Exeter, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

LEMINOR, INC., SEQUOIA ORANGE CO.; SEQUOIA ENTERPRISES; SEQUOIA DEHYDRATOR, INC.; TEE DEE RANCH, INC.; MERRYMAN RANCH, INC., a California Corporation; CAMEO RANCHES; CANAL RANCH; CANYON RANCH, COUNTY LINE RANCH, ENTERPRISES II RANCH, J&W RANCH, a California Partnership, a Single Agricultural Employer, Employer, and WILLIAM PAUL MELLINGER, Petitioner, FRESH FRUIT AND VEGETABLE WORKERS, LOCAL 78-B, UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO, Certified Bargaining Representative.	Case No. 95-RD-3-VI 22 ALRB No. 3 (May 24, 1996)

DECISION AND CERTIFICATION OF ELECTION

On March 4, 1996, Investigative Hearing Examiner (IHE) Douglas Gallop issued the attached decision in which he sustained the election objection filed by the Fresh Fruit and Vegetable Workers, Local 78-B, United Food And Commercial Workers International Union, AFL-CIO (FFVW or Union) and recommended that the decertification election held on January 8, 1996 be set aside due to the provision of an incorrect and/or incomplete list of the names and addresses of current employees, which agricultural

employers are required by statute to maintain. Leminor, Inc., et al. (Employer) filed timely exceptions to the IHE's decision.

FACTUAL SUMMARY

An employee, William Paul Mellinger, filed a decertification petition on December 29, 1995. The Tally of Ballots from the January 8, 1996 election showed 16 votes in favor of retaining the FFVW, 39 votes for No Union, and 2 unresolved challenged ballots. The FFVW filed one election objection, which was set for hearing. The issue addressed at hearing was framed by the Executive Secretary as follows:

> Whether the employee eligibility list submitted by the Employer was deficient, and, if so, whether such deficiencies in the list tended to interfere with the employees' free choice to the extent that the outcome of the election could have been affected.[1]

In response to the petition herein, the Employer provided a list of 67 current employees and their addresses to a

[1]Section 1157.3 of the Agricultural Labor Relations Act (ALRA or Act) (codified at Lab. Code § 1140 et seq.) mandates that agricultural employers shall maintain "accurate and current payroll lists containing the names and addresses of all their employees and shall make such lists available to the board upon request." Title 8, California Code of Regulations, sections 20310(a)(2) and 20390(c) define the address requirement of section 1157.3 as the current street address, in order to facilitate home visitations. Further, the Agricultural Labor Relations Board (ALRB or Board) has held that "current street address" means the address where the employee is living while in the employer's employ. (Laflin & Laflih, et. al (1978) 4 ALRB No. 28.) Such lists must be submitted to the Regional Director within 48 hours of the filing of petitions for certification, decertification, or rival union elections and, in turn, are provided to the parties to the election in order to enable them to conduct home visits prior to the election. The names on the lists also become the basis for determining voter eligibility at the time of the election.

Board agent at the pre-election conference which was held on January 3, 1996, five days prior to the election. The information was obtained by the Employer solely from employment applications and provided only post office box numbers for 15 of the employees. The Employer was not aware of the requirement of current street addresses until the Union had filed an objection to the election based on the insufficiency of the list.

The Employer admitted that three of the addresses were out of date due to inadvertent failure to update its files upon learning of the new addresses. There was no street number for the address provided for Santiago Gomez. The address for Sixto Rodriguez was "Shop 22922, Strathmore, Cal. 93267." It was revealed at hearing that Mr. Rodriguez lived in a vehicle parked at an automotive shop. There is no dispute as to the inability of the Union to make home calls to the 15 post office box addresses. Union organizers testified that, with regard to two or three addresses on the list, they were advised by current residents that the named employee no longer resided at that address. In addition to the deficiencies noted above, the copy of the list which the Board agent provided to the Union was allegedly less legible than the original copy provided by the Employer, and the Union witnesses testified that they could not accurately decipher two or three of the street numbers.[2]

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[2]The day after the pre-election conference, Union representatives reported to the Board agent that the list contained post office boxes and was difficult to read, but did not demand an improved list and made no other effort to get a

(continued...)

DISCUSSION

While the Employer makes numerous arguments in contesting the IHE's decision, it is necessary to address only the Employer's claim that the inadequacies in the list do not warrant setting aside the election.

The employee address list required by section 1157.3 of the ALRA reflects a codification of the rule established by case law under the National Labor Relations Act (NLRA). In 1966, the National Labor Relations Board (NLRB) ruled that parties to a pending election are entitled to receive a list of the names and addresses of all employees eligible to vote. (Excelsior Underwear (1966) 156 NLRB 1236 [61 LRRM 1217] (Excelsior), National Labor Relations Board v. Wyman-Gordon Co. (1969) 394 U.S. 759 [70 LRRM 3345].)

As expressed more recently in North Macon Health Care Facility (1994) 315 NLRB 359, 360 [147 LRRM 1185] (North Macon), the prevailing view of the NLRB continues to be that "the prompt and complete disclosure of employee names and addresses is," as expressed in the Excelsior case itself, "necessary to insure an informed electorate." Reasserting the policy that an employer's failure to substantially comply with the names and address requirement "tends to interfere with a free and fair election," the NLRB in North Macon went on to state that "bad faith [on the

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[2](...continued)
better list. The Board agent did not testify and the record does not reflect that the Employer was informed of the problems with the list, as required by Regulation 20310(e)(2).

part of the employer] is generally not relevant in this area."[3] Though the NLRB in North Macon did find bad faith on the part of the employer, such finding was not necessary to the decision to set aside the election in that case. We take this to mean that, while obviously not a necessary predicate, a finding of bad faith may be one of many factors to be considered, especially in close cases.

As noted above, the duty to maintain an accurate address list is set out in section 1157.3 of the ALRA and implemented in section 20310 of the Board's regulations. In Yoder Brothers, Inc. (1976) 2 ALRB No. 4, while acknowledging that agricultural employers might generally have more difficulty determining who should be on the list and obtaining accurate street addresses, this Board adopted the NLRB's general approach to determining whether failure to supply an accurate list warrants setting aside an election. The Board went on to state that where an employer fails to exercise due diligence in obtaining and supplying accurate addresses, such conduct will be grounds for setting aside the election where the defects in the list substantially impair the utility of the list in its informational function. In later cases, the Board has clarified that this means that the essential inquiry is whether the faulty

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[3]As the NLRB observed in North Macon, at page 360, "[t]he Excelsior rule was not promulgated to test employer good faith, to augment other means of communication, or merely to 'level the playing field' between petitioners and employers. It was imposed so that unions would have access to all eligible voters."

list would tend to affect the outcome of the election. (See, e.g., Jack T. Baillie Co., Inc. (1979) 5 ALRB No. 72.)

Accordingly, while adopting the Excelsior principles, and mandating strict adherence to the statutory requirement,[4] the ALRB has been somewhat more flexible than the NLRB, in recognition of the special problems agricultural employers face in obtaining accurate, up to date street addresses.[5] In Silva Harvesting, Inc. (1985) 11 ALRB No. 12, the Board concluded that it would not be appropriate to adopt the NLRB's use of a presumption that a failure to provide a substantially complete list would have a prejudicial effect upon the election. Instead, this Board will not refuse to entertain evidence of the effect of the faulty list on the outcome of the election. The Board based its rejection of the presumption used by the NLRB not only on the differences inherent in agricultural employment, but also on the provision of section 1156.3(c) of the ALRA which requires that

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[4]Indeed, the failure to provide an adequate and accurate list has been held, with judicial approval, to violate employees' rights under section 1152 of the ALRA. (See, e.g., Harry Carian Sales v. ALRB (1985) 39 Cal.3d 209 [216 Cal.Rptr. 688].) Laflin & Laflin v. ALRB (1985) 166 Cal.App.3d 368 [212 Cal.Rptr. 415].) Conduct which constitutes an unfair labor practice does not necessarily constitute conduct which warrants setting aside an election. Accordingly, failure to provide an adequate list, when alleged as an objection to an election, is evaluated solely on the basis of whether it would tend to have affected the outcome of the election.

[5]Due to the 7-day election requirement under the ALRA, the Board's regulations impose upon its Board agents a major responsibility to assist employers both in understanding their obligation to provide current and accurate names and home addresses and to assure that such lists are promptly made -available to all parties to the election.

the Board certify an election unless there are sufficient grounds to refuse to do so. This provision has been interpreted to create a presumption in favor of certification of an election, with the burden of proof on the objecting party to demonstrate that an election should be set aside. (Ruline Nursery Co. v. ALRB (1985) 169 Cal.App.3d 247, 254 [216 Cal.Rptr. 162].) A significant aspect of that burden is showing that the inadequacies in the list actually impaired the union's ability to communicate with employees. (Tom Buratovich And Sons (1976) 2 ALRB No. 11.) Such a showing logically would include the extent to which the list was actually utilized in the election campaign, including the relative emphasis placed on home visits.

The IHE appeared to interpret the Board's outcome determinative standard to mean that a union would carry its burden of proof by showing that the number of defective addresses equals or exceeds the number of votes that, if shifted in favor of the objecting union, would have changed the outcome of the election. Here, a shift of 13 votes would have ensured a victory for FFVW,[6] as compared to 19 addresses that clearly have been found to be inadequate. However, our review of ALRB and NLRB precedent reflects that neither board has applied such a strict numerical standard in deciding these types of cases.

Where the number of inadequate addresses dwarfs the shift in the number of votes necessary to change the outcome, the

[6]A shift of 11 votes would have forced resolution of the two challenged ballots.

election is normally set aside. This was the situation in the cases cited by the IHE. (Silva Harvesting, Inc., supra, 11 ALRB No. 12 (115 of 198 names had only post office boxes and 20 other defective addresses, shift of 6 votes needed to change outcome), Betteravia Farms (1983) 9 ALRB No. 46 (71 of 307 addresses defective, shift of 17 votes needed to change outcome); Salinas Lettuce Farmers Cooperative (1979) 5 ALRB No. 21 (81 of 236 addresses consisted only of post office boxes, shift of 7 votes needed to change outcome).) Where the number of inadequate addresses is less than the shift in votes necessary to change the outcome, the election would normally be upheld.

However, where the number of inadequacies merely exceeds the number of votes necessary to change the outcome by an insubstantial margin, such as in the instant case, that alone will not result in the election being set aside. In The Lobster House (1970) 186 NLRB 148, the NLRB upheld the election even though 16 of 97 addresses were faulty and a shift of only 8 votes would have changed the outcome of the election. In Telonic Instrument (1968) 173 NLRB 588, the election was upheld where four names were initially omitted from the list, only two of which were ever provided, and the margin of victory was one. Similarly, this Board has repeatedly upheld elections where the number of inadequate addresses exceeded the number of votes necessary to change the outcome. (Patterson Farms, Inc. (1982) 8 ALRB No. 57 (41 inadequate addresses, shift of 15 votes needed to change outcome); H. H. Maulhardt Packing Co. (1980) 6 ALRB

No. 42 (19 inadequate addresses, shift of 9 votes needed to change result); Jack T. Baillie Co., Inc., supra, 5 ALRB No. 72 (47 defective addresses, union shown to have nonetheless contacted 31, shift of 7 votes needed to change result); Point Sal Growers And Packers (1978) 4 ALRB No. 105 (19 inadequate addresses, shift of 11 votes needed to change outcome); Yoder Brothers, Inc., supra, 2 ALRB No. 4 (approximately 23 omissions and inaccurate addresses, shift of 14 votes necessary to force runoff election).)

Here, the Employer, who must be charged with knowledge of the requirements of the statute and regulations, did not exercise due diligence in maintaining accurate street addresses. Consequently, the list contained 19 clearly inadequate addresses. However, the number of inadequacies in relation to the number of votes necessary to change the outcome of the election (13) is not so large that the outcome would necessarily tend to have been affected. Indeed, as discussed above, the numbers involved here fall well within the parameters of cases where the elections have been upheld. We must therefore look to other factors, including the actual use of the list by the Union, the efforts of the Employer to compile an accurate list, and the efforts of Board agents to facilitate the process of providing the list to the Union.

Though Union representatives indicated to the Board agent that the list was imperfect, the record fails to show that the Union made any demand for an improved list. While the Union

had no legal duty to make such a demand, evidence of such a demand would have strengthened the Union's showing that a completely accurate list was essential to its election campaign. Although Union representatives did testify that they intended to make home visits to everyone on the list, the record evidence does not demonstrate the extent to which the Union's ability to communicate with employees was dependent on such use of the list. Nor was the Employer's submission of an imperfect list due to bad faith or any other conduct designed to hamper the Union's communication with the employees. In addition, the Employer was not alerted to the deficiencies in the list and given the opportunity to correct them.[7] We find, therefore, that the record fails to reflect any additional circumstances beyond the list's facial deficiencies that would support the claim that a more accurate list would have affected the outcome of the election.

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[7]In this instance, the record does not reflect that the Board agent, upon being given the list by the Employer at the pre-election conference, made any effort to review the list for accuracy and completeness before the list was given to the Union for its use. Further, the record does not reflect that the Board agent, upon being informed by the Union that the list was imperfect, made any effort to comply with Regulation 20310(e)(2), which requires a Board agent, after determining that a list is not complete or accurate, to state the reasons therefor in writing and serve a copy of such written reasons on all parties. Had the Employer been so informed of the list's deficiencies, the faulty list might have been corrected so as to eliminate any challenge to the election. Nevertheless, as discussed above, we find that neither the problems with the list, nor the conduct of the parties and the Board agent, warrant the setting aside of the election.

Under these circumstances, coupled with the fact that the relative number of inadequacies as compared to the number of votes necessary to shift the outcome is most closely analogous to those cases where the elections have been upheld, we must conclude that the Union has failed to meet its burden of demonstrating that the deficiencies in the list would tend to affect the outcome of the election. We will, therefore, certify the results of the election.

CERTIFICATION OF ELECTION

Having found the election objection insufficient to warrant setting aside the election, it is hereby ordered that the results of the election held on January 8, 1996 be upheld and the Fresh Fruit and Vegetable Workers, Local 78-B, United Food And Commercial Workers International Union, AFL-CIO be decertified as the exclusive bargaining representative of all the agricultural employees of Leminor, Inc., et al. working in off the farm packing houses in Terra Bella and Exeter (Tulare County).

DATED: May 24, 1996

MICHAEL B. STOKER, Chairman

IVONNE RAMOS RICHARDSON, Member

LINDA A. FRICK, Member

CASE SUMMARY

LEMINOR, INC., et al.
(William Paul Mellinger;
FFVW, Local 78-B (UFCW))

22 ALRB No. 3
Case No. 95-RD-3-VI

Background

A decertification election was held on January 8, 1996, with the tally of ballots showing 16 votes for the FFVW, 39 votes for No Union, and 2 unresolved challenged ballots. On March 4, 1996, the Investigative Hearing Examiner issued a decision in which he sustained the election objection filed by the FFVW and recommended that the decertification election be set aside due to the provision of an incorrect and/or incomplete list of the names and addresses of current employees, which agricultural employers are required by statute to maintain. The list provided by the Employer contained 19 inadequate or incomplete addresses and a shift of 13 votes would have changed the outcome of the election. The Employer filed timely exceptions to the IHE's decision.

Board Decision

The Board first noted that Labor Code section 1156.3(c) has been interpreted to create a presumption in favor of certification of an election, with the burden of proof on the objecting party to demonstrate that an election should be set aside. Moreover, an outcome determinative standard has been applied in cases involving employee address lists, and a significant aspect of the complaining union's burden in such cases is showing that the inadequacies in the-list actually impaired the union's ability to communicate with employees. Upon reviewing its prior cases, as well as NLRB cases, the Board concluded that a strict numerical comparison of inadequate addresses and margin of victory has not been applied. Rather, where the number of inadequacies merely exceeds the number of votes necessary to change the outcome by an insubstantial margin, such as in this case, that alone will not result in the election being set aside. The Board found that the record failed to reflect any additional circumstances beyond the list's facial deficiencies that would support the conclusion that the outcome of the election would have been affected by the defective list. The Board noted that the record did not fully establish the extent to which the Union's ability to communicate with the unit employees was dependent on the use of the list, the Employer's submission of an imperfect list was not due to bad faith or any other conduct designed to hamper the Union's communication with the employees, and the Employer was not alerted to the deficiencies in the list and given the opportunity to correct them. Therefore, the Board upheld the results of the election.

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STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of: LEMINOR, INC., and SEQUOIA ORANGE COMPANY; SEQUOIA ENTERPRISES; SEQUOIA DEHYDRATOR, INC; TEE DEE RANCH, INC.; MERRYMAN RANCH, INC., a California Corporation; CAMEO RANCHES; CANAL RANCH, CANYON RANCH COUNTY, LINE RANCH, ENTERPRISES II RANCH, J&W RANCH, a California Partnership, a Single Agricultural Employer, Employer, and WILLIAM PAUL MELLINGER Petitioner, FRESH FRUIT AND VEGETABLE WORKERS, LOCAL 78-B, UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO, Certified Bargaining Representative.	Case Ho. 95-RD-3-VI

Appearances:

Pamela J. Pescosolido
Exeter, CA
for the Employer

William Paul Mellinger
Porterville, CA for the
Petitioner

David A. Rosenfeld
VAN BOURG, WEINBERG, ROGER & ROSENFELD
Oakland, CA
for the Union

DECISION OF THE INVESTIGATIVE HEARING EXAMINER

DOUGLAS GALLOP: This case was heard by me on February 13, 1996. On May 7, 1992, Fresh Fruit and Vegetable Workers Local 78-B (hereinafter Union) was certified as representative of the Employer's agricultural employees. Employee, William Paul Mellinger (hereinafter Petitioner) filed a decertification petition on December 29, 1995. The Agricultural Labor Relations Board (ALRB or Board) conducted an election on January 8, 1996, and the Tally of Ballots showed 16 votes in favor of the Union, 39 for no union and two unresolved challenged ballots. The Union filed one timely objection to conduct of the election on January 15, 1996, which was set for hearing.[1] The Union objects to the election because the Excelsior list it received contained inadequate and/or inaccurate addresses, was illegible and did not give the job classifications of the employees. The Union and Employer presented witnesses, documentary evidence and oral argument at the hearing, all of which have been carefully considered.[2]

STATEMENT OF FACTS

The ALRB conducted a pre-election conference on January 3, 1996, and the Employer was instructed to provide an employee list to the Board agent conducting the conference. The Employer provided a list, containing 67 names, but no job classifications. The Employer used addresses submitted by

[1]Respondent's motion, at the hearing, to dismiss the objection because, inter alia, it was untimely, was denied.

[2]The Petitioner was present at the hearing, but chose to not formally appear or participate.

employees on their applications for employment. It does not require street addresses, and as the result, 15 of the listed employees were followed by post office box addresses. The Employer failed to obtain street addresses for the list because it was unaware, until the hearing in this matter, that sections 20310(a)(2) and 20390(c) of the Board's Regulations require it to do so. The Employer had, in the past, provided both the Board and the Union with employee lists containing post office box addresses, without objection.[3]

The Employer admits that the addresses of three employees on the list (Jesus Uribe, Rafael Ornelas and Gloria Garcia Martinez) are incorrect because the employees had moved, but the Employer, although informed of the new addresses, inadvertently failed to place them on the list. The Employer also admits that it placed the name of an ineligible voter (Martha O. Martinez) on the list. The address for employee Santiago Gomez is clearly inadequate, because no street number is given. The address for Sixto Rodriguez is shown as "Shop 22922, Strathmore CA 93267." Mr. Rodriguez lives in a vehicle parked at an automotive shop with no street address, but this was not explained to the Board or the Union.

The Excelsior list provided by the Employer is

[3]The Union is affiliated with the United Food and Commercial Workers (UFCW), who placed it into trusteeship before the petition was filed, and assigned representatives to take control. ,In November 1995, UFCW representatives contacted the Employer and requested a current employee list. The Employer refused the request, on the basis that the UFCW is not the certified unit representative.

essentially legible; however, the "0" numerals contain slashes which make them difficult to read. The Board agent copied the original list and returned it to the Employer's representative. The copy provided to the Union is far less legible, and as a result, representatives went to at least three incorrect addresses looking for employees. The Union representatives at the pre-election conference did not notice that the list contained post office box addresses, or that some of the addresses were difficult to read, until after they left. On the following day, they reported these problems to the Board agent, but received no further information. The Union presented hearsay evidence indicating that two or three additional employees had moved. The Union's representatives had access to eligible voters at the worksites, but it is unclear how many employees were present.

ANALYSIS AND CONCLUSIONS

Home visits are considered a critical element in any union campaign. Even where in-plant access is permitted, the greater one-on-one privacy available in a residential environment is not fulfilled. The Board has repeatedly held that providing post office box addresses, contrary to its Regulations, is grounds for setting aside an election where the failure potentially affects the outcome. Silva Harvesting (1985) 11 ALRB No. 12; Betteravia Farms (1983) 9 ALRB No. 46; Salinas Lettuce Farmers Cooperative (1979) 5 ALRB No. 21. Although not intentional, the Employer's failure to comply with the

Regulations cannot be considered excusable neglect. The failure of the Union or the Board to have objected to similar lists in the past does not act to waive the'requirements set forth in the Regulations. It is further noted that the Union, having won the 1992 election, had no reason to formally object, and the newly-assigned UFCW agents were unfamiliar with the unit employees. While the representatives could have examined the list more closely at the pre-election conference, it was the Employer's conduct that began this unfortunate chain of events. When the Union's representatives realized there were problems with the list, they did inform the Board agent. See Betteravia Farms, supra. Since a swing of 15 votes would have changed the outcome of the election, the inability of the Union to make home visits to those employees potentially affected the results. This, in itself, is grounds for setting aside the election.

The Employer further admits that it provided non-current addresses for three employees, and the address for Santiago Gomez is facially inadequate. The evidence fails to show that these failures were excusable.[4] Non-current and facially inadequate addresses, when potentially outcome-determinative, are also grounds for setting aside an election. Betteravia Farms, supra. These additional deficiencies increase the possibility that the outcome of the election was affected.

[4]Although the concept of fault appears in representation cases, it must be kept in mind that irrespective of misconduct, the priority in these cases is to ensure that all parties be afforded their rights under the Act.

Accordingly, it will be recommended that the election be set aside. Inasmuch as the Employer maintains a relatively stable workforce which is employed for most of the year, and there is no allegation that the showing of interest in support of the petition was tainted, it will further be recommended that a second election be conducted.

In light of the above findings and conclusions, it is unnecessary to consider the other purportedly deficient addresses, the failure to set forth job classifications or the effect of providing a poor copy of the list by the Board agent.

ORDER

Based on the foregoing findings of fact and conclusions of law, and the record as a whole, the Union's objection to conduct of election is sustained, the election is hereby set aside and a second election shall be conducted at the earliest time at which the Board's peak employment requirements are met.

Dated: March 4, 1996

Douglas Gallop
Investigative Hearing Examiner