Oxnard, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

OCEANVIEW PRODUCE COMPANY, Employer, and JOSE CUELLAR, Petitioner, a n d UNITED FARM WORKERS OF AMERICA, AFL-CIO, Certified Bargaining Representative.	Case No. 98-RD-1-EC(OX) 24 ALRB No. 6 (December 16, 1998)

DECISION DISMISSING ONE REMAINING ELECTION OBJECTION AND DIRECTING OPENING AND COUNTING OF IMPOUNDED BALLOTS AND ISSUING OF OFFICIAL TALLY OF BALLOTS

Pursuant to the filing of a decertification petition on January 27, 1997, the Regional Director held an election for employees in the certified unit of agricultural employees of Oceanview Produce Company (Employer) represented by the United Farm Workers of America, AFL-CIO (UFW or Union). The results of the February 3, 1997 election remain unknown because the Regional Director impounded the ballots in response to a late filed unfair labor practice charge by the UFW.

In Cattle Valley Farms (1982) 8 ALRB No. 24, the Agricultural Labor Relations Board (ALRB or Board) adopted a modified version of the "blocking-charge" practice of the National

Labor Relations Board (NLRB or National Board). The NLRB's policy provides for the delay of a pending election until such time as unfair labor practice charges affecting employees in the unit are resolved in order (1) to assure an atmosphere in which employees may exercise a free and uncoerced choice in the election and (2} to deny the charged party an opportunity to profit from its own misconduct. Because of the seasonal nature of agriculture and the statutory requirement under the Agricultural Labor Relations Act {ALRA or Act) requiring that elections be held only when the employer is at no less than 50 percent of peak employment for the relevant calendar year (section 1156.41, we are less inclined to "block" elections unless a charge has first undergone a full investigation which resulted in the issuance of a formal complaint or certain categories of violations have been found but are not yet fully remedied. (Cattle Valley Farms, supra; see, also Scheid Vineyards & Manasement Co. (1998) 98 Admin. Order No. 2) Where however, as here, a late-filed charge alleges conduct which has the potential to interfere with free choice, Cattle Valley Farms permits the Regional Director to hold the election and impound the ballots pending completion of the investigation.

Although lacking benefit of the actual results of the election, the UFW timely filed objections to the election within the statutorily required five day period following the election. (Section 1156.3(c).[1] As certain of the objections were based on

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

the same or similar circumstances as other unfair labor practices filed by the UFW, the Board, following standard practice, deferred to the General Counsel and held the objections in abeyance pending resolution of the charges. (Mann Packing Co. (1989) 15 ALRB No. 11.) After all such charges were dismissed by the General Counsel, including the charge on which the impoundment order was based, and all appeals of the dismissals having run their course, the Executive Secretary of the Board issued the attached Order dismissing the related objections as well as any other pending objections which although not necessarily related to an unfair labor practice charge were nevertheless insufficient by Board standards to warrant further consideration.

This matter is now before the Board on the basis of the UFW's Request for Review of the dismissal of election objection No. 5. The Union contends that the objection was dismissed in part on the faulty premise that it lacked proper declaratory support.

Objection No. 5, in conjunction with the relevant declaratory support, alleges in pertinent part that the Employer assembled employees during paid work time to advise them of increases in their share of medical insurance premiums and implied that the size of the rate increase was a direct result of the UFW's failure to respond to the Employer's request to negotiate.

In the words of one employee declarant who was present at the meeting on or about January 6, 1997, and who described the meeting at which three management representatives were present to

advise employees of the premium increase, a spokesperson told the assembled employees that although the Company had tried to set up a meeting with the Union several times, the Union failed to respond. The declarant also quoted the speaker as adding that "since the Union did not send anyone [to meet with the Company], the costs of the medical plan had to be raised." According to the same declarant, several co-workers became angry and spoke out, one of them exclaiming, for example, "there's the Union for you, not even sending anyone."

The Board's regulations at Title 8, California Code of Regulations, section 20365 et seq., require that valid declarations be signed under penalty of perjury and describe conduct of which the declarant has personal knowledge. As we find that the declaration described above comports with the regulations, we believe the UFW is correct as to the sufficiency of the declaration. Accordingly, the request for review is granted.

We turn now to the merits of the objection in order to determine whether the declaration serves to demonstrate conduct which, by an objective standard, reasonably would tend to interfere with employee free choice and warrant the setting aside the election.

It is well settled that an employer may oppose unionization so long as there is no promise, of benefit or threat of retaliation. (Gissel Packing Co. (1969) 395 US 275). There is no evidence here that the Employer threatened dire consequences if

the Union was retained, nor did the Employer promise benefits should the employees chose to remove the Union. The Employer advised employees of a dramatic increase in their share of medical insurance premiums and then blamed the Union's failure to negotiate as the cause of the amount of the new rate.

Under the National Labor Relations Act (NLRA or national act), statements which are neither a promise of benefit nor a threat of retaliation, but which nevertheless may be misleading, will not be considered when raised in the context of election objections; they are acceptable campaign propaganda because, as the NLRB reasons, employees should be able to place them in the proper context and evaluate them accordingly. (See, e.g., Underwriters Laboratories. Inc. (1997) 323 NLRB No. 51.)

The NLRB'S view of such statements, however, has not been consistent or without controversy. Having followed a somewhat tortured path over the years, wavering between at least two (and perhaps three) widely divergent approaches, the NLRB seems to have settled into a posture in which it no" longer sets aside elections based on allegations of material misrepresentations of fact or law. Accordingly, the national board has determined that it "will no longer probe into the truth or falsity of the parties' campaign statements." (Midland National Life Insurance Co. (1982) 263 NLRB 127, 133 (Midland).) Certainly, elections may still be set aside on the basis of misrepresentations, but only if a party has forged documents or altered NLRB documents during the election campaign. (NLRB v.

Yellow Transportation Co. (9th Cir. 1983) 709 F.2d 1342, 1343. As the NLRB has explained, "it would set elections aside if a party misrepresented the facts or the law by forging documents, thereby deceiving the voters, and rendering them unable to recognize the propaganda for what it is." (Acme Bus Corp. (1995) 316 NLRB 274.)

Midland was preceded by 20 years in Hollywood Ceramics (1962) 140 NLRB 221 (Hollywood Ceramics). There, the NLRB held that "an election should be set aside only where there has been a misrepresentation or other similar campaign trickery, which involves a substantial departure from the truth, at a time which prevents the other party or parties from making an effective reply, so that the misrepresentation, whether deliberate or not, may reasonably be expected to have a significant impact on the election." Hollywood Ceramics ultimately was overruled in Shopping Kart Food Marts (1971) 228 NLRB 1311 (Shopping Kart), wherein the NLRB indicated that it would not set aside an election because of a misrepresentation unless the misrepresentation involved the Board or forged documents were used. Thereafter, between 1978 and 1982, the NLRB abandoned this view (see General. Knit of California (1978) 239 NLRB 619) and reversed Shopping Kart by reinstating Hollywood Ceramics, 1982, both Hollywood Ceramics and Shopping Kart gave way to the now-prevailing Midland rule.

This case may present the ALRB's first opportunity to determine whether, or to what extent if any, it will follow Midland. In cases decided prior to Midland, we scrutinized

alleged misrepresentations in order to determine first whether a disputed statement did in fact constitute a misrepresentation and, if so, whether it was such that it would tend to affect employee choice. For example, in Sakata Ranches (1979) 5 ALRB No. 56, the Employer argued that the UFW's promise to help employees with immigration matters constituted campaign misrepresentations. The Board found that certain of the Union's answers to employee questions were indeed misrepresentations but, upon examination of the misrepresentations and their context, concluded that they were remote and of uncertain value and thus "were no more than a pledge of assistance." There the Board expressly eschewed "a strict or mechanical approach to the Hollywood Ceramics standard and held that it would set aside elections only where a realistic appraisal of the pre-election conduct indicates that the integrity of the election has been impaired." In that same case, the ALRB also reasoned that the NLRB approach to misrepresentations is not available in agriculture because of, as noted previously, the peak requirement. Therefore, "[i]thas.. .been our practice to set aside elections only where the employees could not express their free and uncoerced choice. . .". (See, also, Lawrence Vineyards Farming Corn. (1977) 3 ALRB No. 9; Jake J. Cesare & Sons (1976) 2 ALRB No. 6; Paul W. Bertuccio (1978) 4 ALRB No. 91; Ves-A-Mix (1979) 5 ALRB No. 14.)

Without determining with finality whether Midland is a precedent of the national board which has meaning in agriculture,

and therefore one we may be obligated to follow,[1] the question here may be resolved by reference to Hollywood Ceramics, but only insofar as that case stands for the proposition that a statement, even if construed as a misrepresentation in fact, need not invalidate an election if it appears that the other party has had an opportunity to refute or explain away the contested statement.

In this case, the Board has the benefit of the sworn declaration of a UFW organizer which specifies that on January 8, 1997, two days following the meeting of assembled employees described above, 19 days before the decertification petition was filed, and 26 days prior to the election, the Union had been advised of the Employer's alleged implication to employees that the UFW could have negotiated the proposed increase in medical insurance premiums and that its failure to do so may perhaps have been the cause of the size of the increase. As the organizer's knowledge may be immediately imputed to the Union on a theory of agency, it seems apparent that the UFW had an opportunity to make an effective reply in order to diffuse or explain away the alleged misrepresentation. (Hollywood Ceramics.)

Accordingly, election objection No. 5, the only remaining objection, should be, and it hereby is, dismissed. The Regional Director may now open and count the ballots and issue an

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[1]Section 1148 provides that the ALRB "shall follow applicable precedents of the National Labor Relations Act, as amended."

official Tally of Ballots to the parties.[3]

DATED: December 16, 1998

MICHAEL B. STOKER, Chairman

IVONNE RAMOS-RICHARDSON, Member

GRACE TRUJILLO DANIEL, Member

MARY MCDONALD, Member

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[1]This decision is issued as precedent for future cases of the Agricultural Labor Relations Eoard. (Govt. Code section 1425.60)

CASE SUMMARY

OCEANVIEW PRODUCE CO.
(UFW)

24 ALRB No. 6
Case NO. 98-RD-1-EC(OX)

Background

Following a decertification election held in a unit of Oceanview agricultural employees represented by the United Farm Workers of America, AFL-CIO (UFW or Union), the Regional Director impounded the ballots pending investigation of a late filed unfair labor practice charge. Pursuant to the ALRB's "blocking" policy, charges which have resulted in the issuance of a formal complaint may serve to prevent an election from going forward when the complaint alleges conduct which reasonably would tend to interfere with employee free choice. However, when the Regional Director has not had an opportunity to fully investigate a charge, and therefore no complaint could have issued, the election goes forward but the ballots may be impounded pending completion of the investigation. In this instance, the investigation has been completed and the charge which served as a basis for the impoundment order has been dismissed.

In the interim, however, although it lacked knowledge as to the outcome of the election, the UFW timely filed objections to the election within the statutory five day period following the election. Those objections were held in abeyance pending resolution by the General Counsel of unfair labor practice charges alleging the same or similar conduct as those which the Union presented directly to the Board in the form of objections. After all relevant charges were dismissed, the Executive Secretary of the Board dismissed the related objections as well as any other objections which either did not comport with the Board's filing requirements or did not assert conduct which would warrant setting aside the election.

Following the dismissal of all election objections, the UFW filed a request for review by the Board on the grounds that it was error for Objection No. 5 to have been dismissed. The Board agreed, in part, finding that the declaration in support of the objection was not based on hearsay, one of the grounds for the dismissal, but on the personal knowledge of the declarant who described certain preelection conduct under penalty of perjury. On that basis, the request for review was granted and the Board was compelled to. examine the objection on its merits:

Board Decision

The issue before the Board was whether the Employer misrepresented to assembled employees prior to the decertification election that a dramatic increase in their share of medical

insurance premiums was a direct result of the Union's failure to respond to the Employer's request to negotiate, and therefore whether the election should be set aside because such conduct reasonably would tend to interfere with employee choice. As a defense to a related unfair labor practice charge, in which the UFW alleged that the increase was implemented unilaterally by the Employer without prior notification to the Union, the *Employer* argued that it had no duty to negotiate with the UFW with regard to the employees' share of insurance premiums.

The Board [1]observed that the present position of the National Labor Relations Board (NLRB or national board) is that it will no longer set aside elections based on allegations of material misrepresentations of fact or law unless a party has forged documents or altered NLRB documents during the election campaign and decided that it need not determine the applicability of such a rule in this case. Rather, the Board cited early ALRB decisions in which allegations of misrepresentations were examined in order to determine whether they were in fact misrepresentations of fact or law and, if so, whether they were such that they would tend to interfere with free choice. Here, however, the Board did not need to decide whether the statements attributed to the Employer were in fact misrepresentations, finding that, in any' event, the Union had notice of the statements 19 days before the decertification petition was filed and 26 days prior to the election. The Board concluded that the Union therefore had sufficient opportunity to make an effective reply in order to diffuse or explain away the alleged misrepresentation by the Employer.

Having dismissed the last remaining objection, the Regional Director was directed to open and count the ballots and issue an official Tally of Ballots to the parties.

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STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

in the Matter of: OCEANVIEW PRODUCE COMPANY, Employer, and JOSE CUELLAR, Petitioner, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Certified Bargaining Representative.	Case No. 98-RD-1-EC(OX) SUPPLEMENTAL ORDER DISMISSING ELECTION OBJECTIONS HELD IN ABEYANCE; NOTICE OF OPPORTUNITY TO FILE REQUEST FOR REVIEW

PLEASE TAKE NOTICE that the objections filed by the United Farm Workers of America, AFL-CIO (Union) in the above-referenced case which were held in abeyance pending the outcome of the General Counsel's investigation of related unfair labor practices are hereby DISMISSED. The Union timely filed objections to a decertification election held on February 3, 1998. By order dated March 2, 1998, the Acting Executive Secretary dismissed various objections and held the remainder in abeyance, as the Board must defer to the exclusive authority of the General Counsel with regard to the investigation of charges and the issuance of complaints. (See *Mann Packing Company, Inc.* (1989) 15 ALRB No. 11.) On May 11,

1998, the Regional Director dismissed all allegations contained in the charges in Case *Nos.* 98-CE-20-EC(OX) and 8-CE-20-1-EC(OX). The Union requested review of the dismissals and, an October 9, 1998, the General Counsel issued decision upholding the dismissal of the charges. In accordance with the principles of Mann *Packing Company, Inc.,* the objections whose merit was dependent upon a finding by the General Counsel that the related unfair labor practice charges rarranted the issuance of a complaint must in turn be dismissed. Specifically, the dismissal of the charges in Case Nos. 98-CE-20-EC(OX) and 98-CE-20-1-EC(OX) requires the tismissal of Objections 1 and 7, as well as those portions of objections 2, 3, 4, 8, and 9 not dismissed by the order of March 2, 1996.

Objection 5 alleges that the Employer held *an* illegal captive audience speech to denigrate the Union with regard to medical plan premiums. While this allegation did not appear on the face of the related unfair labor practice charges as filed, it was part of the same course of conduct complained of and was, therefore, held in abeyance in anticipation that the General Counsel's investigation might address it. However, the record does not indicate that this specific allegation was investigated by the General Counsel and included in the dismissal of the charges. Therefore, the abjection must be addressed here for the first time.

Objection 5 is DISMISSED for failure to provide

declaratory support. The only references to such a meeting in 'the declarations are hearsay and, thus, fail to satisfy the requirement in the Board's regulations that declarations state facts within the personal knowledge of the declarant. (Regulation 20365(c) (2)(B)[1]; J. *R.* Norton Co. v. ALRB (1979) 26 Cal.3d 1.) Moreover, the declarations reflect no threat or promise of benefit that would cause the Employer's conduct to fall outside permissible speech rights. *(See Jack or Marion Radovich, supra, 9* ALRB No. *45.)*

Objections 6 and 10, in which it is alleged that Oceanview Produce Company (Employer) discriminatorily paid the regular Oceanview employees four hours pay to induce them to vote, involve conduct which was the subject of an *unfair* labor practice charge in Case No. 98-CE-23-EC(OX) filed on February 17, 1998. Sometime thereafter, the Union requested withdrawal of the charge, and that request was granted by the Regional Director on August 5, 1998. In Mann *Packing Company, Inc.,* the Board stated that it was not required to defer to the General Counsel's authority where no unfair labor practice charges have been filed. (Id., at p. 8, fn. 7.) Since there has been no formal determination by the Regional-Director as to the merits of the charge in Case No. 9S-CE-23-EC(OX), it will be assumed for the purposes of this order that no deferral is required where, as here, a charge has been

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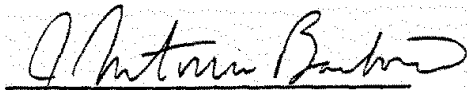
'The Board's regulations are codified at Title 8, Caliiomia Code of Regulations, section 20100, et seq.

withdrawn. Therefore, the merits of these objections are addressed below.

Objections 6 and 10 are DISMISSED for failure to provide sufficient declaratory support. The portions of the declarations which address thesa objections are entirely nearsay and, thus, fail to satisfy the requirement in the loard's regulations that declarations state facts within the personal knowledge of the declarant. (Regulation :036S(c) (2) (B); J. *R. Norton Co. v. ALRB*, *supra, 26* Cal.3d 1.) in any event, the supporting declarations fail to indicate that four hours of pay was discriminatorily offered to only :he regular Oceanview employees. (See *TNH Farms, Inc., supra,* 10 ALRB NO. 37.)

PLEASE TARE FURTHER NOTICE that pursuant to Regulation 20393 (a), the Union may file with the Board a request for review of the dismissal of its election objections formerly held in abeyance within five (5) days of this Order. Che five-day filing period is calculated in accordance with Regulation 20170. Accordingly, the request for review is due On October 30, 1998.

DATED: October 20, 1998



J. ANTONI
Executive Secretary, ALRB