Oxnard, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

OCEANVIEW PRODUCE COMPANY, A DIVISION OF DOLE FRESH VEGETABLE COMPANY, INC. Employer, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Petitioner.	)	Case No. 94-RC-1-EC(OX) 21 ALRB No. 1 (March 1, 1995)

DECISION AND CERTIFICATION OF REPRESENTATIVE

On January 4, 1995, Investigative Hearing Examiner (IHE) Douglas Gallop issued the attached decision in which he dismissed Oceanview Produce Company's (Oceanview) election objection in its entirety. Specifically, the IHE found that Oceanview failed to offer sufficient evidence to prove its allegations that the election should be set aside because organizers, agents, or supporters of the United Farm Workers of America, AFL-CIO (UFW or Union) threatened employees with job loss for failure to sign authorization cards or vote for the Union.[1]

[1]The IHE found that in one instance statements alleged to constitute threats were made by individuals who, according to Board precedent, must be deemed special agents of the Union. As explained below, we find that these individuals were not shown to be either special or general agents of the Union. Consequently, all of the alleged threats in the present case must be evaluated under the less restrictive third party standard, which requires a showing that misconduct created an atmosphere of fear and reprisal that rendered employee free choice in the election impossible. (See, e.g., *Ace Tomato Company, Inc.* (1986) 12 ALRB No. 20.)

As a result of a representation petition filed by the UFW, an election was held on May 18, 1994. The initial tally of ballots resulted in 275 votes for the UFW, 231 for No Union, and 87 unresolved challenged ballots. After an investigation of the challenged ballots by the Regional Director and review by the Board *(Oceanview Produce Company* (1994) 20 ALRB No. 10), the revised tally revealed 298 votes for the UFW, 278 for No Union, and 6 unresolved challenged ballots. Oceanview's election objections were then evaluated by the Executive Secretary, who issued an order on July 27, 1994 dismissing all but a portion of Objection No. 2. The portion set for hearing was described by the Executive Secretary as alleging that:

> The Union, by and through its organizers, agents, representatives and/or supporters, engaged in numerous acts of intimidation directed towards eligible voters and thereby prevented the employees' uncoerced expression of their sentiments in the election.

The Board, in *Oceanview Produce Company* (1994) 20 ALRB No. 16, affirmed in its entirety the Executive Secretary's partial dismissal of Oceanview's election objections.

In light of the language set out above, and in conjunction with the Executive Secretary's and the Board's specific discussion of various elements of the objections, the IHE determined that the specific allegations set for hearing were limited to claims of pre-election threats of job loss for failure to support the Union. Finding the evidence of threats insufficient to warrant setting aside the election, the IHE recommended dismissal of the objections and, consequently,

certification of the UFW as the exclusive bargaining representative of Oceanview's agricultural employees in Ventura County. Oceanview timely filed exceptions to the IHE's decision, taking issue with the IHE's conclusion that the evidence did not warrant setting aside the election. The UFW filed a single exception, on the grounds that the IHE erred in finding that Board precedent requires that union supporters be deemed special agents of the union while soliciting authorization cards.

The Board has considered the record and the IHE's decision in light of the exceptions and briefs filed by the parties and affirms the IHE's findings of fact[2] and conclusions of law,[3] except as noted below.[4] The discussion that follows

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[2]We note that there is evidence in the record which, while not expressly relied on by the IHE, nevertheless further supports his conclusion that Oceanview failed to meet its burden of producing evidence sufficient to warrant setting aside the election. Humberto Martinez Rangel testified that, after the first instance in which he was allegedly subjected to threats of job loss, he spoke with his co-workers, who told him that what the men said was not true. Similarly, Miguel Rodriguez, who allegedly was told that he would lose his job with Oceanview and have to remain working for the labor contractor if he did not sign an authorization card, testified that he thereafter spoke with a co-worker who explained to him that the labor contractor employees would receive the same pay as people in the union. Thus, there is evidence that the witnesses were exposed to countervailing statements that would have lessened, if not eliminated, any coercive effects of the alleged threats. Moreover, there is no reason to believe that those to whom the witnesses disseminated the various statements learned only of the alleged threats and not of the countervailing statements.

[3]Citing Triple *E Produce Corporation* v. *ALRB* (1985) 35 Cal.3d 42 [i96 Cal.Rptr. 518], Oceanview excepts to the IHE's finding that the employees would know that their ballots would be cast in secret and the Union therefore would not know how they voted. Triple *E* is distinguishable because in that case the statements were made by union organizers and the court relied on

(continued...)

addresses the UFWs exception, which highlights the need to clarify the import of prior cases.

DISCUSSION

The UFW excepts only to the IHE's ruling that the Board overruled *Agri-Sun Nursery* (1987) 13 ALRB No. 19 sub silentio in a footnote in Furukawa Farms, *Inc.* (1991) 17 ALRB No. 4. This exception has alerted the Board to the necessity of clarifying its prior holdings with regard to the import of the National Labor Relations Board's (NLRB) decision in *Davlan Engineering, Inc.* (1987) 283 NLRB 803 [125 LRRM 1049].

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[3](...continued)
an express finding by the Board that the employees believed that the union would be privy to how they voted. Here, the alleged threats were not shown to have been made by union agents and the record reveals no reason to draw an inference that the employees believed their ballots would not be cast in secret. Nevertheless, this is a minor element of the IHE's analysis and is not necessary to the conclusion that the election should be upheld.

[4]Oceanview's claim that the IHE improperly narrowed the scope of the objections set for hearing by limiting the evidence to coercive conduct occurring prior to the election *is* without merit. Oceanview asserts that the Executive Secretary did not dismiss those portions of Objection No. 2 concerning the massing of Union supporters near the polling location, the Union's conduct in making a baseless challenge to the votes of labor contractor employees, and the making of threats and insults to Oceanview's election observers. A close examination of the Executive Secretary's order and the Board's decision in 20 ALRB No. 16 affirming that order reveals that these allegations were discussed and dismissed. While Oceanview may have intended these allegations'to be part of what it described as Objection No. 2, it was unclear from its supporting papers to which objections they related and the Executive Secretary and the Board simply analyzed the allegations in discussion under subheadings denoting other numbered objections.

In *Davlan,* a case involving pre-election promises of union initiation fee waivers in exchange for support for the union, the NLRB held that:

> [I]n the absence of extraordinary circumstances, employees who solicit authorization cards should be deemed special agents of the union for the limited purpose of assessing the impact of statements about union fee waivers or other purported union policies that they make in the course of soliciting.

In *Agri-Sun,* the Board distinguished *Davlan,* finding that it did not apply to the facts of that case, which involved alleged threats of job loss for failure to sign authorization cards. In *Furukawa* Farms, the Board concluded that the evidence in that case was insufficient to establish threats of job loss by individuals soliciting signatures on authorization cards. However, in a footnote, without mentioning Agri-Sun, the Board cited *Davlan* for the proposition that it was unnecessary to determine if the alleged statements were made by union representatives or merely by supporters, because the conduct of individuals passing out authorization cards could be attributable to the union. While the discussion in *Furukawa* was clearly dicta in the context of that case, it reasonably may be read as inconsistent with the Board's holding in *Agri-Sun.* However, it was not the intent of the Board to overrule *Agri-Sun.*

In *Agri-Sun*, the Board acknowledged that the Davlan rule was not restricted to statements about fee waivers, but concluded that *Davlan* was distinguishable because the alleged threats of job loss were not statements concerning union

"policies." The Board explained that the NLRB's analysis in *Davlan* was based on the fact that a union could counteract erroneous statements about its internal policies simply by making it policies known, whereas it would be in no position to anticipate and correct all unauthorized statements or claims made by employees who assist in obtaining authorization cards. Moreover, there is no indication in *Davlan* or subsequent NLRB cases that the NLRB intended the special agency relationship to apply to all conduct occurring in the process of soliciting authorization cards. Consequently, to the extent that it implies otherwise, the footnote in *Furukawa* was an overbroad statement of the rule announced in *Davlan.*

In sum, despite the language of the footnote in *Furukawa,* the Board did not intend to overrule *Agri-Sun* or broaden the rule announced in *Davlan.* Turning now to facts involved here, we cannot conclude that the alleged threat made to Miguel Rodriguez and Francisco Perez Baron (Perez) involved the type of internal union policies encompassed within the special agency rule of *Davlan.* Perez testified that the man said that if they did not sign, "they" would get rid of their jobs. Particularly since "they" are not identified and there is no explanation of how the jobs could be taken away, this does not amount to a statement of union policy. Rodriguez' testimony makes the issue less clear because he testified that, after the man stated that they would "go back and make 4.55" if they did not sign, the man said that the union does not accept

contractors. This is most reasonably viewed as a representation of the Union's bargaining position on the use of labor contractors, and does not constitute the type of internal policy within the control of the Union that is contemplated by *Davlan.* Therefore, the evidence is not sufficient to deem the man who allegedly threatened Rodriguez and Perez while soliciting authorization cards to be a special agent of the Union.[5]

CERTIFICATION

Having found the evidence in support of the election objection insufficient to warrant setting aside the election, we order that the results of the election conducted on May 18, 1994 be upheld and that the United Farm Workers of America, AFL-CIO, be certified as the exclusive collective bargaining representative of all of the agricultural employees of Oceanview Produce Company in Ventura County.

DATED: March 1, 1995

BRUCE J. JANIGIAN, Chairman

IVONNE RAMOS RICHARDSON, Member

LINDA A. FRICK, Member

[5]For the reasons stated by the IHE, we also find the record evidence insufficient to establish a general agency relationship. Therefore, this alleged threat must be analyzed under the third party standard, which has the effect of further supporting the IHE's conclusion that the evidence does not warrant setting aside the election.

Estado de California
CONSEJO DE RELACIONESDE TRABAJADORES AGRICOLAS

OCEANVIEW PRODUCE COMPANY, A DIVISION OF DOLE FRESH VEGETABLE COMPANY, INC.,
Employer,
and

UNITED FARM WORKERS OF AMERICA, AFL-CIO,

Petitoner

Case No.94-RC-1-EC(OX)

Caso Núm.

CERTIFICATION OF REPRESENTATIVE

CERTIFICACION DEL REPRESENTATIVE

An election having been conducted in the above matter under the supervision of the Agricultural Labor Relations Board in accordance with the Rules and Regulations of the Board; and it appearing from the Tally of Ballots that the Collective bargaining representative has been selected; and no petition filed pursuant to Section 1156 3(c) remaining outstanding;

Habiendose conducido una election en el asunto arriba titado bajo la supervision dSP'Consejo de Relationes de Trabajadores Agricolas de acuerdo con las Reglas y Regulationes del Consejo; y aparetiendo por la Cuenta de Votos que se ha seleccionado un representante de negotiation coleco'va; y que no se ha registrado (archivado) una petition de acuerdo con la Section 1156.3{c) que queda pendiente;

Pursuant to the authority vested in the undersigned by the Agricultural Labor Relations Board, IT IS HEREBY CERTIFIED that a majority of the valid ballots have been cast for

De acuerdo con la autoridad establecida en el suscribiente por el Consejo de Relationes de Traba/adores Agricolas, por LA PRESENTE SE CERTIFICA que la mayor/a de las balotas validas han sido depositadas en favor de

UNITED FARM WORKERS OF AMERICA, AFL-CIO

and that, pursuant to Section 1156 of the Agricultural Labor Relations Act, the said labor organization is the exclusive representative of all the employees in the unit set forth below, found to be appropriate for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment.

y que, de acuerdo con la Section 11S6 del Acto de Relationes de Trabaiadores Agricolas, dicha organization de trabajadores es el representante exclusive de todos los traba/adores en la unidad aqufimplicada, yseha determinado que es apropiada con el fin de llevar a cabo negotiaci6n colectiva con respecto al salario, las horas de trabafo, y otras condicidnes de empleo.

UNIT: All the agricultural employees of Oceanview Produce Company in Venture County.
UNIDAD:

Signed at Sacramento, California

On the 1st day of March 1995

Firmado en _____
En el ___ dia de _____ *19* _____

On behalf of
AGRICULTURAL LABOR RELATIONS BOARD

De pane del
CONSEJO DE RELACIONESDE TRABAJADORES AGRICOLAS

J. ANTONIO BARBOSA, Executive Secretary

ALRB 49

CASE SUMMARY

OCEANVIEW PRODUCE CO., A DIVISION OF DOLE FRESH VEGETABLE CO., INC. (UFW)

21 ALRB No. 1
Case No. 94-RC-l-EC(OX)

Background

On January 4, 1995, Investigative Hearing Examiner (IHE) Douglas Gallop issued a decision in which he dismissed Oceanview Produce Company's (Oceanview) election objection. Specifically, the IHE found that Oceanview failed to offer sufficient evidence to prove its allegations that the election should be set aside because organizers, agents, or supporters of the United Farm Workers of America, AFL-CIO (UFW or Union) threatened employees with job loss for failure to sign authorization cards or vote for the Union. The IHE first determined that the specific allegations set for hearing were limited to claims of pre-election threats of job loss for failure to support the Union. Finding the evidence of threats insufficient to warrant setting aside the election, the IHE recommended dismissal of the objection and, consequently, certification of the UFW as the exclusive bargaining representative of Oceanview's agricultural employees in Ventura County. Oceanview filed several exceptions, claiming that the evidence demonstrated interference with employee free choice that warranted setting aside the election. The UFW filed a single exception, asserting that the IHE erred in concluding that Board precedent requires that union supporters be deemed special agents of the union while soliciting authorization cards.

Board Decision

The Board affirmed the IHE's dismissal of Oceanview's election objection. The Board expressly rejected Oceanview's claim that the IHE improperly narrowed the scope of the hearing. The Board explained that, in earlier orders, the Executive Secretary and the Board had in fact discussed and dismissed the allegations which Oceanview asserted to be a part of the objection set for hearing. The Board also noted that the IHE's dismissal of the objections was further supported by evidence in the record that, when those who were allegedly subjected to threats of job loss for not supporting the Union related the statements to co-workers, the co-workers told them the comments were not true. The Board found that such countervailing statements lessened, if not eliminated, any coercive effects of the alleged threats.

The Board observed that the UFW's exception demonstrated the need to clarify its prior holdings with regard to the import of the NLRB's decision in Davlan *Engineering, Inc.* (1987) 283 NLRB 803 [125 LRRM 1049]. Acknowledging that a footnote in *Furukawa Farms, Inc.* (1991) 17 ALRB No. 4 may reasonably be read as

inconsistent with the Board's holding in *Agri-Sun Nursery* (1987) 13 ALRB No. 19, the Board clarified that it did not intend to overrule *Agri-Sun* or broaden the rule announced in *Davlan.* Consequently, the Board will not find a special agency relationship arising in all circumstances involving the solicitation of authorization cards. Rather, as stated in *Davlan,* those soliciting authorization cards will be deemed special agents of the union for the limited purpose of assessing the impact of statements about union fee waivers or other purported union policies that can be counteracted simply by making the union's internal policies known. In the present case, the Board concluded that the statement in question, which the Board construed as being related to the Union's aversion to the use of labor contractors, did not involve the type of internal union policy contemplated by *Davlan.* For the reasons stated by the IHE, the Board also found the record insufficient to establish a regular agency relationship.

* * *

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of: OCEANVIEW PRODUCE COMPANY, A DIVISION OF DOLE FRESH VEGETABLE COMPANY, INC., Employer, and UNITED FARM WORKERS OF AMERICA, AFL-CIO. Petitioner.	Case No. 94-RC-1-EC(OX)

Appearances:

Theodore R. Scott
LITTLER, MENDELSON, FASTIFF, TICHY & MATHIASON
San Diego, CA
for the Employer

Marcos Camacho
MARCOS CAMACHO A LAW CORPORATION
P.O. BOX 310
Keene, CA
for the Petitioner

DECISION OF THE INVESTIGATIVE HEARING EXAMINER

DOUGLAS GALLOP: This case was heard by me on September 12 and 13, 1994. It is based on objections to conduct of election filed by Oceanview Produce Company, A Division of Dole Fresh Vegetable Company, Inc. (hereinafter Employer), alleging, inter alia, that agents and supporters of the United Farm Workers of America, AFL-CIO (hereinafter Union) interfered with the conduct of an election conducted pursuant to a petition originally filed on May *6,* 1994, seeking certification of the Union as the collective bargaining representative of the Employer's agricultural employees in Ventura County, California. After the election, a tally of ballots issued, with 275 votes for the Union, 231 for no union and 87 determinative challenged ballots. After an investigation, a Regional Director of the Agricultural Labor Relations Board (ALRB) overruled the challenges to 70 of the ballots, and ordered them to be opened and counted.[1] A revised tally of ballots resulted in 29B votes for the Union, 278 votes for no union, and *6* non-terminative challenged ballots.

The Employer also filed six objections to conduct of the election. In an order dated July 27, 1994, the Executive Secretary set a portion of Employer's Objection No. 2 for hearing, and dismissed the remainder of the objections. The Board affirmed the Executive Secretary's dismissal of the remaining objections in an order dated September 9, 1994.[2]

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[1]See (1994) 20 ALRB No. 10.

[2]See (1994) 20 ALRB No. 16.

The objection set for hearing is:

> The Union, by and through its organizers, agents, representatives and/or supporters, engaged in numerous acts of intimidation directed towards eligible voters and thereby prevented the employees' uncoerced expression of their sentiments in the election.

At the hearing, a question arose concerning the scope of the Board'6 September 9 order. The undersigned determined that the only incidents which had been set for hearing were those involving threats of job loss if employees did not sign authorization cards or vote for the Union.

STATEMENT OF FACTS

The alleged objectionable conduct involves statements made to employees of a labor contractor, Cuevas, who was engaged by the Employer to perform irrigation work. These employees were eligible to vote in the election. Of the 20-25 Cuevas employees working at the Employer's Oxnard area fields, about 10 were regularly assigned to work at the Garnier Ranch during the time period in which the events herein took place.

The Union employed 10 organizers and obtained the assistance of four volunteers during the election campaign. Undisputed testimony shows that many employees wore Union pins, and some placed Union flags on their vehicles. The evidence also shows that at least some employees solicited others to sign Union authorization cards.

There is a dispute as to whether the Union's organizers and volunteers always identified themselves as such to employees. Organizers Mario Brito and Jorge Estrada Ramos testified that the

organizers and volunteers always wore identification tags and introduced themselves by name as representatives when they met with the employees. Ranch Manager, Rank Oliver, testified that he frequently saw union representatives take access without wearing identification tags. At the same time, Oliver testified that Respondent, for a time, instructed its security guards not to permit access by the Union's representatives unless they wore such identification.[3] Of the three witnesses, Brito was the most credible, and even though he was not physically present during all occasions where the Union took access, it is found that the organizers and volunteers wore such tags on at least most of those occasions. This is important, because none of the employees who testified concerning the alleged objectionable conduct claimed to have seen the individuals involved wearing " such tags.

Humberto Martinez Rangel testified concerning three incidents at the Garnier Ranch involving alleged Union agents. Rangel admitted he was busy working, was not paying attention to what the individuals said and indeed, was purposely ignoring them. His testimony very much reflects these factors. Rangel was unable to give any physical description of the individuals who spoke to him, beyond saying that each incident involved different males. In response to a leading question, he identified these individuals as Union organizers, but his

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[3]It does not appear that security guards were posted at the Garnier Ranch.

testimony shows this identification was based on conjecture. He noted the individuals wore Union pins and had Union flags in their vehicles, but he also knew that employees engaged in such displays. Rangel also noted he had never seen these persons working for the Employer, but there were over 700 employees working at various locations during April and May 1994. When asked when these incidents took place, Rangel first testified, "at the beginning," but later contended the third incident took place "almost close" to the election.

Rangel initially testified that a threat of job loss was made only during the third incident. This took place as he and a co-worker, who he initially identified as Jesus Quiroz, and later changed to Ruben _____, were carrying irrigation pipes to the edge of the field. (Quiroz testified and did not corroborate ' Rangel on this incident. Ruben _____ did not testify.)

From a distance of perhaps 40 yards, one or both of two individuals, who were standing by their vehicles, shouted that if Rangel and the co-employee did not vote for the Union, and the Union won, they would not have a job. Rangel later testified that one or both individuals first asked them how they were going to vote, and then said if they did not have a job, the Union would give them one, but, if the Union won, they would not have a job.

Still later, Rangel testified that the individual(s) told them that if they voted for the Union, they would have a lot of benefits, but if they did not vote, and the Union won, they

would not have a job.

After testifying that the alleged threat took place during the third visit, Rangel claimed a different individual also made the same threat during the second incident. Rangel was unable to identify who was with him on that occasion, or how many crew members were working. Rangel could not remember anything else that was said on the second occasion. Rangel discussed the statements with the other crew members, and did not believe he would lose his job.

Based on the foregoing, it is impossible to determine exactly what was said to Rangel, since his testimony was simply too vague and inconsistent, and lacked corroboration. Rangel's unreliability as a witness is further demonstrated by his failure to corroborate Quiroz's testimony, infra. although Quiroz named him as a percipient witness. Thus, it is uncertain whether the individual was threatening a loss of employment, or referred to the Union's willingness to refer Rangel and others for employment in the future. It is also uncertain whether the purported threat was based on whether employees voted for the Union, which employees would reasonably know could not be ascertained in a secret-ballot election, or whether they had voted at all, which might be determined by the observers. The testimony is also ambiguous on the issue of when the statement(s) were made, which is critical in determining the likely coercive impact. Finally, there was no testimony to establish the context in which the statement(s) were made.

Quiroz credibly testified that in mid-April, he and Rangel had a brief conversation with another employee as they passed each other on the street. The employee asked if they were going to vote for the Union, and they replied they did not know. The employee then said that if they did not vote for the Union, either the day after the voting or the day after negotiations they would have to look for a job in the (contractor's) yard. Quiroz and Rangel did not respond, and the incident ended. Quiroz repeated this statement to about six co-workers.

Miguel Rodriguez and Francisco Perez Baron (Perez) testified concerning statements made to them by one of four alleged Union representatives who took access to the Gamier Ranch. It is clear they were referring to one incident where both were present, since each recalled only one conversation with any alleged organizer, identified the other as being present and testified that the conversation took place shortly after 6:00 a.m. They also gave similar, but sketchy physical descriptions of the individual who spoke to them.

with respect to the position held by this individual, Rodriguez testified he said he was "from the Union," but Perez did not corroborate that testimony. Perez testified he "imagines" the individual was a Union representative, since he had some Union pins and because of what he said.

Rodriguez, who initially could not recall the date of the incident, eventually estimated it took place in late April or on May 1, 1994. Perez initially testified that the incident took

place a couple days before the election, but later testified it was about eight days before the election was originally scheduled to occur.[4]

Rodriguez testified that the individual asked him how he was doing, and Rodriguez responded he was fine. The individual then said he had a problem, because a friend had said they did not wish to sign cards. Rodriguez (falsely) responded they had all signed. The individual responded that this was not true, but if they did not want to sign, not to do so. He then allegedly said that the Union was going to win, and they would "absolutely" be "out" and making $4.55 per hour. Rodriguez later testified he was already earning $4.55 per hour at that time. When asked the significance of the statement, given his hourly rate, he added , that the individual stated the Union does not want contractors working for the Employer. Rodriguez also contended that Perez said nothing during the incident.

Perez testified that the individual told them that if they did not sign the "papers," "they" were going to "get rid of their jobs." Contrary to Rodriguez' testimony, Perez contended he did speak, telling the individual he would not sign. Rodriguez and/or Perez repeated these statements to the other crew members. They told Rodriguez not to worry, because if the Union did win the election, he would earn $7.00 (per hour) the next day since, "absolutely", if he was with the contractor, he

[4]The election was originally scheduled for May 11, 1994, but was postponed to May 18, 1994.

would be in the Union.

Between Rodriguez and Perez, the former was more credible, because he testified in greater detail, and appeared to be making an effort to specifically relate what was said, rather than summarize the incident. Rodriguez's testimony, however, either raises a substantial uncertainty as to exactly what the individual said, or makes it difficult to understand what the individual meant by his statement. To say that the employees would be "absolutely out," while at the same time continuing to earn $4.55 per hour is far from an unequivocal threat of job loss. The reference to the Union's dislike for contractors could mean several things. For example, the contractor's employees, if not members of the Union, might be "out" of the contractual wage increases, or perhaps, the Union would negotiate a contract prohibiting the use of contractors. Most likely, Rodriguez does not recall everything which was stated, or the precise language used. Thus, it again cannot be determined, with any reasonable degree of accuracy, what was said on that date.

ANALYSIS AND CONCLUSIONS OF LAW

It is the Employer's burden of proof to establish that an election should be set aside based on the conduct of Union agents or supporters. Such conduct is not established by vague or ambiguous testimony. Furukawa Farms, Inc. (1991) 17 ALRB No. 4. It is also the Employer's burden to establish an individual's status as a union agent, rather than a third party. San Joaquin Tomato Grower's, et al. (1993) 19 ALRB No. 4.

The Employer has failed to establish the identity of any of the individuals involved in these incidents with sufficient certainty to conclude they were organizers or volunteers of the Union. With respect to the Rodriguez/Perez incident, the Union contends that threats of job loss by employees solicitating signatures for authorization cards is beyond the scope of their agency, and hence, not attributable to the Union, citing Acrri-Sun Nursery (1987) 13 ALRB No. 19. The Board, however, overruled this analysis, sub eilentio, in Furukawa Farms, Inc., supra. at page 28, footnote 17, where it held that such threats of job loss by employee solicitors are attributable to the union. Therefore, it is concluded that the evidence fails to establish that the individuals referred to in Rangel's testimony, or the employee referred to by Quiroz were agents of the Union, but does establish the individual who pressured Rodriguez and Perez to sign cards was such an agent, even if not a representative or volunteer.

The conduct of third parties not established as agents of the Union will be grounds for setting aside an election only if their misconduct created an atmosphere of fear and reprisal rendering free employee choice in the election impossible. Ace Tomato Company, Inc, (1986) 12 ALRB No. 20. The Board will set aside an election based on misconduct attributable to a union where the objecting party proves the conduct tended to interfere with employee free choice to the point that it affected the outcome of the election. Furukawa Farms. Inc., supra. The test

to be applied in determining whether the conduct reasonably has a coercive impact is objective, and not subjective. Aori-Sun Nursery, supra.

The Board has held that where a union organizer threatened two employees with the loss of their jobs, only two days before the election, and the threat was not disseminated to other employees, said conduct did not constitute grounds for setting aside the election. Jack or Marion Radovieh (1976) 2 ALRB No. 12. The National Labor Relations Board (NLRB) and the Court of Appeals, Fifth Circuit, have held that a union organizer's statement to black employees, that all blacks would be fired if the union lost the election, was not sufficient to overturn the results. Bancroft Manufacturing Company, Inc. (1974) 210 NLRB 1007 [86 LRRM 1376]; enfd. NLRB v. Bancroft Manufacturing Company. Inc. (CA 5, 1975) 516 F.2d 436. The NLRB has also held that threats of job loss by a non-agent supporter of the Union, made to 10 employees in a unit of 120 eligible voters, did not require a second election, even when accompanied by threats of physical violence. Bonanza Aluminum Corporation (1990) 300 NLRB 584 [135 LRRM 1249].

On the other hand, the California Supreme Court held that where a union agent, on the day before and the day of the election, repeatedly told eligible voters they would be replaced by "union people" if they did not vote for the union, the election should be set aside. The Court inferred that such remarks would be disseminated to other employees. Triple E

Produce Corporation v. ALRB. et al. (1985) 35 Cal.3d 42 1196 Cal.Rptr. 518].

As found above, the testimony concerning the Rangel and Rodriguez/Perez incidents is too vague and inconsistent to support findings of objectionable conduct. Quiroz's testimony, although readily implying a loss of employment, had minimal coercive impact, because the employees reasonably knew their ballots would be cast in secret, and the employee, in making the statement, was not speaking on behalf of the Union.

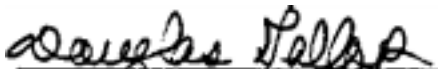
Even if some weight were to be attached to the testimony of Rangel, Rodriguez and Perez, the alleged conduct, including the Quiroz incident, would not be sufficient to require a new election. With respect to Rangel, whether the incident took place "at the beginning" of the Union campaign or "almost close" to the election, the testimony provides insufficient evidence to determine how much time passed after the incident to allow for dissipation of the effects. Again, the impact of the statement(s) should have reasonably been minimized by the secret-ballot provisions of the election. With respect to the alleged threat to Rodriguez and Perez, Rodriguez's testimony indicates that if the statements were made as alleged, employees would reasonably have interpreted them as meaning they would not obtain wage increases under a Union contract, as much as a far more serious threat of job loss. It is also noted that this incident took place more than two weeks prior to the election, giving ample time for dissipation of the effects. While it may be

presumed that election campaign statements will be disseminated, the evidence at least suggests that as employees of a contractor, these employees discussed the incidents solely as a crew of 10. Given the large size of the voting unit, and the sporadic, vague and improbable nature of most of the statements, it cannot be said that the nonparty conduct, to the extent it can be determined by the testimony, created an atmosphere of fear and coercion making employee free choice impossible, or that the agent conduct, as far as it can be determined, reasonably tended to interfere, to the point it affected the election's outcome. Accordingly, it will be recommended that the Employer's objections be dismissed.

ORDER

Based on the foregoing findings of fact and conclusions of law, and the record as a whole, the Employer's objections to conduct of election are dismissed in their entirety, and a certification of Rentative shall issue.

Dated: January 4, 1995



DOUGLAS GALLOP
Investigative Hearing Examiner