Watsonville, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

COASTAL BERRY FARMS, LLC., Employer, and COASTAL BERRY FARMWORKERS COMMITTEE, Petitioner, and GUADALUPE LARA, CANDELARIA LLANAS, LEONARDO MARTINEZ, ISABEL RENDON, JOSE ROJAS, and EFREN VARGAS, Individual Employees of Coastal Berry Farms, LLC., and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Labor Organization.	Case No. 98-RC-l-SAL 24 ALRB No. 4 (October 22, 1998)

RULING ON NOVEL QUESTIONS OF LAW

Pursuant to an initial Petition for Certification filed on July 16, 1998 by the Coastal Berry Farmworkers Committee (CBFC or Petitioner), an election by secret ballot was conducted under the direction and supervision of the Regional Director for the Salinas Region among the agricultural employees of the Coastal Berry Company (Employer) on July 23, 1998. At the conclusion of the election, the parties were furnished with a tally of ballots which showed that of approximately 1054 eligible voters, 983 cast ballots, of which 523 were for and 410 were against the

Petitioner. There were 39 challenged ballots which were insufficient in number to affect the results of the election. Thereafter, in accordance with Labor Code section 1156.3(c),[1] the Employer filed timely objections to conduct affecting the conduct of the election and conduct affecting the results of the election.

Although it did not file a petition to intervene in the election, and therefore was not a direct participant in the election process insofar as its name did not appear on the ballot, the United Farm Workers of America, AFL-CIO (UFW or Union) filed objections to the election within the time period prescribed by section 1156.3(c). Six individual employees who voted in the election also submitted objections within the statutory five-day period for filing objections. Neither the UFW's nor the employees' objections have been evaluated because, as a threshold matter, the Board must determine whether a labor organization or individual employees have standing to file objections to an election in which none had been presented to voters as a choice on the ballot.[2]

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[1]Unless otherwise specified, all section references herein are to the California Labor Code, section 1140 et seq.

[2]In accordance with the Board's regulations, election objections are subject to initial screening by the Board's Executive Secretary to determine first whether there is proper support for the objection and second whether the objection establishes prima facie conduct which would warrant the setting aside of the election. Since there is limited Board precedent governing the right of a nonparticipating union to file objections and no precedent whatsoever with regard to such filings by individual employees, the Executive Secretary declined

(continued...)

We are faced with the important, albeit not recurring, questions of whether the language of section 1156.3(c) may be read to permit the filing of post election objections by (l) labor organizations which were not actual participants in the election process or (2) unit employees who voted in the election. Section 1156.3(c), in relevant-part, provides that objections may be filed by "any person." Section 1140.4(d) defines "person" as an individual or entity with an "interest in the outcome of the proceeding." The Union and the employees believe they are "persons" with the requisite "interest in the outcome."

Research reveals only one published Board decision addressing the right of nonparties to file objections. (Herbert Buck Ranches, Inc. (1975) 1 ALRB No. 6, hereafter Buck.) On the basis of an issue that arose just two weeks after the effective date of the Agricultural Labor Relations Act (ALRA or Act), the Board held that although the UFW had not been on the ballot in that case, it nevertheless should be permitted to file an objection challenging the Regional Director's peak determination, but lacked sufficient interest in the outcome of the election within the meaning of section 1140.4(d) to allege that election day misconduct resulted in the disenfranchisement of eligible

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[2](...continued)
to process the objections until the Board ruled on the question of standing.

The Employer also filed objections, but since there is no dispute as to the Employer's standing, those objections have been reviewed by the Executive Secretary and at least one of them, alleging the disenfranchisement of an outcome-determinative number of voters, will be the subject of an evidentiary hearing.

voters. Failure to file a petition in accordance with the statutory peak requirement would preclude a valid question concerning representation sufficient to warrant the holding of an election. In permitting the UFW to object on the basis of peak, the Board seemed to suggest that any other result would permit collusion between an employer and the petitioner to go unchecked and permit an improper election to stand. In the same case, however, the Board rejected the objection in which the UFW alleged disenfranchisement, reasoning that since the UFW could not have benefited from a larger voter turnout because it was not on the ballot, the Union could not claim an "interest in the outcome of a proceeding" within the meaning of section 1140.4(d).

The case at hand is different, in that the law was far less clear at the time Buck was decided. Whatever the efficacy of Buck may have been at the time the case was before the Board, subsequent rulings by this Board, and the development of comprehensive regulations for determining such matters as peak, have impliedly if not expressly overruled the holding as well as the reasoning of that case. In language identical to that which appears in section 9(c) of the National Labor Relations Act (NLRA or national act), section 1156.3(a) provides that representation petitions "may be filed in accordance with such rules and regulations as may be prescribed by the board . . . ." The Board has indeed and repeatedly exercised section 1156.3(a) authority in order to establish rules applicable to all representation petitions, not as "a jurisdictional prerequisite to Board action;

[but] rather, [as] an administrative expedient for determination of whether, generally, further proceedings are warranted." (Lotus Suites. Inc. (1992) 309 NLRB 1313 [142 LRRM 1291].) With judicial approval, the Board's regulations and related cases have resulted in a comprehensive body of procedures and standards for measuring the validity of a representation petition vis-a-vis the peak requirement prior to going forward with an election.[3] (See, e.g., Charles Malovich (1979) 5 ALRB No. 33; Ruline Nursery v. Agricultural Labor Relations Board (1985) 169 Cal.App.3d 247 [216 Cal.Rptr. 162]; Scheid Vineyards & Management Co. v. Agricultural Labor Relations Bd. (1994) 22 Cal.App.4th 139 [27 Cal.Rptr.2d 36].)[4]

Moreover, the Board has historically been guided by the Legislative mandate of section 1148 which instructs us to follow

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[3]A bona fide question concerning representation requires Regional Director investigation and clearance on certain additional preelection requirements set forth in section 1153(a) which are not relevant here.

[4]Accordingly, Regional Directors are charged with a duty to investigate all allegations in representation petitions, particularly those which relate to peak, in light of the standards and processes established by the Board and the courts consistent with the cited decisions. Moreover, since Buck, the Board has developed additional safeguards by requiring employers to file a mandatory response within 48 hours of the filing of a representation petition providing detailed information, such as payroll and employment levels, in order to assist the Regional Director in determining peak. Employer's who dispute the Regional Director's ultimate determination may of course file election objections. Given the Board's present emphasis on assuring that elections are held only when the work force represents at least 50 percent of the employer's peak agricultural employment for the relevant calendar year, the Board need not depend on nonparties to protect the peak requirement.

applicable precedents of the National Labor Relations Act. The National Labor Relations Board (NLRB or national board) has long held that the only parties to an election are the employer involved, the petitioner, or any labor organization (including any intervening union(s)) or individuals whose name(s) appear on the ballot. (See, Warwick Mfg. Corn. (1953) 107 NLRB 1 [33 LRRM 1040]; Wilson & Co. , Inc. (1949) 82 NLRB 405 [23 LRRM 1575]; H. 0. Canfield Co. (1948) 80 NLRB 1027 [23 LRRM 1195].)

Unlike our Act, however, there is no express provision in the NLRA itself for the filing of post election objections. The right to file such objections under the national act is, in the main, a product of a 1974 regulation permitting only "parties," as defined above, to file such objections (29 C.F.R. § 102.69(a); NLRB Casehandling Manual § 11392.3). As employees are not parties, they of course may not file objections under the regulation. (Clarence E. Clapp (1986) 279 NLRB 330 [122 LRRM 1067].)

As a codification of the NLRB regulation, the Legislature adopted ALRA section 1156.3(c) which provides, in relevant part, that "[w]ithin five days after an election, any person may file with the Board a signed petition" objecting to the election on various grounds. (Emphasis added) Upon the effective date of the ALRA in 1975, and prior to the Buck decision, the Agricultural Labor Relations Board (ALRB or Board) implemented section 1156.3(c) by means of a regulation which makes no reference whatsoever to the term "person" and provides,

in part, that "any party may file ... a petition under section 1156.3(c) . . .". (Emphasis added). The logical conclusion, of course, is that the ALRB read the statutory language as limiting the right to object to an election to the parties to that election.[5]

Thus, despite its literal appeal, this Board, like the NLRB, has construed the scope of "persons" with standing in election proceedings to apply to only those individuals or entities who possess the requisite direct interest in the election. Accordingly, as has the NLRB, we have consistently interpreted the phrase "interest in the outcome of the proceeding" to apply only to the actual parties to the election.

While neither Buck nor any other ALRB decision has considered whether employees may file objections, we again believe, for the reasons discussed above, that the regulation governing the filing of election objections is dispositive. In this instance, the employees who filed objections were eligible to and did in fact vote in the election. Having thus exercised their franchise to choose whether or not to be represented by the Petitioner, they are bound by the vote of the majority of those

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[5]The regulation, section 20365, was adopted on August 27, 1975 and made effective on September 12, 1975 upon filing with the Secretary of State. Approximately one year later, the ALRB revisited all regulations and, to section 20365, added introductory language which precisely tracks the Act, stating that "Within five days after an election, any person may, pursuant to Labor Code section 1156.3(c), file with the Board a signed petition" objecting to the election. But, consistent with the prior regulation, in all of the pivotal operational provisions which follow, those which define the procedures for filing objections, the Board again refers only to "parties."

who cast ballots. (Lab. Code § 1156). The Board's election process did not fail them. Thus, as they were not disenfranchised, they could have no special interest in the outcome that differentiates them from the interest possessed by any other voter and thus are not entitled to assert an interest sufficient to challenge the conduct of the election or conduct affecting the results of the election. We hold, therefore, that individual employees under the facts of this case, lack standing to file objections to the election which is in question herein.[6] This reading harmonizes with the NLRB policy governing the filing of objections by employees and we perceive no compelling reason to depart from such precedent here.

In this as in all such cases, the Board must remain mindful of its obligation to expeditiously resolve election disputes and, to that end, should be guided by what the NLRB has characterized as "prudential considerations." (Newport News Shipbuilding (1978) 239 NLRB 82, 83 [99 LRRM 1518].) That case is particularly instructive. Albeit in the somewhat different

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[6]That, however, does not mean that either individual employees or a nonparticipating union is without recourse to object to an election by means other than the direct procedures set forth in section 1156.3(c). Any one, whether or not a party to a particular proceeding, may file appropriate unfair labor practice charges alleging conduct which would warrant the setting aside of an election. One such example would be a charge alleging that the petition for certification was the result, in whole or in part, of unlawful assistance by the employer. The remedy for such conduct could render the petition invalid at its inception for such conduct presumptively would constitute interference with employee free choice.

context of deciding whether a hearing is absolutely required when evaluating election objections, the NLRB observed as follows:

> The Board is under a duty to allocate its limited resources in an efficient manner, and the parties rightly expect that election cases will be handled expeditiously, without unnecessary delay. Finality is a critical consideration in representation elections, and the Board should not unduly delay either the commencement of collective bargaining on behalf of the employees by the agent they have selected or the signaling of the end of a union campaign where the majority of employees have decided not to select a union as their representative.

It is beyond dispute that the Legislature closely modeled our Act after the NLRA, but with a notable difference in election procedures. Acknowledging the seasonal nature of agriculture, the Legislature mandated that we hold elections only when they serve the widest expression of employee choice and that the process be expedited.[7] Notwithstanding this clear Legislative policy, two of our colleagues propose to extend that process by permitting "any person," including nonparticipating unions and/or individual employees, to file objections in order to set aside elections. We believe their focus is misplaced. The severest remedy for a failed election is invalidation and a rerun election often is not an option because of the statutory peak requirement. Accordingly, their efforts may better be directed towards getting elections right the first time, both as

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[7]As an example, elections will be held only when the current employment level is no less than 50 percent of peak employment and all elections must be held within seven days or less of the filing of the representation petition. (Labor Code section 1156.4, 1156.3(a)(4).)

a means of promoting public confidence in the impartiality and finality of elections as well as a means of allocating our budget resources wisely and efficiently.

In accordance with our opinion herein, the Executive Secretary is authorized to now consider the objections filed by the UFW and the individual employees.

DATED: October 22, 1998

GRACE TRUJILLO DANIEL, Member

JOHN D. SMITH, Member

MEMBER McDONALD CONCURRING:

I concur with my colleagues who have interpreted the election objections provisions of the Agricultural Labor Relations Act (ALRA) consistent with federal precedents.

While the National Labor Relations Board makes no provision for objections by employees, the national board has on occasion granted special leave for employee intervention for a limited purpose. Thus, notwithstanding my agreement with the majority, as a general rule, *I* also believe that the Agricultural Labor Relations Board could provide a vehicle to facilitate the ability of unit employees to bring relevant and material matters to our attention, particularly when it appears that the integrity of our election process has been compromised.

Under the national act, objections are evaluated and investigated by regional directors who issue a report to which

parties may file exceptions with the full NLRB. We follow a somewhat different process, inasmuch as it is the Executive Secretary of the Board who sets for hearing before an Investigative Hearing Examiner (IHE) those objections in which parties have prima facie demonstrated conduct which could warrant setting aside the election. Thereafter, the IHE issues a decision to which only parties may file exceptions. Our IHE decisions may serve a purpose somewhat analogous to the report of an NLRB regional director.

To illustrate, in Finfrock Motor Sales (1973) 203 NLRB 541 [83 LRRM 1130], the NLRB granted intervenor status to employees on the basis of a regulation which provides in part that "any person desiring to intervene in any proceeding shall make a motion for intervention, stating the grounds upon which such person claims to have an interest in the proceeding." (C.F.R. § 102.65(b).)

At Title 8, California Code of Regulations, section 20130, the ALRB has a somewhat similar regulation, which defines a "party" to any proceeding as "any person named or admitted as a party" and authorizes the Board to limit participation "to the extent of [the party's] interest only." While section 20130 may have been intended to apply only to those who can claim party status by right, it could be construed by the Board to embrace individual employees who seek to be heard.

Such a reading harmonizes with ALRA section 1140.4(d) which defines "person" as anyone with "an interest in the outcome

of the proceeding" as well as the language of the NLRB regulation quoted above. I would recommend to the Board that it consider utilizing regulation section 20130 to permit individual employees to seek post election intervenor status in election matters such as the one here, but in the context of a formal rulemaking process where the proposed procedures may be fully explored.

Dated: October 22, 1998

MARY E. McDONALD, Member

CHAIRMAN STOKER CONCURRING IN PART:

The lead opinion concludes that standing to file election objections within the meaning of Labor Code section 1156.3(c) pertains only to individuals or other entities whose names actually appeared on the ballot. For reasons discussed below, I believe that the Board also has the authority to extend standing, but under certain limited circumstances such as where a nonparty can demonstrate that we held an election in violation of the statutory requirements governing the conduct of elections under our Act. Accordingly, I disagree with the lead opinion's narrow definition of standing without accommodation for extenuating circumstances identified below.

In Herbert Buck Ranches. Inc. (1975) 1 ALRB No. 6 (Buck), the Board identified three types of objections which may be filed pursuant to section 1156.3(c), as follows: (l) those

which pertain to the statutory prerequisites specified in section 1156.3(a) as necessary in determining whether an election petition raises a bona fide question concerning representation,[8] (2) those which assert that the unit specified in the petition is inappropriate for collective bargaining in light of section 1156.2 (bargaining units will be comprised of all of the agricultural employees of an employer unless employed in two or more noncontiguous geographical areas), and (3) those which object to the conduct of the election or conduct affecting the results of the election.

In assessing the first objection, the Board, in Buck, specifically found that the term "person, " as used in section 1156.3(c), is determined by applying the definition of "person" as the Legislature directed in section 1140.4(d). (Buck, at p. 3.) Section 1140.4(d) defines person in this manner:

> The term "person' shall mean one or more individuals, corporations, partnerships, associations, legal representatives, trustees in bankruptcy, receivers, or any other legal entity, employer, or labor organization having an interest in the outcome of a proceeding under this part. (Emphasis added.)

Construing the statutory language set forth above, the Board in Buck then stated that, "[a] determination of standing . . . must be based on an understanding of what is meant

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[8]The threshold requirements set forth in section 1156.3(a) include a showing that the petition was timely filed vis-a-vis the peak requirement of section 1156.4, and that there are no election, certification or contract bars to the holding of an election.

by the term interest in the outcome of a proceeding.'" (Buck, at p. 3.) After a lengthy discussion of the Legislature's reasons for enacting the ALRA, the Board noted that the Act was "intended to bring peace to the industry by guaranteeing both 'justice' and * stability,' a sense both of 'fair play' and 'certainty.'" (Buck. at p. 6.) The Board further noted that "if any person could, by merely filing post-election objections under section 1156.3(c), acquire a sufficient justiciable 'interest' to tie up the certification process, 'stability' and 'certainty' would fall victims to the caprice of any litigious intermeddler." (Buck, at p. 7.) The Board then observed that, as a general rule,[9] "interest in the outcome of a proceeding" was essentially limited to those whose names appeared on the election ballot.

Although there is no counterpart to section 1156,3(c) in the national act, the NLRB has longed adhered to the principle that the only parties to an election, and thus the only parties who may file objections, are those whose names appear on the ballot; e.g., the employer, incumbent or rival unions, cross petitioners and intervenors. (See, e.g., Clarence E. Clapp (1986) 279 NLRB 330 [122 LRRM 1067]; Warwick Mfg. Corp. (1953) 107 NLRB 1 [33 LRRM 1040] ; H. 0. Canfield Co. (1948) 80 NLRB 1027 [23 LRRM 1195]; 29 C.F.R. § 102.69(a); NLRB Casehandling Manual § 11392.3.) Likewise the ALRA, by means of an express statutory scheme, permits any labor organization to be named on

[9]As will be discussed below, Buck carried out a limited exception to the general rule in order to permit a non-party to assert a challenge to the requirements of section 1156.3(a).

the ballot in any election through intervention. (Lab. Code § 1156.3(b).) Pursuant to this provision, the UFW, had it chosen, could have intervened in the election, in which case the Union would have been placed on the election ballot as another choice for voters and there would be no question as to its right to file objections to the election or participate fully in any other matter related to the election process.

Consequently, pursuant to the Buck Board's interpretation of section 1140.4(d) and 1156.3(b), all petitioners, intervenors, and employers have standing to assert a challenge to the threshold requirements for filing a valid representation petition as those requirements are enumerated in section 1156.3(a). Having arrived at this determination, the Buck Board then examined whether, under any circumstances, there are situations where standing could be expanded by a non-party who raised a "jurisdictional" issue.

In Buck, at page 2, the Board was faced with an allegation that an election was conducted in violation of section 1156.3(a)(l), a provision requiring that an election must be conducted only when the work force is at 50 percent or more of peak employment. After weighing all the consequences for expansion, the Board decided to expand standing only where a question pertaining to the Board's jurisdiction was at issue. Specifically the Board found:

> To reach a contrary finding might permit collusion between some of the parties, whereby they agree that an election be held in the absence of the proper jurisdictional pre-

> requisites, and foreclose review of that election by limiting standing to just those who participated improperly in it. (Buck, at p. 8 .)

However, the Board was careful to limit its holding to the facts of that case. (Buck, at p. 9) In reviewing the Buck decision, it is interesting to note the Board's interchangeability of the terms "jurisdictional prerequisites" and "statutory prerequisites." Whether section 1156.3(a) is a statutory provision which specifically defines the jurisdictional parameters for this Board is a question I need not answer here. Clearly, at a minimum, 1156.3(a), et seq. provides four "statutory prerequisites" which must be complied with before an election is valid. By corollary, should there be a failure of any one of the four "statutory prerequisites", the election, by legislative mandate, would be invalid.

I find the logic of the Buck decision narrowly expanding standing persuasive. In affirming Buck, I find, as did the Board in that case, that the only "persons" who have standing to assert election objections are those whose names appear on the election ballot as petitioner, cross petitioner, intervenor, or employer, except in those instances where any individual or entity asserts that the validity of the representation petition is in question because one of the "statutory prerequisites" mandated by section 1156.3(a) is lacking.

While the Board in Buck expressed an expansive view of standing with regard to one of the four "statutory prerequisites" required by section 1156.3(a)(including peak) for a valid

election petition, the Board nevertheless declined to permit a nonparty to file objections challenging the conduct of the election or conduct affecting the results of the election.

In reaching my decision *I* believe it is significant that the Buck decision regarding standing was the product of the first Board to interpret and apply the various provisions of the ALRA and we can fairly presume that it did so in light of its appraisal of the then-recent Legislative debate which resulted in the enactment of the Act.

In its brief in support of standing, the UFW directs us to numerous civil cases in which nonparties may be granted intervenor status on the basis of Code of Civil Procedure section 387. Pursuant to Code of Civil Procedure section 387, the right to intervene in civil matters is never conferred as a matter of right. As stated in Simpson Redwood Co. v. State of California (1987) 196 Cal.App.3d 1192, 1199 [242 Cal.Rptr. 447],

> The right to intervene granted by section 387, subdivision (a), is not absolute, however,-intervention is properly permitted only if the requirements of the statute have been satisfied. [Citations.] The trial court is vested with discretion to determine whether the standards for intervention have been met. [Citations.]"

By contrast, under our Act, intervention is by right as section 1153(b) provides that once an initial representation petition has been filed,

> Any other labor organization shall be qualified to appear on the ballot if it presents authorization cards signed by at least 20 percent of the employees in the bargaining unit at least 24 hours

prior to the election. (Cal. Code of Regs., Tit. 8, § 20315) .

Thus, insofar as any labor organization is entitled to intervene by right, the cases put forth by the Union are not applicable.

Finally, it should be noted that, a labor organization which believes it was wrongfully denied an opportunity to participate in a contested election (e.g., that it was denied organizational access to employees) or that there was misconduct that interfered with employee free choice (e.g., that the employer aided or dominated the petitioner), has recourse other than filing a petition for intervention, or a cross-petition. Both of the examples noted above are grounds for the filing of unfair labor practice charges and, in appropriate circumstances, would serve to invalidate the election and thereby reach the same end result as would an objections petition.

For the reasons discussed above, I conclude that, pursuant to section 1156.3 (c), the Board should consider election objections which are timely filed by any party(ies) to an election, party status to be denoted by placement on the ballot (i.e., petitioner, employer, interventing union(s).) Their interest in the outcome of the proceeding may be presumed.

Objections also may be considered by the Board, on a case by case basis, by nonparties provided they can demonstrate that they are "any person" with an "interest in the outcome of the proceeding." (Lab. Code §§ 1140.4, 1156.3(c).) In accordance with the Board's decision in Buck, such interest

should be limited to asserting a challenge alleging that the "statutory prerequisites" for the filing of a valid petition for certification, as set forth in section 1156.3(a), have not been complied with.

DATED: October 22, 1998

MICHAEL B. STOKER, Chairman

MEMBER RAMOS RICHARDSON, Dissenting:

For the reasons discussed below, I would hold that employees of the bargaining unit and, in certain circumstances, a labor organization not on the ballot, have standing to raise post-election objections.

Standing of Labor Organization Not on the Ballot

Labor Code section 1156.3(c) provides that "any person" may file objections to the conduct of an election or conduct affecting the results of the election. Section H40.4(d) states that the term "person" shall mean an individual, corporation, employer, labor organization, etc., having an interest in the outcome of a proceeding.

Unlike the ALRA, the National Labor Relations Act (NLRA) does not in its text provide for the filing of election objections. Rather, the National Labor Relations Board's (NLRB) procedure for the filing of objections is contained in its

regulations, which provide that only parties to the election may file such objections.[10] Labor Code section 1148, which requires this Board to follow applicable precedents of the NLRA, does not require us to follow the NLRB's procedural rules. Further, NLRA case law precedents are not binding on this Board where there are textual differences between the two statutes. (See, e.g., F & P Growers Assn. v. ALRB (1985) 168 Cal.App.3d *667,* 671-677.)[11]

Since the ALRA employs both the terms "person" and "party" throughout the statute, it must be presumed that the Legislature intended different meanings to the two terms. "Party" is the more specific term, in that it refers to a party in a particular proceeding. The term "person" is broader in its definition (Lab. Code § 1140.4(d)) and is used throughout the statute to refer to a wide range of entities or individuals (see, e.g., section 1151(a), referring to service of a subpoena "on any person," section 1151.6, "any person who shall willfully resist. . .or interfere with any member of the board. . ."; section 1155.5, "It shall be unlawful for any person to request, demand. . .any payment. . .or other thing of value prohibited by

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[10] See section 102.8 of the NLRB's regulations, which defines "party," and section 102.66, which limits the filing of election objections to "any party."

[11] The Board's administrative order in Swanton Berry Farms. Case No. 97-RC-l-SAL (Admin. Order No. 98-8), which states that only "parties" to an election can file objections, does not constitute Board precedent. Moreover, the order in Swanton did not specifically address the question of whether employees have standing to file election objections. Further, Swanton appears to err in relying on NLRB precedent interpreting NLRB regulations which provide that only parties may file election objections, while ignoring the different statutory language (i.e., that the NLRA is silent on who may file objections and the ALRA permits "any person" to file such objections).

Section 1155.4"; section 1160.2, "Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice. . . ." Section 1160.3, on the other hand, makes clear that only "parties" are served with an Administrative Law Judge (ALJ) decision .in an unfair labor practice proceeding, and thus only parties have the opportunity to file exceptions.[12]

In Herbert Buck Ranches. Inc. (1975) 1 ALRB No. 6 (Buck), the Board ruled that a union not on the ballot (the United Farm Workers of America, AFL-CIO (UFW)) did have standing to raise an objection that the petition for certification was erroneous in its assertion of current peak employment and that the election should not have been conducted. In Buck, the Board noted that California has followed an increasingly expanded view of the concept of standing in civil litigation. The Board cited the following provision contained in the Code of Civil Procedure, section 387: "At any time before trial, any person, who has an interest in the matter in litigation, or in the success of either of the parties, or an interest against both, may intervene in the action of proceeding." The Board observed that "interest in the matter" has been defined as an interest of such "a direct and immediate character that (the) intervenor will either gain or

[12] I disagree with the majority's contention that the Board's regulations (specifically, Cal. Code Regs., tit. 8, §20365) implementing section 1156.3(c) interpret the statutory language as limiting the right to object to elections only to parties to that election. Section 20365(a) of the Regulations, for example, specifies that "any person" may file an election objections petition within the statutory five-day period. (Cal. Code Regs., tit. 8, §20365(a).)

lose by direct legal operation and effect of the judgment." (Schwartz v. Schwartz (1953) 119 Cal.App.2d 102.)

In order to determine someone's standing to raise post-election objections, the Board decided in Buck, it was necessary to distinguish among the various types of objections that may be raised under the statute. The Board identified three categories of election objections which may be filed pursuant to section 1156.3(c):

1) Objections to allegations made in the petition for certification pursuant to section 1156.3(a) (i.e., peak; no prior representational election in the last 12 months; no currently certified labor organization as bargaining representative; and no bar by an existing collective bargaining agreement);

2) Objections to the improper determination of the geographical scope of the bargaining unit; and

3) Objections to conduct of the election or conduct affecting the results of the election.

The objections raised by the UFW in Buck concerned an allegation that the employer was not at peak employment when the election was conducted (category one) and an allegation that conduct on the day of the election had the effect of disenfranchising a number of voters (category three).

As to the peak objection, the Board held that the UFW did have standing to raise it. The requirement that the election be conducted during the peak employment period is central to the ALRA's scheme of maximizing the franchise, the Board found. Further, to require an entity to be a party on the ballot in

order to object to an election conducted in the absence of peak would pose requirements that the law does not intend, and permit results that the law was designed to prevent. If only parties on the ballot were permitted to raise an objection based on peak, the Board reasoned, a labor organization would be forced to expend resources and energy to qualify for a ballot position, and participate in an election process which it contends is a nullity. The Board refused to impose the obligation to participate in such an empty act. Furthermore, if a union declined to participate in an election on the basis that the election was defective for lack of peak, the Board found that the union should not be required to rely on those who participated in the election to litigate the question of peak. Thus, the Board held that the UFW had standing to raise and litigate its peak season objection in the case.

However, the Board concluded that the UFW did not have standing to object to the election on the basis that conduct on the day of the election had the effect of disenfranchising a number of voters. Even if the conduct had taken place, the Board reasoned, the UFW could not demonstrate that any direct and immediate interest of the Union had been injured because, even if the disenfranchised employees had voted, the UFW, which was not on the ballot, could not have been directly affected. However, Buck did not conclude that unions not participating in the

election could never file objections to conduct of the election or conduct interfering with the results of the election.[13]

I agree with the conclusion in Buck that a non-participating union's standing to file post-election objections depends on both the nature of the objections, as described in Labor Code section 1156.3 (c), and the effect (or lack of effect) of the alleged conduct on that union. The extent to which the labor organization can demonstrate a direct interest in the outcome of the election depends on the recent history of the union's contact with the employer's employees. Has the union, for instance, been in the course of organizing the employees of the employer, and if so, for how long? Has the union recently filed a Notice of Intent to Take Access and/or a Notice of Intent to Organize? How many times has the union taken access and on how many sites? Has the union alleged election conduct or misconduct directly affecting the union's personnel (e.g., violence against its organizers on the employer's premises)? Is the union alleging interference in its organizing activities at the employer's premises?

In the instant case, the conduct alleged in the UFW's election objections (coercion of employees and collusion between the Employer and the Petitioner) is so serious that the Board should not require a union to get on the ballot in order to raise them, so long as that union can demonstrate that it has a direct

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[13] I disagree with the majority's contention that this Board has consistently interpreted the phrase "interest in the outcome of the proceeding" to apply only to the actual parties to the election. The Board did not interpret the phrase that narrowly in Buck.

interest in the outcome of the election (e.g., that it has been actively engaged in attempting to organize the employees of that employer).

Following the Board's reasoning in Buck. it would be appropriate to dismiss the UFW's objection herein that the Board failed to notify an outcome-determinative number of eligible voters of their right to participate in the election. This particular objection is inappropriately filed by the UFW because no matter how many voters were informed of the election and no matter how many of them voted for or against the union on the ballot, none of them could have voted for the UFW. Thus, the UFW has failed to demonstrate a direct interest in the outcome of the proceedings with regard to that objection.

However, some of the other issues raised by the UFW in Coastal Berry do go to matters in which the UFW has a direct interest. For example, since it is known that the UFW was attempting to organize the employees of Coastal Berry, the UFW's allegations that the employer and its agents coerced, threatened, and intimidated employees by assisting in the circulation of the Coastal Berry Farmworkers Committee's petition indicate conduct that would have directly affected the UFW's own attempts at organizing the employees. Similarly, the UFW's allegations that the Coastal Berry Farm Workers Committee is not a bona fide labor organization but rather an anti-union group supported by the employer's supervisors, can be seen as suggesting conduct directly interfering with the UFW's attempts to organize Coastal Berry workers. As the Board's decision in Buck pointed out, if a

union declines to participate in an election, contending that the election is defective on statutory grounds (e.g., in Buck, lack of peak), it cannot be required to rely on those who participated in the election to litigate that question. Similarly, in Coastal Berry the UFW should not be required to rely on those who participated in the election to litigate the question of whether those very participants were in collusion to elect a union unlawfully dominated and assisted by the employer.

It has been argued that a non-party should not be permitted to file an election objection because there is an alternative process available--filing an unfair labor practice charge--by which the same conduct may be alleged. However, the process of filing, investigating, evaluating, and litigating unfair labor practice charges is a matter entirely within the final authority of the General Counsel under Chapter 6 of the ALRA, and thus the Board itself has no authority to take part in that process. Since it is well established that the Board has exclusive jurisdiction to administer representation matters under Chapter 5 of the ALRA, the Board has a duty to ensure that its own election processes are fair, and that elections are conducted in an atmosphere free from fear, coercion, or intimidation, so that employees can exercise their free and well-informed choice. For that reason, the Board should not dismiss election objections simply because there exists an alternative process under which

the objecting entity might choose to raise its allegations, and which is entirely beyond its control.[14]

For the reasons discussed above, I would find that a labor organization not on the ballot does have standing to raise post-election objections, as defined in Labor Code section 1156.3(c), as to matters in which the labor organization can show a direct interest in the outcome of the proceedings.

Standing of Bargaining Unit Employees

Employees who participated in an election are persons who have a very vital interest in the outcome of the proceedings. The very purpose of the ALRA's election and certification procedures is to ensure the rights of employees to exercise free choice in whether or not to be represented by a bargaining agent. All employees of the bargaining unit are directly affected by the outcome of the election proceedings, since a certified bargaining representative will be the only entity entitled to bargain over those employees' terms and conditions of employment. If a labor organization is elected which does not truly represent the free choice of the employees, the statutory bar will prevent another election from taking place for at least a year after the certification (section 1156.3). If the employees are alleging collusion between the elected labor organization and the employer, there would never be any entity or individual with the necessary interest in filing objections other than the employees

[14] I note, also, that it is well established that conduct sufficient to warrant the setting aside of an election need not rise to the level of an unfair labor practice. (Mann Packing Company. Inc. (1989) 15 ALRB No. 11.)

themselves. The employer-assisted labor organization would have no desire to file objections that might nullify its victory, and the employer could not assert its own unlawful assistance or coercion as grounds for setting aside the election.

I note that the NLRB has, on occasion, permitted objections to be filed by employees and labor organizations not on the ballot despite the national board's regulatory language limiting the filing of objections to parties.[15] In Shoreline Enterprises (1955) 114 NLRB 716, the NLRB permitted individual employees to intervene for the limited purpose of entering exceptions to the part of a regional director's report on objections which related to their nonparticipation in the election. The employees alleged that at the time the employer's attorney signed the election agreement, he was ignorant of the fact that these employees performed some production work, thereby qualifying them for inclusion in the unit. Although the board permitted their intervention, it found that their contentions had been fully presented and discussed by the employer, so that it was unnecessary to consider them separately. The board also decided to uphold its regional director's decision to exclude the employees from the list of eligible voters because the company and the union had agreed among themselves to exclude those individuals.

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[15] I cannot understand why the majority feels it necessary to "harmonize" its reading of our statute with NLRB policy or to adhere to NLRB precedent on the issue of standing to file election objections, since the texts of the ALRA and the NLRA on this matter are entirely different.

When the resulting refusal-to-bargain; unfair labor practice case (117 NLRB 1619) got to the federal court of appeals, however, the board's decision was reversed. In Shoreline Enterprises of America. Inc. v. NLRB (5th Cir. 1959) 262 F.2d 933, the court of appeals held that the NLRB abuses its discretion when it knowingly allows eligible employees to be disenfranchised or when it fails to investigate eligibility of disenfranchised employees whose votes would change the results of an election. The court refused to accept the view that a company and a union may agree between themselves to exclude individual employees from an opportunity to select the bargaining agent of a unit in which those employees work regularly. As the court stated, "The interest of a rank-and-file worker in selecting an economic representative having the power to fix wages and working conditions is no less important than a citizen's interest in selecting a political representative." (262 F.2d at 944.) Thus, the court set aside the board's decision and denied enforcement of its bargaining order.

I conclude that strong policy reasons exist for allowing employees to file objections, as described in Labor Code section 1156.3(c), because there are important issues they might raise which no party to the election would be motivated to raise (e.g., collusion between the employer and the labor organization on the ballot). A reasonable interpretation of the statutory language of the ALRA is that employees of the employer where the election was conducted are persons with an interest in the outcome of the proceeding and are thus entitled to file election

objections. I would find that the statutory interest is limited to a direct interest (thus including employees of the bargaining unit in which the election was conducted, but excluding employees of other employers or other employers themselves, both of whom have only a remote interest).

I am not concerned that groundless election objections would be filed in future cases by employees and non-participating unions because of such reasoning. The Board has in place a well-established screening process under which the Executive Secretary carefully reviews all election objections filed, dismisses those found to be frivolous or unsubstantiated, and sets for hearing only those which set forth a prima facie showing of conduct sufficient to set aside the election.

For the reasons discussed above, I would find that the employees of the bargaining unit do have standing to raise post-election objections, as they have a direct interest in the outcome of the proceedings.[16]

DATED: October 22, 1998

IVONNE RAMOS RICHARDSON, Member

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[16] I do not agree with the majority's claim that voters in the election would need to show a "special" interest in the outcome different from other voters' interests. The statute does not require a "special" interest be shown in order to be considered a "person" having an interest in the outcome of the proceedings.

CASE SUMMARY

Coastal Berry Farms, LLC
(CBFC/UFW)

24 ALRB No. 4
Case No. 98-RC-l-SAL

BACKGROUND

Pursuant to a petition for certification filed by the Coastal Berry Farmworkers Committee (Committee) , the Regional Director of the Board's Salinas region conducted an election on July 23, 1998, in which the Committee received a majority of the valid votes cast. Thereafter, the Employer filed objections to the election alleging, in part, that an outcome determinative number of employees had been disenfranchised. That objection was set for a hearing scheduled to commence on October 16, 1998.

The United Farm Workers of America, AFL-CIO (UFW or Union) as well as a group of individual Coastal Berry agricultural employees who voted in the election also filed election objections. Those objections were held in abeyance pending Board determination as to whether a labor organization that had not intervened in the election, and did not otherwise achieve ballot status, or whether unit employees had standing to file objections.

BOARD DECISIONS

LEAD OPINION

Three of the five members of the Agricultural Labor Relations Board held, consistent with precedents established under the National Labor Relations Act (NLRA), that the only persons entitled to file election objections were parties to the election, parties defined as anyone whose name was on the ballot (e.g., the petitioner, the employer involved in the election, and any intervening or cross-petitioning union(s).) On that basis, Members Grace Trujillo Daniel, John D. Smith, and Mary McDonald would not consider election objections filed by a nonparticipating union or individual employees.

CONCURRING OPINION

While in agreement with the views of the lead opinion, Member McDonald wrote a separate concurring opinion in which she proposed that the Board might utilize a rulemaking process as an opportunity to develop a vehicle by which employees may bring to the Board certain matters, such as conduct which compromises the integrity of the Board's election process.

Coastal Berry Farms, LLC,
(CBFC/UFW)

24 ALRB No. 4
Case No. 98-RC-l-SAL

CONCURRING OPINION

Chairman Stoker agreed in part with the views expressed above, but would affirm an early Board decision holding that entities which had not participated in the election could nevertheless challenge any of the four statutory prerequisites specified in Labor Code section 1156.3(a) which must be established before an election may go forward.

DISSENT

Member Ramos Richardson would hold that employees of the bargaining unit and, in certain circumstances, a labor organization not on the ballot, have standing to raise post-election objections, as defined by Labor Code section 1156.3(c). She agrees with the conclusion in Herbert Buck Ranches, Inc. (1975) 1 ALRB No. 6 that a non-participating union's standing to file post-election objections depends on both the nature of the objections and the effect of the alleged conduct on that union. She does not believe that the language of Labor Code section 1156.3(c) permitting "any person" to file election objections, read together with the statutory definition of "person" in section 1140.4(d), is intended to limit the filing of election objections to parties. Further, she does not believe that NLRB regulations or case precedent on the subject is applicable to the ALRB, since the NLRA does not in its text provide for the filing of election objections, and the NLRB's election objection procedure is contained only in its regulations. If a labor organization can demonstrate a direct interest in the outcome of the election on the basis of its recent history of contact with the employer's employees, this may be sufficient to show alleged election conduct or misconduct directly affecting the union's personnel. She also believes that employees of the bargaining unit have standing to raise post-election objections, as they have a direct interest in the outcome of the proceedings. She notes that there are important issues that might be raised by employees but which no party to the election would be motivated to raise (e.g., collusion between the employer and the labor organization on the ballot). She is not concerned that groundless election objections would be filed in future cases by employees and non-participating unions, because the Board has in place a well-established screening process under which the Executive Secretary carefully reviews objections and sets for hearing only those which set forth a prima facie showing.