Dinuba, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

G H & G ZYSLING DAIRY, Employer, and TEAMSTERS UNION, LOCAL 517 CREAMERY EMPLOYEES & DRIVERS, Petitioner.	)	Case No. 93-RC-3-VI 20 ALRB No. 3 (19 ALRB No. 17) (April 22, 1994)

DECISION AND CERTIFICATION OF REPRESENTATIVE

On April 15, 1993, Teamsters Union, Local 517, Creamery Employees and Drivers (Union) filed a petition for certification, seeking a unit of all of the agricultural employees of G H & G Zysling Dairy (Zysling or Employer) . An election was held on April 21, 1993, with the following results:

Teamsters	7
No Union	2
Unresolved Challenged Ballots	2
Total Ballots Cast	11

Zysling filed several election objections. In the objections set for hearing, Zysling alleged that an outcome determinative number of its employees were disenfranchised because they were not given notice of the election and did not vote. The objections also allege that the Regional Director did not adequately investigate whether Zysling was at 50 percent of peak employment during the pre-petition payroll period.

A hearing on the election objections was held on November 29 and 30, 1993. On December 29, 1993, Investigative

Hearing Examiner (IHE) Douglas Gallop issued a decision in which he found it appropriate to overrule in their entirety the election objections filed by Zysling.[1] The IHE concluded that the objections must be overruled, despite the perceived possibility of disenfranchisement of employees, because the failure to give notice to any additional Zysling employees was due to Zysling's failure to alert the Regional Director prior to the election of the existence of such employees. Zysling filed timely exceptions to the IHE's decision and the Visalia Regional Director filed a response.

DISCUSSION

This matter was litigated primarily as a case involving the possible disenfranchisement of employees who were unknown to the Regional Director prior to the election and thus did not receive notice of or vote in the election. The IHE in turn focussed his analysis on this issue. The IHE did not expressly determine if the individuals at issue were in fact Zysling employees and thus disenfranchised. Instead, the IHE analyzed the case as one presenting the need to balance an employer's failure to provide the information required by Regulation

[1]At the end of the hearing, Zysling withdrew its objections with regard to employees of two contractors, Bushnell Industries and Amaral Dairy Service. The individuals remaining at issue upon submission to the IHE were a nutritionist, two employees of Robert Vanderham, who farms property adjoining the dairy, and 20-25 harvesting employees of Danell Brothers who harvested on the adjoining property.

20310,[2] along with the prohibition of Regulation 20365, subdivision (c)(5) against alleging one's own conduct as grounds for setting aside an election, against the countervailing evil of the potential disenfranchisement of an outcome determinative number of employees.

The IHE approached this difficult dilemma with the view that, while potential disenfranchisement is to be taken very seriously, it is appropriate to consider the circumstances of each case in light of the various affected interests. Citing the potential for encouraging abuse if employers could seek to have elections invalidated based on information they failed to provide prior to the election, along with the prejudice to the union's interests and the burden on the resources of the Board, the IHE concluded that the election objections should be overruled. In its exceptions, Zysling takes issue with the balance struck by the IHE, and stresses as its primary argument that potential disenfranchisement should be the overriding consideration. Zysling further contends that its failure to provide information

[2]The Board's regulations are codified at Title 8, California Code of Regulations, section 20100, et seg. Regulation 20310 delineates the information that must be provided by employers in response to petitions for certification. The information required includes a statement of the peak employment for the current calendar year and the names of all agricultural employees in the unit sought who worked during the pre-petition payroll period, including any hired through a labor contractor.

about possible additional employees prior to the election was wholly unintentional and excusable.[3]

Disenfranchisement

A. Bargaining Unit Status

Obviously, employees who are not in the bargaining unit are not eligible to vote and cannot be disenfranchised. Thus, we first will examine the record evidence to determine if the individuals at issue are Zysling employees properly included in the bargaining unit.[4]

The record establishes that the two individuals who worked for Robert Vanderham on the adjoining farm land owned by Zysling were indeed his employees and not Zysling's. Gary Zysling testified that Vanderham controls the terms and conditions of the two individuals, including the setting of hours and wage rates, hiring and firing, and supervision. Zysling, due to his general oversight of the farming operation,[5] occasionally does some supervision of the two, but Vanderham is chiefly responsible for their supervision. Similarly, Zysling testified that he has the authority, should he disapprove of their performance, to ask that they be replaced. In that event, the

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[3]Given the focus of his analysis, the IHE did not reach the issue of the peak determination, and Zysling did not file an exception addressing this issue.

[4]As required by Labor Code section 1156.2, the Regional Director properly determined the bargaining unit to include all agricultural employees of Zysling in the State of California.

[5]The property is leased to Vanderham and he grows crops which Zysling agrees to buy for feed.

individual would no longer work on that property but might be assigned by Vanderham to one of his operations not involving Zysling property. Thus, Zysling's involvement with these two individuals is insufficient to establish either a direct employment relationship with them or a joint employer relationship with Vanderham.

In addition, there is insufficient evidence to establish that Zysling and Vanderham constituted a single employer. The Board has adopted the four factors used by the National Labor Relations Board, (1) interrelation of operations, (2) centralized control of labor relations, (3) common management, and (4) common ownership and financial control, with centralized control of labor relations regarded as the critical factor. (certified ECTCT Farms and Olson Farms, Inc. (1990) 16 ALRB No. 7; Andrews Distribution Co., Inc. (1988) 14 ALRB No. 19.)

There is no evidence of common ownership and, as detailed above, the most critical factor, centralized control of labor relations, is also absent. The only evidence of interrelation of operations and common management is simply Gary Zysling's testimony that he engaged in general oversight of the farming operation to ensure the feed crop met his specifications and that the two Vanderham employees occasionally performed work on the dairy property. This is insufficient to support a single employer theory.

The evidence with regard to the unit status of the nutritionist and the Danell Brothers harvesting crew is less clear. There was testimony that the nutritionist receives a fixed amount of money each month from Zysling regardless of how much time he spends at the dairy, though he is usually there two or three times a week for two to four hours at a time. Gary Zysling was unable to recall if the wages of the nutritionist, who also works for other companies, were reported to the appropriate authorities in the same manner as those of other employees.

If Danell Brothers is a custom harvester, then its employees would not be part of the unit and their potential disenfranchisement would no longer be an issue. However, the IHE made no finding on this point and it is not clear from the record whether Danell Brothers is a labor contractor or a custom harvester. The crop is harvested by crew members operating choppers, which mechanically fill trucks that are then driven to the dairy and dumped in silage pits. A person operating a bulldozer then stacks, bulldozes, and compacts the grain. That is all the record reveals.

Since Zysling had the burden of proof in this proceeding,[6] equivocal evidence is insufficient to establish its claims. Consequently, in addition to our finding above that the

[6]The party filing election objections bears the burden of proving by a preponderance of evidence that its objections are meritorious and warrant setting aside the election. (J. Oberti, Inc.. et al. (1984) 10 ALRB No. 50; Bright's Nursery (1984) 10 ALRB No. 18.)

two individuals working for Vanderham are not Zysling employees, we find that Zysling failed to establish that the nutritionist and the Danell Brothers crew were Zysling employees. These findings provide an independent basis for dismissing the claim of disenfranchisement, for such individuals could not have been disenfranchised if they are not Zysling employees properly within the bargaining unit. In addition, as discussed below, there is another reason why this claim must be rejected.

B. Pre-petition Eligibility Period

Assuming arguendo that Zysling had successfully shown that the Danell Brothers crew were Zysling employees properly within the bargaining unit, the record nonetheless reveals that the crew was not disenfranchised. The potential for disenfranchisement arises only where the employees who were not given the opportunity to vote in fact would have been eligible to vote. Indeed, that was the situation in the cases cited by the IHE and the parties in the present case. (See Perry Farms. Inc.. 6t al. V. ALRB (1978) 86 Cal.App.3d 448 [150 Cal.Rptr. 495]; gequoia Orange Co., et al. (1985) 11 ALRB No. 21.) Here, Zysling has failed to establish that the Danell Brothers crew members would have been eligible voters, even if they had been shown to be in the bargaining unit.[7]

[7]It appears from the record that the nutritionist and the two Vanderham employees would have been eligible to vote if they had been Zysling employees. However, as noted above, we find that the two Vanderham employees are not in the bargaining unit and that Zysling failed to make an adequate showing that the nutritionist was in the unit.

Pursuant to Labor Code section 1157, only those agricultural employees of the employer who worked during the payroll period immediately preceding the filing of the election petition are eligible to vote. In this case, the pre-petition payroll period was March 16-31, 1993. In his declaration submitted along with the election objections, Gary Zysling stated that the people harvesting on the adjoining land worked from April 1-15, 1993, outside the pre-petition payroll period. Zysling's testimony at hearing added only confusion to the issue, since he alternately asserted that his declaration mistakenly referred to April 1-15 rather than March 1-15, and that the Danell Brothers crew was working at the time of the election on April 21, 1993. In any event, he at no time asserted that the Danell Brothers crew worked during the period of March 16-31, 1993. No documentary evidence was presented to show when the Danell Brothers crew worked on Zysling's farm land.

In sum, this case does not raise genuine issues of outcome determinative disenfranchisement because Zysling failed to prove that the individuals at issue were in the bargaining unit and, with regard to the Danell Brothers crew members, failed to show that they would have been eligible to vote even if they were in the bargaining unit.

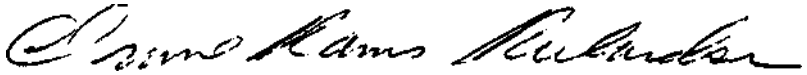
CERTIFICATION

We conclude that Zysling has failed to demonstrate that an outcome determinative number of eligible voters were disenfranchised by lack of notice and opportunity to vote in the

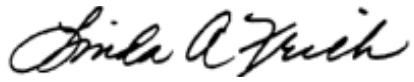
election. Having thus found no merit in the exceptions to the IHE's recommendation that the election objections be overruled, we order that the results *of* the election conducted on April 21, 1993 be upheld and that the Teamsters Union, Local 517 Creamery Employees & Drivers, be certified as the exclusive collective bargaining representative *of* all of the agricultural employees of G H & G Zysling Dairy in the state of California.

DATED: April 22, 1994

BRUCE J. JANIGIAN, Chairman



IVONNE RAMOS RICHARDSON, Member



LINDA A. FRICK, Member

CASE SUMMARY

G H & G ZYSLING DAIRY
(Teamsters Union, Local 517)

20 ALRB No. 3
Case No. 93-RC-3-VI

Decision of the Investigative Hearing Examiner

On December 29, 1993, Investigative Hearing Examiner (IHE) Douglas Gallop issued a decision in which he found it appropriate to overrule in their entirety the election objections filed by G H & G Zysling Dairy (Zysling). In the objections set for hearing, Zysling alleged that an outcome determinative number of its employees were disenfranchised because they were not given notice of the election and did not vote. In its objections, Zysling also alleged that the regional director did not adequately investigate whether Zysling was at 50% of peak employment. The IHE concluded that the objections must be overruled, despite the possible disenfranchisement of employees, because the failure to give notice to any additional Zysling employees was due to Zysling's failure to alert the regional director prior to the election of the existence of such employees. Zysling filed timely exceptions to the IHE's decision and the Visalia Regional Director filed a response.

Board Decision

The Board affirmed the IHE's recommendation that the election be certified, but found it unnecessary in doing so to balance Zysling's failure to provide information prior to the election against the possible disenfranchisement of employees. Instead, the Board found that Zysling failed to meet its burden to demonstrate a legitimate claim of disenfranchisement because Zysling failed to prove that the individuals at issue were Zysling employees and, therefore, in the bargaining unit. First, the Board found that the record evidence established that two of the individuals were not employees of Zysling, but of the farmer who leased the adjoining land, Robert Vanderham. The Board also found no evidence that Zysling and Vanderham were joint employers or constituted a single employer. With regard to a nutritionist and a 20-25 member harvesting crew provided by Danell Brothers which worked on the adjoining property, the Board found that the evidence was equivocal and therefore insufficient to demonstrate that they were Zysling employees. In the case of the harvesting crew, their status was unproven because it was unclear whether Danell Brothers was acting as a labor contractor or a custom harvester.

The Board also found that the record was insufficient to establish that the Danell Brothers crew would have been eligible to vote even if they had been shown to be Zysling employees. Zysling gave varying dates as to when the crew was working on the property, but none of the asserted dates fell within the eligibility period of March 16-31, 1993.

* * *

This Case Summary is furnished for information only and is not an official statement of the case, or of the ALRB.

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of:	)	
G H & G ZYSLING DAIRY,	)	**Case No.** 93-RC-3-VI
Employer,	)	
and	)	
TEAMSTERS UNION, LOCAL 517 CREAMERY EMPLOYEES & DRIVERS	)	
Petitioner.	)	

Appearances:

Stephen H. Martin, Consultant
Pacific Employers Management Consultants
for the Employer

John Davis, Organizer IBT
Local 517
for the Union

Stephanie Bullock ALRB
Regional Office Visalia, CA
for the General Counsel

Before:
Douglas Gallop
Investigative Hearing Examiner

DATED: January 29, 1993

DECISION OF THE INVESTIGATIVE HEARING EXAMINER

DOUGLAS GALLOP: This hearing was conducted on November 29 and 30, 1993 at Visalia, California. *It* was based on certain objections to the conduct of election filed by G H & G Zysling Dairy (hereinafter Employer), which were noticed for hearing by the Executive Secretary of the Agricultural Labor Relations Board (hereinafter Board)[1] The objections followed a Board election conducted on April 21, 1993, in which seven votes were cast favoring representation by Teamsters Union, Local 517, Creamery Employees and Drivers (hereinafter Union) , two votes were cast for no union, and there were two non-determinative challenged ballots. At the close of the hearing, the Employer and Counsel for the Regional Director presented oral argument.

Upon the entire record, including the documents received into evidence, and for which official notice has been taken, my observation of the witnesses and after careful consideration of the arguments presented, I make the following findings of fact and conclusion of law:

FINDINGS OF FACT

The Union filed a petition for certification, notice of intent to organize and notice of intent to take access on April 15, 1993, after serving the Employer with those documents on April 14. The petition sets forth a bargaining unit consisting of all agricultural employees of the Employer, with nine unit members.

[1]Other objections filed by the Employer were dismissed by the Executive Secretary. On appeal by the Employer, the Board affirmed those dismissals.

The Employer filed original and amended responses to the petition. The responses contain the same information, other than information concerning a contractor, Valley Farm Service, whose three employees were initially included in the unit, and then deleted by the amendment, leaving nine unit members. The Employer listed no other contractors supplying labor to the Employer.

The Employer also disputed the unit description, contending the appropriate unit should include all dairy employees of the Employer at its Dinuba, California facility, rather than all agricultural employees. The Employer, in the responses, stated it owns 160 acres of farm land next to its dairy, but listed no employees in either the petitioned-for unit or the unit it contended was appropriate, other than the nine dairy employees and, in the original response, those employees of Valley Farm Service working at the dairy. The Employer set forth facts establishing the voting eligibility period as March 15-31, 1993. The responses further stated there was no issue of peak employment raised by the petition.

At no time prior to the election did the Employer otherwise inform the Board agent responsible for processing the petition that employees of other persons or entities might be properly included in the unit. After the election, the Employer for the first time contended, in its objections, that a substantial number of such employees had been improperly disenfranchised in

the election.[2] The objections set for hearing all concern certain groups of these employees. None of the employees' names appeared on the Employer's eligibility lists.

At the hearing, the Employer withdrew its objections based on the failure to give notice of the election to employees of two contractors, Bushnell Industries and Amaral Dairy Service. This left the unit inclusion of *a* nutritionist, two employees of a farmer named Robert Vanderham and 20-25 harvesting employees of Danell Brothers at issue. The Visalia Regional Director, however, contends that even if these employees should have been included in the unit, the objections are invalid, because the disenfranchisement of those employees resulted from the Employer's conduct.

ANALYSIS AND CONCLUSIONS OF LAW

Section 20310 of the Board's Regulations requires employers to provide unit information in response to petitions for certification, including the names of all labor contractors supplying employees to the employer during the eligibility period, or during the peak season if they work on a seasonal basis, the names of the contractors' employees and information concerning when the peak season occurs. All the above information was requested in the standard response form sent to the Employer, but virtually none of that information was provided. Based on the Employer's unit description, it is

[2]It is undisputed that only employees directly employed by the Employer were notified of the election.

apparent the failure to list the other contractors or their employees resulted from the Employer's position as to the appropriate unit. The Employer, however, was still obligated to furnish those names, along with relevant peak season information.[3] See Tenneco West. Inc. (1977) 3 ALRB No. 92; Yoder Brothers (1976) 2 ALRB No. 4; Cardinal Distributing Company (1977) 3 ALRB No. 23.

Section 20310(e) sets forth sanctions which may be imposed for failure to comply with these obligations, including presumptions of employee support for the petition, eligibility for voters not on the eligibility list and timeliness of the petition with respect to peak season. See Cardinal Distributing Company. supra, Filice Estate Vineyards (1978) 4 ALRB No. 71. A separate regulation, section 20365(c) (5), prohibits a party from alleging its own conduct, or the conduct of its agents, as grounds for setting aside an election.

Counsel for the Regional Director cites Muranaka Farms (1983) 9 ALRB No. 20, for the proposition that the Employer's failure to provide information concerning the contractors and peak season, or to submit a complete eligibility list automatically precludes consideration of objections arising from unit inclusion issues and the lack of notice to employees of the

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[3]The Employer's passing reference to its ownership of contiguous farm land was insufficient to satisfy its obligation to list contractors and employees under § 20310. The peak season information may be relevant in considering the unit inclusion of Danell Brothers' employees, who harvest crops grown at the Employer's premises on a seasonal basis.

election. While it is correct that the Board, in Muranaka Farms. considered the employer's failure to provide an accurate eligibility list to preclude consideration of its objection based thereon, there was no allegation the conduct of that election disenfranchised any employee. To the contrary, the employer in Muranaka Farms contended ineligible voters were permitted to vote. This is clearly distinguishable, since the employer was permitted to have an observer at the election, who could challenge such voters.

In a case where the Board did invoke § 20365(c)(5), with the result of disenfranchising 75% of the potential bargaining unit, it was reversed by the California Court of Appeal. The Court held that the Board had failed to consider the rights of disenfranchised employees, a paramount concern, when invoking § 20365(c)(5), and refused to enforce a bargaining order arising from the certification. Perry Farms. Inc., et al. v. ALRB (1978) 86 Cal.App. 3d 448 [150 Cal. Rptr. 495]. It is noted, however, that the election at Perry Farms took place shortly after § 20365(c)(5) became effective, involved a strike election providing little time for the employer to comply with its obligations, and the Court found the Board agent processing the petition did not adequately investigate the potential for additional eligible voters, even though aware of facts suggesting the existence of such employees.

It appears the Board, as the result of this decision, may not automatically overrule objections which result in the

disenfranchisement of many potentially eligible voters, on the sole basis of employer misconduct. Thus, in Sequoia Orange Company, et al. (1985) 11 ALRB No. 21, it declined to affirm an administrative law judge's recommendation overruling an employer's objection, where it was the employer's noncompliance with § 20310 which led to the disenfranchisement of many potentially eligible voters. Citing, inter alia. Perry Farms. Inc.. et al., supra, the Board left the issue open, subject to resolution on its other rulings in the case.

The instant case involves the potential disenfranchisement of about 75% of the unit employees, and the undersigned believes this is an important factor to consider. On the other hand, the Board's resources, as well as the Union's resulting from a second organizing campaign and election are also important. In addition, as Counsel for the Regional Director contends, sustaining objections arising from improperly described and incomplete unit information will encourage employers to engage in such tactics, ultimately resulting in the frustration of many more employees' representational wishes, while objections are processed, appeals are filed and rerun elections are conducted. Therefore, it is appropriate to consider the facts of the case at hand in light of the various affected interests.

In this case, the Employer was represented by highly experienced counsel, and its responses to the petition did not occur under the extreme time constraints of a strike-related certification election. Since the Employer, in its initial

response, included one contractor's employees in the unit, it may be inferred that it considered, and rejected the possibility of including employees of other entities. Indeed, the Employer sought to decrease the petitioned-for scope of the unit, by limiting it to its dairy employees. Furthermore, unlike in Perry Farms. Inc., there has been no evidence presented establishing a failure by the Board's agents to adequately investigate the petition.

Therefore, the undersigned considers the Employer's non-compliance with § 20310 to have been intentional, serious and unexcused. The effect of a potentially favorable ruling on the merits of these objections will be to seriously prejudice the Union, and to impose an immediate and long-term financial burden on the Board, which it is ill-equipped to assume. On the other hand, while the potentially disenfranchised voters may constitute about 75% of the bargaining unit, they are relatively few in actual numbers, and there will be the option of a decertification election.

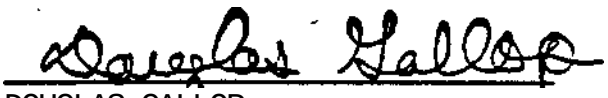
Accordingly, based on the above considerations, it is appropriate to overrule the Employer's objections. In light of this ruling, it is questionable whether the unit inclusion issues should be resolved in this proceeding. See Muranaka Farms. supra. Rather, should the parties seek a resolution of these issues, either the Employer or the Union may file a unit clarification petition, under § 20385 of the Board's regulations, which may be decided based on the record herein, and any

additional evidence the Board deems appropriate.

RECOMMENDED ORDER

The Employer's Objections to Conduct of the Election are overruled in their entirety, and a certification of representative shall issue.

DATED: December 29, 1993



DOUGLAS GALLOP,
Investigative Hearing Officer