

STATE OF CALIFORNIA
AGRICULTURAL LABOR RELATIONS BOARD

In the matter of:)	
)	
KLEIN RANCH,)	CASE NO. 75-RC-20-S
)	
Employer,)	
)	1 ALRB NO. 18
and)	
)	
UNITED FARM WORKERS)	
OF AMERICA, AFL-CIO,)	
)	
Petitioner.)	
_____)	

An election was conducted at Klein Ranch on September 27, 1975, upon the filing of a Petition for Certification by the United Farm Workers of America, AFL-CIO (hereinafter referred to as "UFW") on September 19, 1975. The results, as indicated on the Tally of Ballots, were 68 UFW votes, 4 no union votes, 13 challenged votes, and 2 void votes. On October 3, 1975, the Sacramento Regional Director of the Agricultural Labor Relations Board (hereinafter referred to as "Board") inadvertently issued a Certification of Representative to the UFW. Such certification was withdrawn by the Director on learning that the employer had filed a timely petition of objections to certification pursuant to Section 1156.3(c) of the Labor Code on October 2, 1975.^{1/} Accordingly, the Board issued

^{1/}The objections petition apparently was filed at the Board's office rather than the Regional Office. The Regional Office was not aware of the filing for some time and accordingly issued a Certification of Representative. The Regional Office was later informed by the Board that such a petition had been timely filed and that a hearing was being scheduled on a number of allegations raised in the Employer's petition.

a Notice of Hearing and Order of Partial Dismissal of Petition on October 11, 1975 on the Employer's petition. The following issues were noticed for hearing:

- (1) Whether the Board's failure to conduct an election within seven days after the Petition for Certification had been filed, as required under 1156.3(a) of the Labor Code, prevents the Board from certifying the election.
- (2) Whether the employer was wrongfully deprived of the right to have adequate observers present during the course of the election, thereby depriving the employer of a proper opportunity to challenge voters.
- (3) Whether the UFW representatives engaged in improper conduct by electioneering in or near the polling area and stopping cars on entry and exit of the polling area.
- (4) Whether the ballot was misleading as to the available choices, not properly designating "no union" as an equal choice.
- (5) Whether prohibited ex parte communications occurred between the UFW and the Board agents.

A hearing was held on October 23, 1975, in Tracy, California,

1. Effect of Election Held Beyond Seven Days

As noted above, the petition in this matter was filed on September 19, 1975, and the election held on September 27, 1975, eight days later. Labor Code Section 1156.3(a) directs that an election be conducted within a maximum of seven days of the filing of the petition.^{2/} The employer therefore objects to the election being conducted beyond this seven-day period. It appears from the record, that the basis for holding the election on the eighth day was the result of an erroneous decision by the Board agent in charge of the election to exclude an intervening Sunday from the computation. 8 Cal. Admin. Code, Section 20400.5(a) requires its inclusion.^{3/} No party alleges that they were prejudiced by the holding of this election on the eighth day. Specifically, there is no evidence that eligible employees were prevented or deterred from voting as a result of the delay. The question here is a matter of direct statutory interpretation, whether in the absence of any prejudice the holding of an election a day beyond the maximum prescribed by Section 1156.3(a) divests the Board of jurisdiction and compels the voiding of this election.

^{2/}Labor Code Section 1156.3(a) reads in pertinent part as follows:

"...upon receipt of such assigned petition, the Board shall immediately investigate such petition, and, if it (the Board) has reasonable cause to believe that a bona fide question of representation exists, it shall direct a representation election by secret ballot to be held, upon due notice to all interested parties and within a maximum of seven days of the filing of the petition.."(Emphasis added).

^{3/}See also, Government Code Section 6800.

The Agricultural Labor Relations Act of 1975 (hereafter the "Act") expresses the policy of the State "to encourage and protect the rights of agricultural employees to full freedom of association, self organization, and designation of representative of their own choosing. . . ." Labor Code Section 1140.2. See also Labor Code Section 1152. The Act establishes detailed procedures by which agricultural employees can freely designate representatives of their own choice through secret ballot elections. Labor Code Section 1156 et. seq. An election will only be held during that period when the employer's payroll reflects 50 per cent of the peak agricultural employment for the current calendar year for the payroll period immediately preceding the filing of the petition. These procedures and requirements are designed to maximize the franchise to agricultural employees. Labor Code Section 1156.4. To effectuate this policy an election is to be held "within a maximum of seven days of filing," presumably a time when most eligible workers will still be available to participate in the election. Labor Code Section 1156.3(a).

While an election is to be held within seven days of the filing of the Petition for Certification, the failure to conduct one within this time period, albeit an irregularity in procedure, is not a jurisdictional defect. See Anderson v. Pittinger, 197 Cal. App. 2d 188 (1961) where the Court held that the City Council of West Covina did not lose its jurisdiction because it failed to announce its decision regarding an application for a zoning variance within a stated time as required by a city ordinance.

"Intent to divest the court of jurisdiction by time requirements is not read into the statute unless that result is expressly provided or otherwise clearly intended." Garrison v. Rourke, 32 Cal. 2d 430 (1948). In Steen v. City of Los Angeles, 31 Cal. 2d 542 (1948), Section 112 of the Los Angeles City Charter provided for a hearing on a discharge to be held within 15 days. When a hearing held beyond this time period was challenged as beyond the agency's jurisdiction, the court upheld the discharge stating "It is necessary that there exist a very clear indication that the jurisdiction of a Board has been exhausted after the expiration of a certain period of time before a court will find its loss of power." Id. at 546.

No such clear indication can be found in the Agricultural Labor Relations Act, and its entire thrust and purpose suggest the opposite. The seven-day requirement is aimed at conducting elections so that the maximum number of eligible voters can vote. In Peak v. The Industrial Accident Commission, 82 Cal. App. 2d 926 (1947) the petitioner argued that failure to make its order within the 30 days prescribed by the Labor Code^{4/} caused the Industrial Accident Commission to lose its jurisdiction to make an award to an injured employee. The court called such a result absurd. Id. at 932.

^{4/}Labor Code Section 580 provides:

"After final hearing by the Commission, it shall within 30 days, make and file: (a) its findings, upon all facts involved in the controversy; (b) its order, decision or award stating its determination as to the results of the parties."

It would be no less absurd to suggest that a provision of the law requiring elections to be held swiftly while peak employment is still in effect compels us to disenfranchise employees, whose rights to secret ballot elections the law is designed to protect, because of a mistake by a Board agent.

The workers have no control over setting the election date. To overturn this election because a Board official failed to strictly comply with Labor Code Section 1156.3 (a) time requirements, in the absence of any showing that any party or persons were prejudiced, would be to penalize the very persons whom the Act is designed to protect. In the absence of such a showing, the electoral voice of the workers will not be ignored because of an error by a Board agent. The objection is not sustained. However, because of the clear direction of the statute, in the future, a Board agent who sets an election beyond the maximum seven day period will be made available in a post-election proceeding, if necessary, to explain the reason for a delay.

2. Denial of Employer's Choice of Observers

The employer also objects to the conduct of this election on the ground that it was wrongfully deprived of its right to have adequate observers during the election.^{5/} This objection, it appears from the testimony, questions the authority of the Board to deny observer" status to foremen or supervisors. The employer asserts

^{5/}The evidence shows that the employer did have three observers present during the election, one of whom was picked at the pre-election conference.

that only such individuals can effectively exercise the employer's right to challenge voters since they are most familiar with all the employees.

At the conference, the employer submitted the name of Mr. Philipe Gomez as an observer representative. The UFW objected on the ground that Mr. Gomez was a supervisor. Upon this objection, the Board agent, Ms. Maria Khan proceeded to pose to Mr. Gomez, who was also present at the pre-election conference, a series of questions regarding his responsibilities as a Klein Ranch employee.^{6/} After questioning Mr. Gomez, Ms. Khan concluded that he would not qualify as an eligible observer under the law, in that he "did direct people, that he did acquire workers for the company, and that he had the power to hire and fire."^{1/}

Title 8 Cal. Admin. Code, Section 20350 (b) provides that "[e]ach party may be represented by pre-designated observers of his own choosing. Such observers must be non-supervisory employees of the employer." (Emphasis added.) This is in accord with NLRB policy

^{6/} The conversation between Ms. Khan and Mr. Gomez is testimony offered by the UFW witness, Ms. Jan Peterson, who was also present at the pre-election conference and overheard the conversation between Ms. Khan and Mr. Gomez. Although the evidence is hearsay, 8 Cal. Admin. Code, Section 20390(a) provides, in part, the "[s]trict rules of evidence shall not apply" in investigating proceedings such as hearings on elections objections.

^{1/} These are the words of Ms. Peterson paraphrasing Mr. Gomez¹ response to questioning by Ms. Khan, And in other testimony, it was established that Mr. Gomez is known as a labor contractor in the Tracy community.

of denying observer status to supervisors or foremen "to avoid 'the likelihood that their presence at the polls may unduly influence employees to cast a non-union vote.' " See Wilkinson Manufacturing Company v. NLRB, enforced in part, 456 F. 2d 298 (1972), citing Plant City Welding and Tank Company, 199 NLRB 131 (1957). Labor Code Section 1140.4 (j) defines a supervisor as "any individual having the authority, in the interest of the employer, to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward, or discipline other employees. . . ." Clearly, Mr. Gomez falls into this category. Therefore, denial of observer status by the Board agent was a proper exercise of her discretion.

3. Electioneering and Stopping of Cars by Union Representatives

Two other contentions of the employer concern alleged improper electioneering and wrongful stopping of cars entering and exiting Klein Ranch. The charge regarding improper electioneering involves the distribution of leaflets at the entrance of Klein Ranch and the display of a UFW flag first at the entrance to the ranch and later at a road sign one hundred feet from there.

The employer's witness, Mr. Grilli, contends that certain UFW electioneering was improper because it took place in or near the polling area, which he claims is the entirety of the employer's property.^{8/} The evidence submitted by both parties indicates that

^{8/}Mr. Grilli has testified that the employer's property included the dirt road going up to and intersecting with Tracy Boulevard. The dirt road leads into the employer's property to the polling area.

the position of the union representatives was from seven to ten feet off Tracy Boulevard at the dirt road entrance to Klein Ranch. The actual balloting took place in a kitchen on the ranch which Mr. Grilli claims is a little over a quarter of a mile from the intersection of Tracy Boulevard and the dirt road.

In addition to disputing the distance between Tracy Boulevard and the actual polling site^{9/}, Ms. Jan Peterson, Director of the UFW Tracy Office, has testified that the people who were standing at the entrance to the ranch did so at the opposite side of white posts, which appeared to demark the Klein property.

The Board has held that electioneering beyond the polling area is not conduct sufficient to set aside an election. Herota Brothers 1 ALRB No. 3 (1975). Additionally, the designation of such an area is left to the informed judgment of the Board agent conducting the election.^{10/} Marvil International Security Service, Inc. 173 NLRB No. 192 (1968). The Board agent's instruction to both the union and the employer at the time of the election was that they were "to go off the property." The union representatives substantially complied with this request by stationing themselves at the entrance to Klein Ranch. Therefore, the electioneering

^{9/} The UFW witness, Ms. Peterson, has disputed this distance claiming that it is actually one mile to a mile and a half between where UFW representatives were situated and the actual polling place.

^{10/} The size of the polling place is normally dependent on the nature of the election, the number of voters, and the length of the voting period. The Board agent should make as clear a designation as possible of this area.

which took place over a quarter of a mile from the kitchen area clearly did not constitute improper conduct on the part of the UFW.

The employer also alleges that the UFW wrongfully stopped cars entering and exiting the polling area noting, particularly, the improper use of a voter eligibility list. This claim cannot be the basis for denying certification. That a list was used by Ms. Peterson is not denied. However her testimony is that she referred to the list on only one occasion, when some exiting workers informed her that they were not allowed to vote. Consequently, she checked to see if their names were on the list. The employer's witness, on the other hand, only viewed this apparent conduct from a distance, surmising that the payroll list was being used improperly. Assuming, arguendo, that the UFW was using the voter eligibility list to check off names, such conduct is not per se impermissible unless it is part of a totality of conduct amounting to intimidation of eligible voters. There is no evidence of any conduct amounting to an intimidating atmosphere. See Toste Farms, 1 ALRB No. 16 (1975). This objection is overruled.

Charges regarding improper electioneering by the stopping of cars going into and out of Klein Ranch similarly lack substance. If cars were stopped upon entering and exiting Klein Ranch, such conduct occurred a substantial distance from the polling place.^{11/}

^{11/} Ms. Peterson disputes Mr. Grilli's testimony as to cars being stopped on entering Klein Ranch. She does not dispute stopping cars on exiting. On this point she has testified that the UFW stopped cars to inform voters to return for the ballot counting and to find out if anyone needed a ride or had other problems. Mr. Grilli, on the other hand, never was a party to any conversation which took place.

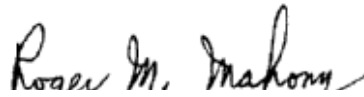
5. Communication between Union Representatives and the Board

Lastly, the employer has charged that prohibited ex parte communication existed between the UFW and the Board agent. No evidence was offered on this point. Accordingly, this allegation is dismissed.

Based on the foregoing the election is hereby certified.

Certification issued.

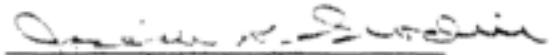
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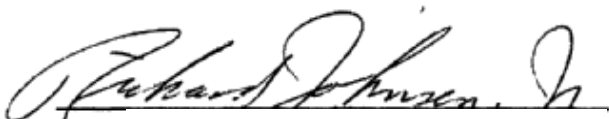
Roger M. Mahony, Chairman



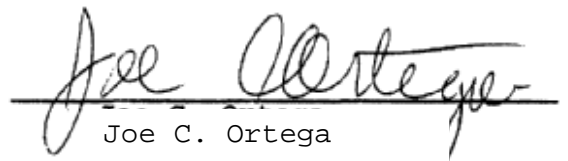
LeRoy Chatfield



Joseph R. Grodin



Richard Johnsen, Jr.



Joe C. Ortega