STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of:	
WILLIAM DAL PORTO & SONS, INC.	NO. 75-RC-14-S
Employer,	1 ALRB NO. 19
and	
United Farm Workers of America AFL-CIO	
Petitioner.	

STATEMENT OF THE FACTS

On September 15, 1975, a Petition for Certification was filed by the United Farm Workers of America, AFL-CIO (hereafter referred to as UFW). The petition sought a representation election for all the agricultural employees of William Dal Porto and Sons, Inc., engaged in the production and harvesting of the employer's agricultural commodities in San Joaquin County. Pursuant to the Direction and Notice of Election issued by the Regional Director of the Board, an election was conducted on September 23, 1975, at a polling place located behind the new Bicksford School. [1/]

[1/] The Tally of Ballots issued showed the results of the election as: UFW = 44 votes; No Union = 3 votes; Challenged = 7 votes; Void = 1.

On September 29, 1975, the employer filed a petition of objections to certification pursuant to §1156.3(c) of the Labor Code. [2/] These objections are discussed below.

Issues Presented:

I. Was the employer wrongfully deprived of the right to have adequate observers during the course of the election?

At the pre-election conference held in this matter the employer requested that two persons, Elena Martinez and Bill Duarte be designated as his official observers. An objection to these individuals serving as observers was made by the UFW and sustained by the Board agent. The employer claims that he had to name two other persons who did not know all the persons who would be voting, thereby depriving him of an adequate observer at this election.

Title 8 Cal. Admin. Code §20350(b) provides in accord with NLRB practice "each party may be represented by pre-designated observers of its choosing. Such observers must be non-supervisory employees of the employers." (Emphasis added). The evidence demonstrates that neither of these individuals is an employee of the employer, and therefore both

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[2/]The objections raised by the employer's petition set for hearing comprise eight separate grounds upon which they contend certification should be denied. Six of these objections are discussed at length in the opinion. No evidence was introduced on two of the objections: (a) that there were improper ex parte communication between Board agents and representatives of the UFW; and (b) that no separate tally for permanent employees was kept to distinguish their vote from votes of seasonal workers. Accordingly, these allegations are dismissed. See also footnote 3.

are ineligible to serve as observers pursuant to 8 Cal. Admin. Code §20350(b) . Bill Duarte is manager of the San Joaquin Farm Production Association. He is not an employee of the William Dal Porto & Sons Co. Elena Martinez is the wife of a labor contractor who supplies workers to the Dal Porto Farms. Mr. Dal Porto testified that Ms. Martinez is not an employee of his company.

Since neither of the challenged persons qualify as employees of the employer they were properly denied observer status by the Board agent.

II. Did the UFW shift workers to increase voter eligibility at the Dal Porto Farm, thereby violating the Agricultural Labor Relations Act?

The testimony from Ms. Martinez shows that workers are moved from ranch to ranch by the dictates of the work and the call of the contractor under whom they work. There was no evidence to indicate that the petitioning union had any involvement whatsoever with either directing or encouraging workers to shift from farm to farm so as to increase the number of eligible voters. Consequently this objection is denied.

III. Was the ballot employed in the election misleading? While there is serious question as to whether this allegation is properly a ground for objection upon which evidence should

have been received, [3]there was, in any event, no evidence introduced to substantiate this charge. The ballot employed for this election was a standard ALRB ballot form. The employer failed to specify in what fashion he considered the ballot to be misleading. The only evidence which could be considered even remotely relevant to this issue was testimony that of the 55 ballots cast at this election, a single ballot had to be voided because it was marked both for a union, and also for no union. That evidence is not sufficient to support the employer's objection.

IV. Did Board agents fail to require proper identification creating an opportunity for non-eligible voters to cast ballots without challenge?

The employer charges that many individuals were allowed to vote without presenting identification.

Title 8 Cal. Admin. Code §20350(c) requires that voters present "evidence of identification which the Board agent in his discretion deems adequate." The testimony of the UFW observer at this election, substantiated by the testimony of the employer's observer,

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[3] This allegation apparently seeks to contest the validity of Emergency Regulation, 8 Cal. Admin. Code §21000 and therefore is not a proper subject for review under §1156.3(c). Samuel S. Vener, 1 ALRB 10 (1975). Similarly, another of the employer's objection, that no separate tally was kept for permanent employees to distinguish their votes from those of seasonal employees, is an attack on the validity of §1156.2 of the Labor Code, which states that "the bargaining unit shall be all the agricultural employees of the employer." While this allegation was also dismissed for lack of supporting evidence, such an allegation is not a proper subject for review under §1156.3(c) and should not have been set for a hearing.

was that UFW cards were used by most of the voters as a means of identifying themselves for the purposes of this election. The UFW observer, who worked for Dal Porto for the past five years, testified that she knew almost all the persons who used UFW cards, and that the names on those cards were the names of the voters. The employer's observer testified that each worker would state his or her name and, he, as company observer, would check the names off the payroll list. The observer did not state that any unchallenged voter had been improperly allowed to vote in this election. As there is neither evidence, nor allegation that anybody was allowed to vote who was ineligible, the objection is overruled.

V. Did the UFW engage in improper conduct at the polling site?

Allegations of improper UFW conduct at the election site fall into two categories. One class (A) alleges that the UFW engaged in improper electioneering. The other (B) relates to the charge that the UFW maintained a voting list at the entrance to the polling area in violation of the prohibition against keeping a list of persons who have voted in a representation election.

A. Charges that the UFW engaged in improper election site electioneering encompass two separate courses of conduct. The first is that the UFW stationed a union representative with a large union flag at a substantial distance from the polls on a public highway. The election was conducted in a rear building of a school. The building in which the polls were located was at the southern end of

a field, behind a parking lot which bordered the public road. There was a distance of 100 to 200 yards from the entrance to the parking lot on Howard Road to the building where the polls were located. The testimony indicates that the union organizer with the flag was located from 200 to 300 yards west of the polling area. There was no testimony that the flag was visible from the polling area. The presence of a union representative with a flag such a distance from the polling area is not conduct that could have affected the outcome of this election. See Herota Bros., 1 ALRB No. 3 (1975).

The other aspect of the electioneering allegation concerns the presence of a UFW organizer at the entrance to the parking lot. As stated above, this location is from 100 to 200 yards from the building where the actual balloting was conducted. There was general testimony by the attorney for the employer that the union organizer stopped a number of cars entering the parking lot and spoke to the occupants, but that he could neither hear the conversations nor observe what transpired in the transactions. The parties dispute how many cars were stopped. The employer's attorney testified that not all cars were stopped. The UFW called Jan Peterson the organizer who was stationed by the parking lot. Ms. Peterson testified that she spoke to persons in only two cars entering the parking lot, both of which contained union organizers. She further testified that a third car stopped briefly but she waved them into the lot telling them that she could not talk. The photographs introduced by the employer tends to substantiate the testimony of Ms. Peterson. Two different cars were identified in the employer's photographs. Both were cars used by union organizers. Based on this record there is no persuasive

evidence that any electioneering took place at this entry point. Even if there had been electioneering it would have occurred beyond the polling area in which electioneering is forbidden and consequently it would not be conduct sufficient to set aside an election. See Herota Bros., 1 ALRB No. 3 (1975). Marvil International Service, Inc., 173 NLRB 192 (1968).

The reliance by the employer on Milchem Inc., 170 NLRB 46, (1968), to support its contention that such conduct constituted improper electioneering is misplaced. The conduct in Milchem involved "sustained conversations with prospective voters waiting to cast their ballots." The electioneering complained of took place inside the actual polling area. Here the conduct, if it occurred at all, took place outside the entrance to the parking lot, at least 100 and perhaps as much as 200 yards from the polling place. The Milchem rule has been held not to apply to conversations with prospective voters unless the voters are in the polling area or in line waiting to vote. Harold W. Moore, 173 NLRB 191, (1968). The Moore case is authority for finding that the conduct alleged here is not sufficient to set aside this election. In Moore the election took place in a warehouse and the polls were located 10 yards from the entrance to that warehouse. The offending conversation took place in a parking lot 10 yards from the building's entrance. The NLRB ruled that the conduct was not so near the polls as to be objectionable, Here, whatever conversations might have taken place, occurred at the entrance to a parking lot at least 100 and perhaps as much as 200 yards from the polling place. Such conversations, if they occurred, did not affect the outcome of this election.

B. The employer objects to the UFW organizer using a voting list to check off persons who voted.

Ms. Peterson, the UFW organizer stationed at the entrance to the parking lot, kept a voting list of persons which she used to check off the names of some of the workers who had voted. While the evidence fails to establish that the list was employed to check off persons going to vote, Ms. Peterson testified that she talked to persons in three cars as they left and that she kept a voting list check-off of those persons.

The NLRB rule of strict prohibition on the use of voting lists to check off voters (Piggly-Wiggly, Eagle Food Centers, Inc., 168 NLRB No. 101), has not been adopted as a per se rule by this Board, Toste Farms Inc., 1 ALRB No. 16 (1975). This is based in part on this Board's recognition of differences in agricultural employment patterns and of organizational difficulties. The NLRB recognizes that its general prohibition against the use of voting lists is a rule informed with a sense of realism, and exceptions to its seeming per se rule permitted. In Tom Brown Drilling Co., 172 NLRB No. 133 (1968), announced after the declaration of the rule in Piggly-Wiggly, the NLRB found that the union organizer's checking off only a few of the first few voters, probably no more than three, would not require an overturning of the election. In not applying Piggly-Wiggly, the NLRB declared "any breach of the aforesaid rule which may have occurred in this case was de minimis and does not constitute grounds for setting aside the election." Tom Brown Drilling Co., id.

In the instant case the record fails to establish that more than three cars were stopped on the way out of the polling area. Since these were voters who had already cast their ballots,

and the election results indicate 44 votes for the UFW and 3 for no union, it appears, as in Tom Brown, that any potentially troublesome conduct was de minimis.

The checking off of these names did not occur as part of an atmosphere of coercion or intimidation. Accordingly, our finding in Toste Farms Inc., 1 ALRB NO. 16 (1975), is applicable here. There was no additional conduct which might constitute sufficient grounds for setting aside this election. The objection is denied.

VI. Is an election conducted eight days after the filing of a petition void under §1156.3(a)?

There is no clear indication in the record of this case as to why the election was held on the eighth day. It appears from the briefs submitted by both parties that the basis for holding this election on the eighth day was a decision by the Board agent who erroneously excluded an intervening Sunday from the computation of the time period involved. No one alleges prejudice from the holding of this election one day past the maximum prescribed by §1156.3(a). Thus the facts herein are similar to those facts found in Klein Ranch, 1 ALRB No. 18 (1975), decided this date. This election shall not be voided.

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CONCLUSION

Based on the above, the election shall be certified.

CERTIFICATION ISSUED.

Dated: December 11, 1975

Roger M. Mahony, Chairman

LeRoy Chatfield

Joseph R. Grodin

Richard Johnsen, Jr.

Joe C. Ortega