Tulare, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

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| GILROY FOODS, INC.,<br><br>Employer,<br><br>and<br><br>UNITED FOOD AND COMMERCIAL WORKERS, LOCAL 1096, AFL-CIO, & CLC,<br><br>Petitioner. | Case No. 97-RC-2-VI<br><br>23 ALRB No. 10<br>(October 3, 1997) |

DECISION AFFIRMING DISMISSAL OF ELECTION OBJECTIONS

On July 28, 1997,[1] an election was held among the agricultural employees of Gilroy Foods, Inc. (Employer). The tally of ballots showed 123 votes for the United Food & Commercial Workers, Local 1096, AFL-CIO (Union or Local 1096), 61 votes for No Union, and 11 unresolved challenged ballots.

The Employer timely filed objections to the conduct of the election and to alleged conduct affecting the results of the election. On August 21, the Board's Executive Secretary issued a Notice setting two of the objections for hearing and dismissing the remaining objections. This matter is now before the Board on the Employer's request for review of the Executive Secretary's dismissal of certain objections.

[1]All dates herein refer to 1997 unless otherwise specified.

Alleged Release of the Employer's Excelsior List (Objections 4 and 6)

The Employer requests review of the Executive Secretary's dismissal of objections alleging that there was an improper release of the Employer's Excelsior list (i.e., the list of current employees and their addresses), and that this resulted in campaigning by representatives of the United Farm Workers of America, AFL-CIO (UFW) which confused eligible voters into thinking that the UFW was a choice on the ballot and, therefore, that the union votes cast in the election were, in part, not in favor of the petitioning union.

A declaration filed by Maria Castillo, a Gilroy employee, states that a person identifying himself as a UFW representative visited her home and told her not to vote for Local 1096 but instead that she and the other employees should "vote-in" the UFW. The person also allegedly told her that they had already visited other employees' houses to tell them to choose the UFW instead of Local 1096 in the election. Castillo states that during the same week she talked to other employees who were visited by UFW people who had said the same thing to them. Geoffrey F. Gega, one of the Employer's attorneys, filed a declaration stating that Local 1096's business agent Roy Mendoza told him that he had information that the Excelsior list had been furnished to the UFW. Mendoza allegedly asked if the Employer had released the list to the UFW, and Gega advised him that the

Employer had released the list only to the Agricultural Labor Relations Board (ALRB).

The Executive Secretary dismissed Objections 4 and 6 for lack of declaratory support demonstrating that the UFW was able to make home visitations only because it apparently received a list of employee names and addresses from the ALRB. The Executive Secretary noted that the only non-hearsay evidence in support of the allegation was of one visit by the UFW to the home of one employee. Moreover, he noted, there was no declaratory support for the allegation that employees may have been confused as to which union they were voting for on the ballot.

The Employer argues that it has submitted sufficient evidence to demonstrate that the UFW obtained the Excelsior list and improperly used the list to make home visits to employees. The Employer further argues that the Executive Secretary should not have excluded from his consideration all hearsay evidence, and in particular should not have excluded the Union agent's alleged statement that he had heard the Excelsior list had been released to the UFW.[2] Finally, the Employer asserts that it is not required to show that employees were actually confused by statements made by UFW representatives during its home visits, and that it has made a prima facie showing that there was a

[2] Contrary to the Employer's assertion, the Executive Secretary did not adopt an "underground" regulation by excluding hearsay statements. The Executive Secretary excluded hearsay statements from his consideration because they alleged facts not within the declarants' personal knowledge, and thus failed to comply with the existing regulation, California Code of Regulations, title 8, section 20365.

potential atmosphere of confusion regarding the balloting process.

Discussion

In J.R. Norton Company v. ALRB (1979) 26 Cal.3d 1, the California Supreme Court concluded that Labor Code section 1153.3(c) did not require the Board to hold a full hearing in every case in which election objections are filed. The court upheld the Board's application of the requirement in the Board's regulations, Title 8, California Code of Regulations;, section 20365, that an election objections petition must be accompanied by declarations establishing a prima facie case of election misconduct. The court found that the regulation, which requires that the facts stated in each declaration shall be within the personal knowledge of the declarant, served a valid purpose in assuring that the board would not dissipate its limited resources in holding meaningless hearings on claims that were legally insufficient.

The Board has held in numerous cases that the Executive Secretary acts properly in dismissing objections based on declarations alleging facts which are not within the personal knowledge of the declarants. (See, e.g., G H & G Zysling Dairy (1993) 19 ALRB No. 17.) The hearsay statements relied upon in the declarations submitted in the instant case--statements made by persons other than the declarants themselves--are clearly statements of alleged facts not within the personal knowledge of the declarants. No declarant states from his or her own personal

knowledge that the UFW was given an Excelsior list of the Employer's employees. Gega's statement that the Union's business agent told him that he had information that the list had been furnished to the UFW is not a statement of facts within the declarant's personal knowledge, since Gega had no personal knowledge of whether or not the list was furnished to the UFW. Similarly, Maria Castillo's statement that a UFW representative visited her home does not establish prima facie that the UFW obtained the list, nor do her hearsay statements that the UFW visited other employees' homes establish that fact.

The Board takes very seriously any allegation that Board agent misconduct impaired the integrity of the election process. It is extremely important that the Board's processes of preparing for and conducting elections be of the utmost fairness and without any taint of bias, either actual or perceived, toward any party. Because we are so concerned with protecting the integrity of elections, we are very reluctant to dismiss an election objection implying that a Board agent may have improperly released an Excelsior list to a union which was not entitled to it. We are however, bound by the procedures set forth in our regulations for consideration of election objections, which require that objections be supported by declarations stating facts within the personal knowledge of the declarants. (Cal. Code Regs., tit. 8, § 20365.) We cannot alter those procedures without a formal amendment of the regulations, even in a case where the allegations imply that there might have

been a serious breach of the integrity of the Board's pre-election processes. We note, however, that if the Employer had wished to pursue this matter further, it could have followed the Board's external complaint procedure, under which the Board investigates complaints against agency employees alleging bias, prejudice or improper conduct.[3]

Concerning Maria Castillo's allegation that the UFW told her that she should "vote-in" the UFW rather than. Local 1096, we find that this is not enough to establish that eligible voters would tend to be confused into thinking that the UFW was *a* choice on the ballot and that a "union" vote was therefore a vote for the UFW. Castillo makes no claim that the appearance of the actual ballot was misleading, or that Local 1096 was not clearly identified on the ballot. In the absence of such a claim, we conclude that a reasonable voter would not be confused about what the actual choices on the ballot were.

For the above reasons, we conclude that the Employer has failed to present a prima facie case that there was an improper release of the Employer's Excelsior list and that this resulted in improper campaigning by the UFW causing voter confusion. We therefore affirm the Executive Secretary's dismissal of Objections 4 and 6.

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[3] The Board's external complaint procedure is contained in the Board's Operations Manual, Chapter 2, section 3-2590, Appendix 2 7.

Alleged. Inadequate Notice of the Election Given to the Employees (Objection 5)

The Employer seeks review of the Executive Secretary's dismissal of its objection that there was inadequate notice of the election given to employees, and claims that there was notice given to less than 50 percent of the eligible voters.

The Employer's safety manager Joe Garcia filed a declaration stating that he acted as the Employer's representative in directing Board field agents to fields where employees were working so that the agents could distribute notices of the election. The agents began their distribution about 10:00 a.m. About 1:30 p.m., Garcia states, a Board agent asked him how many people they had visited during the day. Garcia told him they had visited 102 people out of the 120 people working that day, and they still had time to get to all the remaining fields. According to Garcia, the Board agent indicated that he thought that enough people had been contacted. About twenty minutes later, Garcia offered to take another Board agent to another field to meet with employees, but the Board agent allegedly replied that his supervisor felt that they had already contacted enough employees.

The Executive Secretary dismissed Objection 5 because he calculated that only a maximum of 31 eligible voters failed to vote and this number could not have affected the outcome of the

election.[4] He noted further that there were indications in the declarations that the parties, including representatives of the Employer, discussed the upcoming election with numerous employees.

The Employer argues that the Executive Secretary's reference to 220 eligible voters is erroneous, and that there was in fact notice to less than fifty percent of eligible voters. The Employer now contends that there were actually 241 eligible voters, and claims that it pointed this out in its "Petition."[5] In any case, the Employer argues, the Executive Secretary should not have applied an outcome determinative test in this case because that ignores the Employer's argument that the lack of notice, combined with the UFWs alleged use of the Excelsior list and resulting confusion about which labor organization (or whether both labor organizations) were contained on the ballot, affected or could have affected the outcome of the election.

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[4] The Executive Secretary assumed for purposes of his analysis that the 11 challenged ballots were based on a failure to appear on the list of eligible voters. Subtracting that number from the total number of voters (200, including 5 void ballots), he calculated that a minimum of 189 out of 220 eligible voters (that is, the 220 employees who were on the list) actually cast ballots.

[5] Presumably the Employer is referring to its Response to the Petition. The copy of the Employer's Response to the Petition which was date-stamped as received in the Visalia Regional Office of the Board on July 23, first has the number of employees listed as 241, but this number is crossed out and the number 214 is hand-written below, with the initials "J.G." signed. Curiously, the copy of the Response to the Petition which the Employer attached to its Statement of Facts and Law in Support of Employer's Petition to Set Aside Election does not contain this alteration, which presumably was approved by an agent of the Employer.

Discussion

The Regional Director is required to give as much notice of an election as is reasonably possible under the circumstances of each case. (J. Oberti, Inc. (1984) 10 ALRB No. 50.) The Board does not require that election notices be given individually to each potential voter. (Sun World Packing Corporation (1978) 4 ALRB No. 23.) The very short time constraints of the Agricultural Labor Relations Act (ALRA or Act) which requires an election to be held within seven days of the filing of a petition, as well as the other matters such as peak employment and showing of interest that the Board agents have to determine, all make the giving of notice of the time and place of the election difficult. Thus, an objection based on inadequate notice will generally be dismissed unless the objecting party can show that an outcome determinative number of voters was disenfranchised. (R.T. Englund Company (1976) 2 ALRB No. 23.)

The number of employees on the list submitted by the Employer in this case to the regional office was 220. The Employer may not now be heard to argue that the number was different, since it has presented no evidence that there were any eligible employees who were not on its list. The number of eligible voters who voted, 189,[6] is sufficient to show adequate notice was given, and that there was no "disenfranchisement" of an outcome determinative number of eligible voters.

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[6] This number is arrived at by subtracting the 11 unresolved challenges from the total of 200 votes cast.

Further, the Employer has made no prima facie showing that the ballot was potentially confusing to voters. The tally of ballots clearly indicates that the only union listed on the ballot was Local 1096. Since the UFW did not intervene in the election, it could not have been listed on the ballot and in fact the tally does not list any intervenors.

The only declarant who stated that she had been told by a UFW representative that she should choose the UFW in the election was Castillo. However, Castillo did not state that the ballot listed a second union, or that the identification of Local 1096 on the ballot was confusing, and thus it cannot be concluded that a reasonable person would have been confused about what a vote for the Union would mean.

For the above reasons, we conclude that the Employer failed to make a prima facie showing that there was inadequate notice given of the election or that there was voter confusion about which union was listed on the ballot.[7] We therefore affirm

[7] It is disingenuous for the Employer to imply that it did not know whether both unions were listed on the ballot, since each ballot is held up for viewing by all persons present during the tally, including the Employer's observers. Obviously, if both unions had been listed on the ballot the Employer would have been able to make a specific objection on the grounds that a non-petitioning, non-intervening union had been improperly listed on the ballot.

the Executive Secretary's dismissal of Objection 5.[8]

DATED: October 3, 1997

MICHAEL B. STOKER, Chairman[9]

IVONNE RAMOS RICHARDSON, Member

LINDA A. PRICK, Member

TRICE J. HARVEY, Member

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[8] On September 30, 1997, the Union filed a motion to dismiss the Employer's objections and impose sanctions upon the Employer and its counsel. The Union alleges that the Employer, in obtaining a continuance of the hearing in this matter until October 14, 1997, falsely represented to the Executive Secretary that the Employer's harvest operations would continue through the third week of October 1997. The Union alleges that the harvest is actually ending during the first week of October 1997, and that the Employer knew this to be true at the time it filed its request for continuance. The Union requests that the Employer's objections be dismissed or that, in the alternative, the Employer be prohibited from presenting any evidence for which the Union would have to call any employee rebuttal witness who might be unavailable as of the date of the continued hearing, and that other unspecified sanctions be imposed. We defer this matter to the Investigative Hearing Examiner for determination of whether the Union's motion is well grounded and, if so, what, if any, sanctions to impose.

[9] Member Grace Trujillo Daniel did not participate in the consideration of this case.

CASE SUMMARY

Gilroy Foods, Inc. (United Food and Commercial Workers, Local 1096)

23 ALRB No. 10
Case No. 97-RC-2-VI

Background

Following an election in which the United Food & Commercial Workers, Local 1096, AFL-CIO (Union) was selected as the exclusive representative of the agricultural employees of Gilroy Foods, Inc. (Employer), the Employer filed eleven election objections. In a ruling issued August 21, 1997, the Board's Executive Secretary set some of the objections for hearing and dismissed others.

The Employer requested review of the Executive Secretary's dismissal of objections alleging that there was an improper release of the Employer's Excelsior list, resulting in campaigning by representatives of the United Farm Workers of America, AFL-CIO (UFW) which confused eligible voters into thinking that the UFW was a choice on the ballot; and that there was inadequate notice of the election given to employees.

Board Decision

The Board affirmed the Executive Secretary's dismissal of the objections alleging that improper campaigning by the UFW resulted in confusion of eligible voters. The Board found that the Executive Secretary had properly excluded from his consideration allegations based on hearsay, and concluded that there was no prima facie showing that the UFW had obtained the Excelsior list, and no showing that a reasonable voter would have been confused about the actual choices on the ballot. The Board also affirmed the Executive Secretary's dismissal of the objection alleging that inadequate notice was given of the election. The Board found that the Regional Director had given adequate notice and that the number of employees who had actually voted demonstrated that there could not have been any "disenfranchisement" of an outcome determinative number of eligible voters.

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STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

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| In the Matter of :<br><br>GILROY FOODS, INC.,<br><br>Employer,<br><br>and<br><br>UNITED FOOD AND COMMERCIAL WORKERS, LOCAL 1096, AFL-CIO, & CLC,<br><br>Petitioner. | Case No. 97-RC-2-VI<br><br>AMENDED NOTICE OF OBJECTIONS SET FOR HEARING; NOTICE OF PARTIAL DISMISSAL OF OBJECTIONS; AND NOTICE OF OPPORTUNITY TO FILE REQUEST FOR REVIEW |

PLEASE TAKE NOTICE THAT, pursuant to Labor Code section 1156. 3 (c), an investigative hearing on the objections filed by Gilroy Foods, Inc. Employer) in the above-captioned matter will be conducted on September 30, 1997, and on consecutive days thereafter until completed in Visalia, California, at a location to be later noticed by the Executive Secretary. The investigative hearing shall be conducted in accordance with the provisions of Board Regulation 20370. The Investigative Hearing Examiner shall take evidence on the following issue raised by the allegations in the objections petition:

Objections 3 and 7: Did agents and\or supporters of the United Food and Commercial Workers, Local 1096 (Union), by threatening employees that the Union would have them fired if they 25

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[1] The Boards Regulation are codified in at Title 8, California Code of Regulations, section 20100 et seq.

did not supoort the Union by signing authorization cards and/or voting for the Union in the election, interfere with employee free choice to the extent that warrants invalidating the election under the appropriate standard for evaluating party or third party conduct? (See *Furulcawa Farms, Inc.* (1991) 17 ALRB No. 4, pp. 19, 22.)

PLEASE TAKE FURTHER NOTICE that the following objections filed by the Employer are hereby DISMISSED for the following reasons:

Objection 1, alleging that, due to fraud and misrepresentation in the solicitation of authorization cards, the showing of interest and, thus, the election petition, is defective, is dismissed because the regional director's determination as to the sufficiency of the showing of interest is not reviewable, as it is a purely administrative matter whereby the Agricultural Labor Relations Board (ALRB or Board) decides whether a claim of representation warrants the expense and effort of an election. *(Nishikawa* Farms, *Inc.* v. *Mahoney* (1977) 66 Cal.App.3d 781; *Thomas S. Castle* v. *ALRB* (1983) 40 Cal.App.3d 668.) In addition, an objection will not be set for hearing where, as here, the supporting declarations contain only hearsay, which is contrary to the requirement in the Board's regulations that declarations state facts within the personal knowledge of the declarant. (Regulation 20365(c)(2)(B); *J.R. Norton Co.* v. *ALRB* (1979) 26 Cal.3d 1; *GH&G Zysling Dairy* (1993) 19 ALRB No. 17.)

Objection 2, which alleges that the bargaining unit

should have been limited to the San Joaquin Valley, is dismissed for failure to provide any basis for overcoming the statutory presumption in favor of statewide bargaining units. (Lab. Code Sec. 1156.2.) In light of the statutorily declared policy concerning the scope of bargaining units under the ALRA, a petitioning union's proposed unit designation is not binding on the Board. Moreover, in its response to the Petition for Certification, the Employer advised the Regional Director that the unit sought did indeed include all of its agricultural employees in California (paragraph 6(a)), that the employees are employed within a single geographical area, thereby obviating need for further investigation pursuant to Labor Code section 1156.2 regarding the appropriateness of a single bargaining unit (paragraph 6(b)), and further, that the Employer agreed that the unit sought by the Union is appropriate (paragraph 6(d)).

Objections 4 and 6, which allege improper release of the Excelsior list to the United Farm Workers of America, AFL-CIG (UFW) and unlawful campaigning by the UFW (which did not intervene in the election), are dismissed for lack of declaratory support demonstrating that the UFW was able to make home visitations only because it apparently received a list of employee names and addresses from the ALRB. The only non-hearsay evidence in support of the allegation was of one visit by the UFW to the home of one employee. In addition, there is no declaratory support for the allegation that employees may have been confused as to which union they were voting for.

Objection 5, which alleges that election notices were distributed by Board agents to less than fifty percent of the 220 3 eligible voters, is dismissed in light of the fact that only a maximum of thirty-one eligible voters failed to vote[2] and that this number could not have affected the outcome of the election. Further, there are indications in the declarations that the parties, including representatives of the Employer, discussed the upcoming election with numerous employees.

Objection 8, which alleges misrepresentations of company policy concerning the use of labor contractors, is dismissed for failure to provide declaratory support based on facts within the personal knowledge of the declarants. (See discussion above concerning Objection 1.)

Objection 9, which alleges that employees were intimidated because the Union's observers at the election were avid and vocal Union supporters, is dismissed because no objectionable conduct by the observers is alleged. Nor is any impropriety in the selection of observers alleged, as each party may be represented by observers of its own choosing as long as they are non-supervisory employees of the employer. (Regulation 20350(b).) Moreover, Regulation 20350(b) also provides that any party objecting to the observers designated by another party must register the objection with the Board agent supervising the election prior to the

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[2]Assuming that the 11 challenged ballots were based on a failure to appear on the list of eligible voters, a minimum of 189 of 220 eligible voters actually cast ballots.

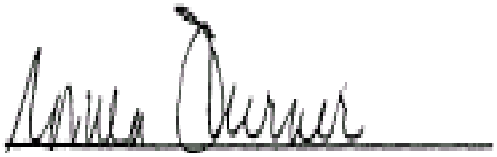
commencement of the election, or the right to object to the conduct of the election on this basis is waived. In this case, there was no showing that any such objection was timely raised by the Employer.

Objection 10, which alleges that the Union's business agent was within the quarantine area at one of the voting sites with five minutes remaining before the posted closing time, is dismissed for failure to allege that there were any employees present in the voting area at that time who had not yet voted.

Objection 11, which alleges that Board agents closed polls five or ten minutes prior to the agreed upon end of the voting period at two sites, is dismissed for failure to provide evidence that any voters were disenfranchised by said conduct, or, if so, that they were sufficient in number to have affected the outcome of the election.

PLEASE TAKE FURTHER NOTICE that, pursuant to Regulation 20393 (a), the Employer may file with the Board a request for review of the partial dismissal of its election objections within five (5) days of this Order. The five-day filing period is calculated in accordance with Regulation 20170. Accordingly, the request for review is due on September 2, 1997.

DATED: August 26, 1997



NORMA TURNER
Acting Executive Secretary, ALRB