Oxnard, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

OCEANVIEW PRODUCE COMPANY, Employer, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Petitioner.	Case No. 94-RC-l-EC(OX) 20 ALRB No. 16 (September 9, 1994)

DECISION AFFIRMING ORDER OF PARTIAL DISMISSAL OF ELECTION OBJECTIONS

Pursuant to Labor Code section 1156.3,[1] the United Farm Workers of America, AFL-CIO (UFW or Union) filed a representation petition with the Agricultural Labor Relations Board (ALRB or Board) on May 6, 1994,[2] and an amendment thereto on May 10, seeking certification as the collective bargaining representative of the Ventura County agricultural employees of Oceanview Produce Company (Employer) . Having investigated the petition and having determined that it raised a valid question concerning representation, the Regional Director held an election at several polling sites in the Oxnard area on May 18.

/

/

/

[1] All section references herein are to the California Labor Code, section 1140 et seq., unless otherwise indicated.

[2] All dates herein are 1994 unless otherwise indicated.

The initial Tally of Ballots revealed the following results:

DFW	275
No Union	231
Challenged Ballots	87
Total Valid Ballots	593[3]

As the challenged ballots were sufficient in number to determine the outcome of the election, the Regional Director conducted an investigation of such ballots as required by Title 8, California Code of Regulations, section 20363. On June 23, he submitted his Report on Challenged Ballots in which he recommended that the challenges to 15 ballots be sustained, that 2 ballots be held in abeyance until such time as they may become outcome determinative,[4] and that the challenges to the 70 remaining ballots be overruled.

Thereafter, the Employer timely filed exceptions to the Regional Director's recommendations insofar as they concerned twelve of the challenges which he would sustain: the ballots of eight voters who were challenged at the polls by Board agents for failure to present adequate identification, and who thereafter failed to accept the Regional Director's extension of time in which to come forward with identification, and the ballots of four employees who were challenged on the grounds they were

---

[3] There were two void ballots.

[4] Those ballots were cast by alleged discriminatees whose status as to voter eligibility will be determined in a pending unfair labor practice proceeding if necessary.

ineligible to participate in the election because they were supervisors.

On July 18, the Board issued a Decision and Order on Challenged Ballots in which it found that the Employer's declaratory support with regard to the four alleged supervisors raised material questions of fact which can only be resolved by means of an evidentiary hearing to be held should their votes ultimately prove determinative of the results of the balloting. The Board addressed and rejected the Employer's exceptions to the Regional Director's findings regarding the eight voters challenged for failure to submit identification.[5] As no party excepted to the Regional Director's recommendation that 70 of the challenges be overruled, the Board adopted his findings in that regard, pro forma, and directed that those ballots be opened and

---

[5] Whereas any party to an election, as well as Board agents, may, for good cause shown, challenge any prospective voter on various grounds expressly set forth in the Board's regulations, the adequacy of voter identification is a matter reserved to the sole discretion of Board agents. (Cal. Code Regs., tit. 8, §§ 20355 (a)(1) through (a)(8); § 20355 (c).) With regard to the voters challenged for failure to submit adequate identification, the Employer contends that their status should have been investigated by the Regional Director and now warns that it does not intend to waive its contention in that regard. The whole of the Employer's premise misconstrues the challenged ballot process insofar as it concerns voter identification. The official Notice and Direction of Election, in both English and Spanish, advises prospective voters that, in order to vote, they must present "identification such as a driver's license, social security card, etc., or other identification as required by the Board agent in charge." Even though he had no duty to do so, the Regional Director granted those employees an extension of time following the election to perfect identification. They failed to do so. The Board has no further obligations concerning the subject ballots.

counted and that a revised Tally of Ballots issue. (Oceanview Produce Company (1994) 20 ALRB No. 10.)

Accordingly, on July 25, 70 ballots were opened and counted with the following results:

UFW	298
No Union	278
Unresolved Challenged Ballots	6

Election Objections

Section 1156.3(c) requires that objections to the conduct of an election, or conduct affecting the results of an election, be filed within five days of the election irrespective of situations where, such as here, the outcome of the election is not immediately known. Both the Employer and the Union timely filed objections to the election within the statutory period. On July 26, on the basis of the new tabulation of ballots, the UFW withdrew its objections to the election.

On July 27, pursuant to Title 8, California Code of Regulations, section 20365, the Executive Secretary of the Board examined the six objections filed by the Employer and issued an order setting for hearing a portion of Objection No. 2, to the extent that it was alleged therein that the Union, through its organizers, representatives, agents, and/or supporters, engaged in acts of intimidation and other misconduct directed towards eligible voters and thereby tended to interfere with their ability to freely choose whether or not to be represented by a labor organization for purposes of collective bargaining. All

of the remaining objections were dismissed on the grounds that, even if the conduct complained of therein was true, it was not such that it would warrant setting aside the election.

Thereafter, the Employer timely filed with the Board a request for review of those objections which the Executive Secretary had dismissed, as well as a new challenge to the conduct of the election based on a question which became apparent only when a box of challenged ballots was opened on July 25, after the close of the filing period for election objections.

When evaluating allegations that the election was not conducted properly, or that misconduct occurred which affected the results of the election, the Executive Secretary examines the supporting declarations in order to determine whether the objecting party has presented facts sufficient to support a prima facie showing of objectionable conduct which, if uncontroverted, unexplained, or otherwise not proven, would establish grounds for setting aside the election. The Executive Secretary's authority on behalf of the Board to dismiss without a hearing objections which fail to meet this standard has been judicially reviewed and approved by the California Supreme Court. (J.R. Norton Co. v. Agricultural Labor Relations Board (1979) 26 Cal.3d. 1, 13 [160 Cal.Rptr. 710].) As explained by the Norton court, at page 16, "[A] hearing is unnecessary where if all the facts contended for by the objecting party were credited, no ground is shown which would warrant setting-aside the election." [Citations omitted.]

It is well established that the party objecting to an election bears a heavy burden of demonstrating not only that improprieties occurred, but that they were sufficiently material to have impacted on the outcome of the election. (Nightingale Oil Co. v. NLRB (1st Cir. 1990) 905 F.2d 528 [134 LRRM 2517].) The burden is not met merely by proving that misconduct did in fact occur, but rather by specific evidence demonstrating that it interfered with the employees' exercise of their free choice to such an extent that the conduct changed the results of the election. (Kux Manufacturing Co. v. NLRB (6th Cir. 1989) 890 F.2d 804 [132 LRRM 2935].)

It is also true that allegations of objectionable misconduct in the context of elections cannot be tested by the subjective individual reactions of employees, as such reactions "are irrelevant to the question whether there was, in fact, objectionable conduct." (Emerson Electric Co. (1980) 247 NLRB 1365 [103 LRRM 1389]). In NLRB v. Gissel Packing Co. (1969) 395 U.S. 575, 608 [71 LRRM 2481], the United States Supreme Court "rejected any rule that requires a probe of an employee's subjective motivations as involving an endless and unreliable inquiry." Rather, the test is whether the conduct, when measured by an objective standard, was such that it reasonably would tend to interfere with employee free choice. (Picoma Industries. Inc. (1989) 296 NLRB 498 [132 LRRM 1161]; Triple E Produce Co. v. Agricultural Labor Relations Board (1983) 35 Cal.3d 42 [196 Cal.Rptr. 518].)

Applying the guidelines outlined above, we have independently reviewed the objections described seriatim below, and have explained our reasons for affirming the Executive Secretary's partial dismissal of the objections petition.

Objection No. 1. The Employer alleged that eligible voters were disenfranchised and the Employer's planned preelection campaign suffered irreparable harm as a result of the Regional Director's failure to hold the election within the requisite seven days of the filing of the Petition for Certification.[6]

The Employer asserts that the delay was the result of the Union's filing of a "bogus" amendment to the petition for certification in order to secure additional time in which to campaign and argues that since the facts had not changed between the time the Union filed the amendment and it ultimately was dismissed, the Regional Director had obviously entered into a conspiratorial scheme with the Union for the sole purpose of forestalling the election. Towards that end, the Employer believes it is now entitled "to question all Board personnel involved in the decisions which resulted in the delay of the election, particularly given the circumstances surrounding the delay . . . ."

---

[6] Although Labor Code section 1156.3(a)(4) requires that elections be held within seven days of the filing of the representation petition, the Employer does not seriously contest the Board's ability to hold elections outside the statutory period under justifiable circumstances. (See, e.g., Radovich v. Agricultural Labor Relations Board (1977) 72 Cal.App.3d 36 [140 Cal.Rptr. 24].)

As the Employer correctly relates, the election herein was held on the 12th day following the May 6 filing of the Petition and two days following the May 10 filing of the amendment which set forth a broader description of the employing entity by naming, in addition to Oceanview Produce Company, four specific individuals described as doing business as Oceanview Produce.

The question here is solely whether the amendment was a valid exercise of the Union's prerogative under the Agricultural Labor Relations Act (Act) and, if so, whether the Regional Director had *an appropriate basis for rescheduling the election in order to investigate the amendment.

Upon receipt of a representation petition, the Regional Director is statutorily required to commence an investigation in order to determine whether there is a bona fide question concerning representation which warrants going forward with the election process. A similar investigation is required whenever an amendment to a petition is filed as such amendments are subject to the approval of the Regional Director for good cause shown. (Cal. Code Regs., tit. 8, § 20300 (a) and (b).) Upon the filing of the amendment, the Regional Director immediately advised the Employer that he was delaying the election in order to investigate the amendment. Following the investigation, and

receipt of the Employer's written position in opposition to the amendment, the amendment ultimately was rejected.[7]

Pursuant to the authority of section 1142 (b) , the Board has delegated to Regional Directors the authority to oversee matters which arise under Chapter 5 of the Act. Where, as here, the Regional Director has an appropriate basis under the Act or the Board's regulations for investigating an amendment to a representation petition, the Board will not speculate on the reasons for his related actions in that regard absent a showing that there was an abuse of the discretion vested in him or her by the Board. Mere allegations that the Regional Director acted improperly does not establish such abuse.[8] Moreover, the

---

[7] The Employer interprets section 2-4050 of the Board's Election Manual to direct "that the filing of an amended petition is to be treated as a new petition so that it will not result in a delay of the election." Unlike the Employer, we read that section to suggest that amendments which differ materially from the initial petition may be treated as a new petition, in which case, there can be an additional seven-day election period. Moreover, the guidelines in the Manual are not binding procedural rules, but are intended only to provide operational guidance in the handling of elections. (Kirsch Drapery Hardware (1990) 299 NLRB 363 [135 LRRM 1001].)

[8] The Employer is persuaded that had not a sphere of collusion between the Union and the Regional Director precluded the holding of a seven-day election, the "No Union" vote would have prevailed. As evidence, the Employer submits a single declaration by its management consultant who states that he had designed the Employer's campaign to peak on the final day of a seven-day election period, in which event the Union could not have achieved a majority vote. Other than the consultant's self-serving evaluation of his campaign, and his prediction of employee sentiment based on pure speculation, there is no objective evidence of employee preference for or against unionization at any time prior to actual balloting.

Employer has submitted nothing more than speculation as to the Union's motive for the amendment.

With regard to the question of voter disenfranchisement, the Employer asserts that had the election been held within the statutory time period, 49 employees supplied by a labor contractor would still have been employed on its premises at the time of the election and thus more likely to have been contacted by the Employer and to have voted. The question is not whether the Employer was able to contact employees it had hired through a labor contractor, but rather one of notice to eligible employees of the impending election.

In the industrial sector, the National Labor Relations Act (NLRA) conditions eligibility to vote in representation elections on two factors, employment during the prepetition payroll period as well as on the day of the election. In recognition of the migratory and/or seasonal work force which prevails in California agriculture, our Act requires only that employees have worked for the employer at some time during the prepetition payroll period - if for only a day - and need not be employed on the day of the election.

The Employer does not allege that the employees had no notice of the election. That shortcoming is particularly significant in light of the Employer's statement that, "[f]rom the evidence submitted [i.e., its own unsuccessful effort to locate the contract workers], it may reasonably be inferred that at least 49 eligible voters did not receive notice of the

election." We have no basis upon which to draw such an inference and decline to do so. There is nothing to indicate that notice was not provided by the Regional Director who has primary responsibility in this regard.

Objection No. 2. This objection alleges in part that a photographer, described as seemingly friendly with UFW representatives, but otherwise unidentified, appeared to be taking pictures of employees as they approached the voting sites and, further, that a car carrying Union organizers was positioned so that the occupants could "stare" at potential voters as they disembarked from Company buses.[9]

The Employer has submitted a declaration from a voter who stated that a woman took photographs "of us from the time we arrived [at the polling area], while we voted and until we finished voting." He believes the woman was from the Union because he had observed her in close proximity to Union supporters. The declarant believed that the taking of photographs was inappropriate "because everything was supposed to be secret" and then described how "many of us tried to cover our faces for fear that those photographs would bring reprisals." Two additional declarants submitted substantially similar statements, with one of them stating that Board agents asked the

[9] As noted previously, that portion of the objection concerning preelection threats was set for hearing by the Executive Secretary and thus is not before the Board in this phase of the proceeding.

photographer "to leave more than once, but she'd just back off for a minute and then walk back again."

The Employer cites six cases which purportedly stand for the proposition that the NLRB and federal courts have recognized the "coercive and intimidating effect union photography may have on employees during an election." (Emphasis ours.) Those cases, without exception, and unlike the instant case, involved photographic recording of employees demonstrating by various means their support for or against unionization prior to the election and, in most instances, the photographic evidence was gathered by employers rather than unions.[10] Such information could of course become the basis for later reprisals.

---

[10] For example, employees photographed while attending a union rally and accepting union leaflets (Pepsi-Cola Bottling Co. of Los Angeles (1988) 289 NLRB 736 [128 LRRM 1275]; employees handbilling for the union outside the plant (Millard Processing Services, Inc. (1991) 304 NLRB 770 [138 LRRM 1094]; union agent videotaping employees demonstrating both for and against the union at the plant gates and then telling an employee he had identified the anti-union employees on tape and warned that some of them might not be there after the election (Mike Yurosek & Son. Inc. (1989) 292 NLRB 1074; union hosted a preelection picnic adjacent to the plant during the workday and photographed those employees who agreed to sign a pro-union petition and receive T-shirts with the message "Union Yes" (Nu-Skin International. Inc. (1992) 307 NLRB 223 [140 LRRM 1052]; employer ordered pictures be taken of union handbilling its employees (NLRB v. Associated Naval Architects. Inc. (4th Cir. 1966) 355 F.2d 788 [61 LRRM 2224]; although case brought under the federal Railway Labor Act, court noted that it is generally unlawful under the NLRA for an employer to photograph picket line activity where photographic surveillance would tend to restrain or coerce employees engaged in protected concerted activity, but such conduct would be acceptable if for the purpose of substantiating picket line misconduct with a view to injunctive or unfair labor practice proceedings. (Airline Pilots Association v. United Airlines, Inc. (7th Cir. 1986) 802 F.2d 886.)

Such is not: the case where, as here, employees cast secret ballots and neither party is privy to how any employee might have voted. Nor is there any evidence that any employees declined to vote after having been photographed. Under circumstances such as these, it cannot be said that the conduct was inherently coercive and that it therefore restrained employees in their right to freely cast ballots.

Equally unavailing is the Employer's further contention that Union agents stationed themselves in a parked car where they could "stare down" and perhaps thus intimidate employees on their way to the polls. Such conduct, standing alone, is insufficient to demonstrate coercive or intimidating circumstances.

In sum, the Employer's conclusionary allegations regarding the two incidents described above are not sufficient to warrant an evidentiary hearing.[11]

Objection No. 3. The Employer contends that the Union injected racial issues into the campaign in a successful effort to inflame racial prejudice and affect the results of the election.

According to the declaration of a labor consultant engaged by the Employer, and submitted in support of the objection, he was speaking to a group of 30 broccoli workers

[11] The Board strives to create election settings free from any possible basis for even the perceptions of conduct which might tend to restrain the exercise of employee free choice. The conduct of the Board agents reflects that they acted reasonably to minimize any conduct in the vicinity of the polls which could be so perceived. (See, e.g., Phillips Chrysler Plymouth (1991) 304 NLRB 304 [138 LRRM 1025].)

approximately one month prior to the election when UFW organizers approached the work site. He sought to eject them on the grounds they were violating the time and manner provisions of the Board's access regulation.[12] When the organizers resisted, he proposed that their spokesperson "didn't know the law" governing access and admits that he accused them of "acting like a bunch of ignorant animals." Immediately thereafter, one of the organizers reportedly turned to the crew and asked, "Did you hear what he just said? He called the workers a bunch of ignorant Mexican animals." The consultant asserts that he was misquoted when the Union injected the reference to "Mexican" and continued to misquote him at Union rallies and in printed flyers distributed to employees.

The Employer submitted one of the relevant flyers, printed in Spanish, and provided an English translation as evidence in support of the objection. The actual text of the literature in question identifies two of the Employer's campaign consultants by name, accuses them of being "false and hypocritical," and charges that they were hired by the Employer for the purpose of "lying" to employees as well as to "insult all Mexicans." In an obvious reference to the field incident

---

[12] The access regulation is reported at title 8, California Code of Regulations, section 20900 et seq. That portion of the regulation which is relevant here pertains to preelection access by nonemployee organizers and provides that they may enter a work site up to one hour before and after work as well as during the lunch break or, if no established break, while employees are actually having lunch. The number of organizers is limited to two per crew or, if the crew exceeds 30, an additional organizer for every 15 employees.

described above, the flyer explains that one of the named consultants "said that all (of us) Mexicans are a bunch of ignorant animals [and] 30 broccoli workers are witnesses." The message then concludes with this statement: "So after all the money we've made for the Company, they hire consultants to offend us."[13]

The National Labor Relations Board (NLRB or national board) has historically distinguished appeals to racial prejudice from appeals to the racial pride of a particular ethnic minority. That line, however, is a thin one, and turns on whether statements were intended "to inflame racial hatred" or "to encourage self-respect and concerted efforts for betterment." (See, e.g., Archer Laundry Company (1965) 150 NLRB 1427 [58 LRRM 1212].) In Baltimore Luggage Co. (1967) 162 NLRB 1230, 1233-34 [64 LRRM 1145], the national board addressed the latter in these terms:

> Campaign material of this type is directed at undoing disadvantages historically imposed . . . upon [the ethnic minority] because of their race, through an appeal to collective bargaining of the disadvantaged ....
>
> * * *

[13] In the month following the encounter with the organizers and the holding of the election, consultant Stephen Highfill would have had numerous opportunities to address the broccoli crew, or any other crew, in order to disavow or clarify the alleged misrepresentation of the name-calling which he instigated. Highfill, just as he declared he did, called the organizers "ignorant animals" in the presence of field employees. We assume by the Union's response that the organizers, as well as the members of the broccoli crew, were of Mexican descent. *If* so, it may well have been reasonable for them to conclude that Highfill's insult was in direct reference to their ethnic group.

> Traditionally, trade unions have sought to unify groups of employees by focusing attention on common problems, and to further the acceptance of union spokesmen by emphasizing the extent to which the spokesmen had identified themselves with those problems. To hold that this traditional approach may not be utilized because of the ethnic composition of the work force might itself be discriminatory.[14]

Cases such as those cited by the Employer in support of the objection are distinguishable. In YKK. Inc. (1984) 269 NLRB 82 [115 LRRM 1186] and NLRB V. Katz (7th Cir. 1983) 701 F.2d 703 [112 LRRM 3024], the attacks were directed by the union on the race or religion of the employers, matters deemed irrelevant to the issues in those campaigns. Here, by contrast, the Union did not assault the Employer's race or religion, but responded to an attack on its agents which was initiated by the Employer's consultant. Moreover, the name-calling in question here was made an election issue by the Employer's own spokesperson.

---

[14] See, also, Bancroft Manufacturing Co. (1974) 210 NLRB 1007, 1008 [86 LRRM 1376], enf'd (5th Cir. 1975) 516 F.2d 436 [89 LRRM 3105], cert, denied (1976) 424 U.S. 914 [91 LRRM 2410] wherein a union organizer warned a predominately black work force that, "if blacks did not stay together as a group and the union lost the election, all the blacks would be fired." Finding evidence that some blacks had indeed been laid off, the NLRB reasoned that the statements concerning 'future layoffs were not "appeals to racial prejudice on matters unrelated to election issues," but that such appeals were "germane to the larger issue of the advantages and disadvantages of the union as a means of promoting economic security and job rights." On similar facts, in NLRB v. Sumter Plvwood Corp. (5th Cir. 1976) 535 F.2d 917 [92 LRRM 3508] cert, denied (1977) 429 U.S. 1092 [94 LRRM 2643], the court affirmed the national board's finding that statements such as "blacks must stick together" and other ethnic messages were permissible calls to ethnic pride and unity similar to the union's traditional call to economic betterment. (See, also, NLRB v. Hood Furniture Manufacturing Co. (5th Cir. 1991) 941 F.2d 325 [138 LRRM 2339].)

Thus, the issue raised by the Employer, while of interest, is really no issue at all as the Employer's own evidence in support of the objection belies the claim that the consultant was substantially misquoted or otherwise misrepresented.[15] An Employer cannot assert its own misconduct as grounds upon which to set aside an election. (Cal. Code Regs., tit. 8, § 20365(d).)[16]

Objection No. 4. Next, the Employer points to what it characterized as Board agent misconduct affecting the conduct of the election itself and singles out two incidents in particular: (1) the making of a second ballot box by Board agents unobserved by Employer officials (presumably a reference to its counsel and/or consultant) and (2) the failure of Board agents to adequately secure yet another and different ballot box by leaving it unattended for about five minutes in a car parked near one of the voting sites where Union supporters were gathered.

In addition to observers selected by the Employer for each of the six voting sites, the Employer had designated two permanent observers to follow and oversee balloting throughout

---

[15] The Employer urges us to follow NLRB v. Silver-man's Men's Wear. Inc. (3d Cir. 1981) 656 F.2d 53, wherein the court overruled the NLRB's failure to set for hearing the disparagement of the religious affiliation of a company vice-president by a union officer. The court found that "[s]uch a remark has no purpose except blatantly to exploit religious prejudices of the voters .... There is no question of truth or falsity in a slur such as this." Here, however, there is no question as to the truth of the consultant's name-calling.

[16] Member Frick is of the view that the Employer has presented sufficient support to warrant setting Objection No. 3 for hearing.

the day. According to the declaration of one of them, after the Union declared its intention to challenge all contract employees, Board agents conferred among themselves and announced they would construct a second ballot for the challenged ballots, and "[t]hey just did it with us observers looking on."

Prior to the official opening of the polls that morning, Employer officials observed the construction of a single ballot box which they apparently assumed would be the only ballot box. Thus, they were surprised to learn upon completion of the election that there were actually two ballot boxes. If the Employer is proposing that it was error for Board agents to construct the second box without having first consulted with the Employer, its concern is misplaced as the Employer was represented by the observers it designated for just such oversight.[17] The decision of the Board agents to employ a second box in order to facilitate the balloting process is within their broad discretion to conduct elections.[18]

---

[17] Parties may not themselves be present during actual balloting. For that reason, each party may select an observer drawn from the ranks of eligible voters to be present throughout the voting process. Such was the case here, with at least three Company observers witnessing the preparation of the disputed ballot box.

[18] The Employer submitted declarations from non-contract employees who attest to the alleged discomfort of the contract employees as a result of their having to wait in line to vote, in the cold (on May 18) , and without benefit of sanitary facilities. However, there is no indication that any of those employees were dissuaded from voting or that waiting in line to vote and/or having to cast challenged ballots interfered with their free choice.

On a related note, the Employer contends that a ballot box left unattended prior to the start of the final polling period in a Board agent's car tainted the election. However, the Employer does not allege, for example, that the box was left in the cabin or trunk of an unlocked car, where it could be easily accessed. Nor does the Employer even suggest that anyone had actually tampered with the box. (See, e.g. Show Industries. Inc. (1990) 299 NLRB 687 [138 LRRM 1416].)

Disputes like the instant one, about the fundamental exercise of Board agent discretion to manage the election or mere allegations that the ballot box was left unguarded, require something more than just one party's preference that a different procedure had been implemented. "The test is not whether optimum practices were followed, but whether on all the facts the manner in which the election was held raises a reasonable doubt as to its validity." (NLRB v. ARA Services. Inc. (3d Cir. 1983) 717 F.2d 57, 69 [114 LRRM 2377]; see, also Nightingale Oil Co. v. NLRB. supra, 905 F.2d 528, holding that an election will be set aside only where there is a defect which significantly impaired the election process.)

Objection No. 5. In this objection, the Employer asserts that in constructing the separate ballot box described above at the behest of the Union, and over the objection of the Employer's election observer, Board agents created the impression they favored the Union. As an Employer declarant stated, "When the state simply ignored my protests, it was obvious that they

wanted to show preference to the union." Another declarant indicated the approximate time that the ballot box was prepared and noted that actual balloting began about 15 minutes later. What we have here is no more than the perception of an observer that the Board agents ignored him and followed a particular procedure only because the Union so requested.

It is the Board's responsibility, not that of the parties, or the parties' observers, to establish the proper procedures for the conduct of elections. (Glenn McClendon Trucking Co.. Inc.. supra. 255 NLRB 1304.) The Employer has neither established bias nor the appearance of bias in the presence of prospective voters.

We again underscore the fact that the Board agents have considerable latitude in conducting elections and absent a clear showing of conduct which in any manner would tend to compromise employee free choice, the Board need not consider the matter further.

Objection No. 6. Finally, the Employer alleges that the totality of all of the circumstances described above prevented employees from exercising free choice. We have exercised our responsibility to assess the cumulative effect of the conduct alleged by the Employer to have affected the conduct of the election and conduct affecting the results of the election on the validity of the proceedings herein. Our agreement with the Executive Secretary that only a portion of Objection No. 2 warrants further investigation disposes of any purported

cumulative impact of the remaining 5 and 1/2 objections. Thus, the objections fail to allege "conduct which, by an objective standard, would reasonably tend to interfere with employee free choice."

Challenged Ballot Count

The challenged ballot box which had been constructed for the purpose of receiving challenges to labor contractor employees and which was opened on July 25 revealed a total of 59 ballots, a number which corresponds with the number of ballots no one disputes the box should have contained.[19] Thus, there is no question as to the number of the ballots, only as to the manner in which that number had been segregated prior to being deposited in the ballot box. The Employer asserts that the box should have contained 37 loose ballots (cast by employees challenged solely on the ground that they had been provided to the Employer by labor contractors) and 22 ballots in envelopes (cast by employees challenged on the ground that they were contract employees as well as grounds that would otherwise serve to disqualify them such as supervisorial status). Upon opening the box, however, it became apparent that there were 45 loose ballots and 14 ballots in sealed envelopes. Yet, the total

[19] It should be noted that there were challenges at other voting sites throughout the election day on grounds other than the prospective voter was an employee of a labor contractor. Those ballots would have appropriately been placed in challenged ballot envelopes and deposited in the "regular" ballot box. The only questions therefore surround the ballot box which was constructed and used solely at the last of the six polling sites.

number of ballots precisely comports with the number of ballots all parties anticipated the box would contain.

The Employer believes that aside from the disparity in loose versus envelope ballots described above, there are 11 ballots in particular which call into question the reliability of the revised ballot tally. In its Decision on Challenged Ballots in Oceanview Produce Company, supra. 20 ALRB No. 10, the Board directed that four of the challenge ballot envelopes not be opened and that four similar envelopes be counted. The Employer contends that none of those eight ballots could be identified because they had not been placed in challenged ballot envelopes. The Employer also believes that an additional three ballots should have been declared "void," rather than added to the UFW column because of a printing error by the Board which allegedly blocked out the ballots' "No Union" box.

Pursuant to the authority of California Code of Regulations, title 8, section 20365(e)(l), the Executive Secretary directed the Regional Director in charge of the election to respond to the Employer's concerns regarding the challenged ballots. Following the Board's ruling on challenges, the Board agent in charge of the election herein proceeded to count 70 of the initial 87 challenged ballots. With respect to the second ballot box, he learned that eight of the challenged ballots which should have been designated for enclosure in envelopes could not be identified because, obviously, they were among the loose ballots. Thus, he could not separate out the

ballots of four contract employees who had been challenged for insufficient identification, which ballots the Board held should remain sealed, or the ballots for the four additional employees whose names had not appeared on the eligibility list, but which ballots the Board directed to be counted. Thus, there are four ballots which should not have been, but which were tallied.

In sum, the revised tally of ballots revealed a 20-vote margin between the UFW and No Union choices with six unresolved challenged ballots. Four of the eight ballots which should have been deposited in envelopes, but not counted, were in fact counted. Assuming, for purposes of analysis only, that those four ballots as well as all six of the unresolved challenged ballots were in fact "No Union" votes, the "No Union" vote would stand at ten less votes than those cast for the UFW.

Again, but solely for purposes of analysis, we add to the "No Union" column the three ballots the Employer contends had been printed in a manner which would cause voter confusion and therefore should have been declared "void" rather than tabulated. While we need not dwell on those ballots in the context of election objections, as they are not outcome determinative, they are of concern.

According to the Employer, the gravamen of the problem lies in the printing of the ballots inasmuch as the "No Union" box, which should have been blank, allegedly was partially or totally eclipsed by printing. The Employer believes that a

prospective voter might have been misled into viewing the open UFW box as the only available ballot choice.

While deviations from standard election procedures, such as the manner in which ballots are printed, are not to be condoned, the three ballots in question here, as noted above, would not adversely affect the conduct of the election because they cannot change the outcome of the election. (See, e.g., Continental Baking Company (1959) 122 NLRB 1074 [43 LRRM 1249].) Nevertheless, the Board believes an investigation is necessary whenever its own processes are susceptible of being interpreted by employees as an endorsement by the Board of one of the parties to the election, or where employees may have been impeded in expressing their true desires, as could be the case here.

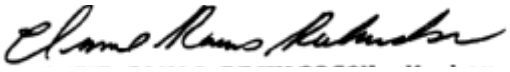
Accordingly, the Board will direct its Regional Director to submit the three disputed ballots directly to the Board, under seal, for an in-camera inspection by the Board, as they may prove useful in assisting the Board should it become necessary to revise its procedures for printing ballots in order that the integrity of its election procedures may be preserved.

Conclusion

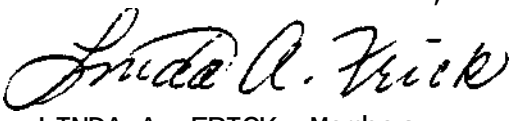
Upon the record as a whole, and after full consideration of all relevant factors, we find the Executive Secretary's dismissal of certain election objections free from prejudicial error. The Executive Secretary's Order of Partial Dismissal of Election Objections should be, and it hereby is, adopted in its entirety.

DATED: September 9, 1994

BRUCE J. JANIGIAN, Chairman



IVONNE RAMOS RICHARDSON, Member



LINDA A. FRICK, Member

CASE SUMMARY

OCEANVIEW PRODUCE COMPANY
(UFW)

20 ALPJB No. 16
Case No. 94-RC-l-EC(OX)

Background

The United Farm Workers of America, AFL-CIO (UFW or Union) filed a petition with the El Centro Regional Office of the Agricultural Labor Relations Board (ALRB or Board) seeking to be certified as the exclusive collective bargaining representative of the Ventura County agricultural employees of Oceanview Produce Company (Employer) . Following an election which was held on May 18, 1994, and the subsequent resolution of challenged ballots, it became apparent that the UFW had received a majority of the valid votes cast. Thereafter, the Executive Secretary of the Board examined the Employer's six objections to the election and concluded that a portion of one objection, which alleged that the Union and/or its agents and supporters had threatened employees in a manner that would tend to interfere with their free choice, should be resolved in a full evidentiary hearing. He dismissed the remaining objections. The Employer then filed with the Board a Request for Review of those objections which the Executive Secretary had dismissed.

Board Review

The Board engaged in an independent investigation of the allegations set forth in the Employer's objections which the Executive Secretary had dismissed and decided to affirm the Executive Secretary's dismissal. The Board observed that none of the conduct alleged in those objections, even if ultimately proven to be true, and judged by the requisite objective standard, was such that it would tend to interfere with employee free choice and warrant the setting aside of the election. The Board let stand those allegations which the Executive Secretary had previously ruled should be set for hearing.

* * *