payroll lists for the same dates of employment. No one challenged these voters and they were, therefore, presumably, properly on the eligibility list. The objection is not sustained by the evidence. To the contrary, the wife of the labor contractor who works for both Toste Farms and another employer testified that the labor contractor frequently moves employees between the ranches of the two employers.

c. This objection states:

"That the voters in this election were subjected to UFW organizing activity and influenced by way of illegal access to the private property of Toste Farms, Inc., prior to the election, thereby creating unfairness in the conduct of this election."

On two occasions, approximately a week to ten days before the election, UFW organizers appeared on the employer's premises at times other than the hours set forth in Title 8 California Administrative Code § 20900. One of these days, union organizers were on the premises during a "break time" while a machine was being checked. There was no evidence that the organizers refused to leave upon request. On another day, four union organizers "drove in and drove out" without talking to anyone or interrupting the work routine of the employees.

It is not clear whether the union organizers were on the employer's premises at times other than those permitted by the Board's access rule; in any event, their conduct was clearly de minimis and does not warrant setting aside the election.

d. The employer claims:

"That UFW representatives displayed flags and congregated at the entrance to the roads to the polling place stopping almost all cars on both entry and exit thereby wrongfully interfering with the proper conduct of the election."

A flag bearing the UFW symbol was displayed by a union adherent near the entrance to the employer's property a distance of 1,500 - 2,000 feet from the polling place. We are asked to set the election aside on the ground that it interfered with the right of employees to a "free choice."

We are concerned, of course, that once the polls have been opened, employees should be permitted to cast their vote in an atmosphere free of interference by the parties or their adherents. We do not consider the public display of the union insignia more that a quarter of a mile away from the polling booth as interference.

e. In addition, the employer contends that conversations between union agents and prospective voters during the election invalidated the election.

Jan Petersen, UFW organizer, had conversations with some of the employees who were proceeding in their automobiles to the voting areas. The conversation took place 1,500 feet from the polling place on a public road.

The election should be set aside, the employer argues, because the prohibition against conversations between the UFW organizer and prospective voters in the polling area[2] is governed by the so-called Milchem rule. This rule, enunciated by the NLRB in Milchem, Inc., 170 NLRB No. 46 (1968), simply stated, stands for the proposition that any conversations in the polling area between parties to the election and employees waiting to vote, regardless of the substance of the conversation, will invalidate an election. In Milchem, the union agent "...[s]tood for several minutes near the line of employees waiting to vote, engaging them in conversation... [w]e believe that the sustained conversation was prospective voters waiting to cast their ballots, regardless of the content of the remarks exchanged, constitutes conduct which, in itself, necessitates a second election..."

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[2] The employer contends that the entire area from the entrance to his property to the polling place should be considered a designated polling area because this was the only one entrance to the polls.

"... [T]his rule is nothing more than a preventive device to enforce the law against electioneering in polling places normally applied in political elections and in our representation elections."

We do not agree that the Milchem rule should be applied in this case. In our judgment, that area between the public road and the polling booth could not rationally be designated "in and around the polling place" as the employer's brief urges. The NLRB evidently considered the ban against electioneering in the same light as a proscription "normally applied in political elections." No one could reasonably argue that 1,500 feet from a polling booth in a political election would be off limits to conversations between partisans of apolitical party and a prospective voter. See also Marvil International Security Svc., 173 NLRB 1260 (1968) holding that the prohibition against conversations is limited to polling areas,

f. Checking off names of voters:

Jan Peterson, a representative of the UFW, while stationed on a public road 1,500 feet from the polling place, stopped the cars of voters and asked their names. She testified that she kept track of the names of those who had voted so that union representatives could attempt, to contact those who had not voted and provide transportation to voters who desired it. An hour and a half before the polls closed, she sent out people to offer rides to the polls to those who had not yet voted.

The employer urges that we overturn the election on the basis of decisions of the National Labor Relations Board which prohibit anyone from keeping a list of persons who have voted aside from the official eligibility list used to check off the voters as they receive their ballots. Piggly-Wiggly Eagle Food Centers, Inc., 168 NLRB No. 101 (1967). The Piggly-Wiggly case has its origins in the case of

International Stamping Company, 97 NLRB No. 101 (1951) where the son and sister-in-law of the president of a small company acted as election observers and as such, checked off the names of eligible voters as they left their work posts to vote. The NLRB overturned the election because of a long standing rule prohibiting observers from keeping a list of voters. The NLRB did not in that case, or in subsequent cases, articulate the reason for the ban on keeping track of voters other than the observation that such a ban would "guarantee free choice." The NLRB has certified elections where employees did not know their names were being checked off. A.D. Juillard and Co. 110 NLRB 2197, 2199, Tom Brown Drilling Company, Inc. 172 NLRB 1267.

The NLRB has found efforts by union representatives to get voters to the polls to be unobjectionable. For example, in Craddock-Terry Shoe Corporation, 80 NLRB 1239, 1240-41, an election was certified where an observer called union headquarters during the election and reported the names of union members who had not yet voted. Informing workers of the time and place of the election and insuring the vote is more difficult in elections conducted under the Agricultural Labor Relations Act than under the NLRB.

Elections held under the National Labor Relations Act are announced enough in advance to enable the Board and the parties to notify the voters. Voters often congregate in central places and can be notified together. Most voters can read. Employees work in a more concentrated area than do most agricultural employees in California. Therefore, shortly before an election begins, and at intervals thereafter, all employees can be notified, often over a public address system that the polls are open. In addition, NLRB decisions require that workers be employed by the employer on the day of the election, thereby increasing the chance that the worker is aware of the

opportunity to vote. See, for example Plymouth Towing Company, Inc. 178 NLRB 651. There is no such requirement under the Act Labor Code § 1157.

Agricultural workers may be scattered over many acres. They cannot be contacted by public address system. Board agents or union representatives may not know where particular crews are working or how many crews there are. In addition, eligible voters not working for the employer on the day of the election cannot be notified at the work place of the time and place of voting. Agricultural workers who are not citizens may have no previous experience of voting in any election. Many workers cannot read the notice of election, even if they see it. Since there is often only a day or less between the announcement of the time of the election and the election, workers have less opportunity than they would under the NLRA to get word of the election.

The record of this case reveals that on the day of the election, many eligible voters were not working on the employer's property where the election was taking place. Keeping track of those who voted enabled the union to contact those who otherwise may not have know about the election and may not have voted. It appears that this was the only use for which the list was employed in this case.

We conclude that the checking off of names of voters who have voted, as part of a campaign to assure that all eligible workers have notice of the election and an opportunity to vote, is not per se impermissible conduct such as to warrant setting an election aside. Such conduct will be viewed as improper however, and my result in setting an election aside, where it occurs in a context of coercion or intimidation such that voters may reasonably regard the checking off of their names as involving undue pressure upon them to vote or not to

vote, or as constituting an implicit threat of surveillance as to how they voted. There is no evidence in this case of improper conduct.

Certification issued.

Dated: December 5, 1975

Roger M. Mahoney, Chairman

LeRoy Chatfield

Joseph R. Grodin

Richard Johnsen, Jr.

Joe C. Ortega