Watsonville, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

COASTAL BERRY COMPANY, LLC, Employer, and COASTAL BERRY FARMWORKERS COMMITTEE, Petitioner.	)	Case No. 98-RC-l-SAL 25 ALRB No. 1

DECISION AND ORDER[1]

On November 5, 1998, Investigative Hearing Examiner (IHE) Thomas Sobel issued the attached decision in which he recommended that the election, held on July 23, 1998, in the above-captioned case be set aside due to the inadvertent provision of a defective voter eligibility list, which resulted in the failure of an outcome determinative number of eligible voters to receive notice of the election. The Coastal Berry Farmworkers Committee (Committee) timely filed exceptions to the IHE's decision and Coastal Berry Company, LLC filed a response to the exceptions.

The Agricultural Labor Relations Board (Board) has considered the IHE's decision in light of the exceptions and

[1]All decisions of the Agricultural Labor Relations Board, in their entirety, are issued as precedent for future cases. (Gov. Code § 11425.60.)

briefs submitted by the parties and affirms the IHE's findings of fact and conclusions of law, and adopts his recommended decision.[2] Therefore, the election held on July 23, 1998 at Coastal Berry Company, LLC is hereby set aside.

DATED: May 6, 1999

GENEVIEVE A. SHIROMA, Chair

IVONNE RAMOS RICHARDSON, Member

GLORIA A. BARRIOS, Member

HERBERT O. MASON, Member

MEMBER STOKER dissents from the majority opinion without comment.

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[2]In its exceptions, the Committee does not specifically challenge the IHE's findings of fact and conclusions of law. Instead, the focus of the Committee's exceptions is in urging the Board to reopen the record to explore an issue that was not the subject of a timely filed election objection nor set for hearing, namely, the appropriateness of a statewide bargaining unit. In an administrative order in this case (Admin. Order No. 99-2), issued on this same date, the Board found no legal basis for belatedly interjecting the unit issue into this proceeding.

CASE SUMMARY

Coastal Berry Company, LLC (Coastal Berry Farmworkers Committee)

Case No. 98-RC-l-SAL
25 ALRB No. 1

Background

An election was held on July 23, 1998 among the agricultural employees of Coastal Berry Company, LLC (Coastal), in which the Coastal Berry Farmworkers Committee (Committee) received 523 votes, "No Union" received 410 votes, and there were 39 unresolved challenged ballots. Coastal timely filed objections to the election, one of which resulted in the setting for hearing of the following question:

> Were an outcome determinative number of eligible voters left off the eligibility list, either inadvertently or for other reasons other than bad faith of the Employer, resulting in no reasonable efforts to notify such voters of the election and, as a consequence, were such voters denied the opportunity to vote in the election held on July 23, 1998?

Investigative Hearing Examiner's (THE) Decision

On November 5, 1998, IHE Thomas Sobel issued *a.* decision in which he recommended that the election be set aside. He determined that no efforts were made to give notice of the election to an outcome determinative number of eligible voters in the Oxnard area, due to the provision by Coastal of a defective voter eligibility list. However, the IHE further found that the defective list was provided through the inadvertence of agents of Coastal, and was not the result of bad faith or a deliberate attempt to mislead. In light of these conclusions, the IHE concluded that facts of this case fell within a recognized exception to the general rule that a party is estopped from profiting from its own misconduct. *(Republic Electronics, Inc.* (1983) 266 NLRB No. 154, "where a party to the election causes an employee to miss the opportunity to vote, the Board will uphold the wrongdoer's objection if the vote is outcome determinative, there is no evidence of bad faith, and the employee was disenfranchised through no fault of his or her own.")

Board Decision

The Committee timely filed exceptions to the IHE's recommended decision. The Board summarily affirmed the IHE's decision and ordered that the election be set aside. The Board also noted that the Committee's attempt to have the record reopened to review the appropriateness of the statewide bargaining unit in which the election was held, an issue that was not the subject of a timely filed election objection, was rejected in an administrative order (Admin. Order No. 99-2) in this case issued on the same date.

* * *

STATE OF CALIFORNIA AGRICULTURAL

LABOR RELATIONS BOARD

In the Matter of: COASTAL BERRY COMPANY, LLC, Employer, and COASTAL BERRY FARMWORKERS COMMITTEE, Petitioner, and GUADALUPE LARA, CANDELARIA LLANAS, LEONARDO MARTINEZ, ISABEL RENDON, JOSE ROJAS and EFREN VARGAS, COASTAL BERRY COMPANY EMPLOYEES, Individually Named Agricultural Employees, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Labor Organization	Case No. 98-RC-l-SAL

Appearances :

Marjorie Cohn
for Employer

James K. Gumberg
for Petitioner

DECISION CF INVESTIGATIVE HEARING EXAMINER

THOMAS SOBEL, Investigative Hearing Examiner: This case was heard by me in Salinas, California on October *16,* 1998. It involves an objection filed by the Employer, Coastal Berry Company LLC, to an election held among its agricultural employees on July 23, 1998. The Tally of Ballots showed:

Coastal Berry Farm Workers Committee	523
No Union	410
Challenged Ballots	39

Although Coastal Berry filed a number of objections to alleged Misconduct Affecting the Results of the Election, after screening[1], the Executive Secretary set the following for hearing:

> Whether an outcome determinative number of voters left off the eligibility list, either inadvertently or for reasons other than the bad faith of the Employer, resulting in no reasonable efforts to notify such voters of the election and, as a consequence, were such voters denied the opportunity to vote in the election held on July 23, 1998?

[1]The Board's Regulations do not require the Board to hold a hearing on every objection; rather, they require the Executive Secretary to determine if the objecting party has made a showing which, if uncontradicted or unexplained, would constitute sufficient grounds to overturn the election. See Title 8 Code of California Regulations Section 20365(c)(2).

Background

I can take official notice that the employees of what is now called Coastal Berry have been the focus of an organizing campaign by the United Farm Workers of America, AFL-CIO (UFW) for some time.[2] When that campaign commenced, Coastal Berry was not on the scene; rather, much of what is presently Coastal Berry's operations was then owned by Gargiulo, Inc.[3] Gargiulo was sold to B&G Farms sometime in June 1997. See, Committee EX 4 . , p. 8, Para. K. B&G is wholly owned by David Gladstone. TR:139. Coastal Berry is a limited liability corporation.[4]

The UFW's relationship with Gargiulo was not always harmonious. Board records show numerous charges lodged by the UFW against it and a number of charges lodged by it against the UFW. However, when B&G bought Gargiulo's "berry operations", it simultaneously succeeded to a Memorandum of Understanding between

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[2]I was the Investigative Hearing Examiner for a case involving allegations of UFW violations of the Access Rule in connection with that campaign. See, *Gargiulo Inc.* (1997) 23 ALRB No. 6

[3]See, Committee Ex. 1: The Employer has three divisions, Oxnard, Inland and Coastal: the Inland division started about 1991 as the strawberry division of Gargiulo; the Coastal Division was acquired by Gargiulo around 1992.

[4]The record is a confusing as to the exact relationship between B&G and Coastal Berry Company LLC. From the Petitioner Fernandez' request to Gladstone to sell the Company, Gladstone alone or B&G and Gladstone own Coastal Berry. Since the "identity" of the employing entity is not at issue in this case, I will say no more on the matter.

Gargiulo *and* the UFW which included the following provision:

> 1(1)(4) The parties recognize that the ALRB has exclusive jurisdiction over the scope of proper scope of a bargaining unit. Nevertheless, Gargiulo represents that it will not contest an appropriate unit consisting of [the agricultural employees of the grower employed at the grower's ranches in Santa Cruz, Monterey, and Ventura Counties in the State of California but that in] the event the Regional Director deems such a unit appropriate, Gargiulo represents that it will not contest as inappropriate units consisting of agricultural employees in Santa Cruz and Monterey Counties and, separately, Ventura County.
>
> Committee Ex. 4[5]

After the execution of this agreement, some employees, including representatives of what came to be the petitioning labor organization in this case, spoke to company officials about what the employees felt was company favoritism towards the UFW and about ending the UFWs organizational campaign. Coastal Berry's President, David Smith, testified that he and Gladstone spoke to Jose Fernandez, the representative of the petitioning union, among others, once or twice in the fields about the company's labor relations policy. Fernandez and the other employees wanted Gladstone to sell the company, to get rid of its labor consultants, and to "cause the UFW to have an election."

According to Smith, Gladstone told the employees that he

[5]There is a good deal more to the Memorandum than I have excerpted; however, since only this provision has become an issue in this case, I include only it.

could not make the UFW call for an election, but if the workers signed authorization cards, the UFW might call for one:

> Mr. Gladstone suggested that if the employees signed a sufficient number of cards that the UFW would call for an election achieving their objective, then they should vote any way they want. * * * [I]f they wanted an election, that was a way to achieve it. It was a direct response to their request for an election. TR: 146

At the time, the only cards Gladstone knew were being circulated were UFW cards. TR: 147.

Fernandez recalled speaking to Gladstone on June 30, 1998 and asking him to call for an election. According to him, Gladstone replied, "Follow the leader, sign the cards and have an election." Fernandez also testified that the Company paid the employees for their time in listening to a UFW presentation and that when he requested a similar opportunity, upon behalf of the Committee, it was denied. TR: 176.

THE ELECTION

On July 16, 1998, Petitioners, the Coastal Berry Farmworkers Committee filed a Petition for Certification seeking an election in a unit of all the agricultural employees of the Employer in Monterey and Santa Cruz counties. Smith testified without contradiction that he was not aware of the existence of the petitioning labor organization until after the filing of the

Petition for Certification. The Employer, through its attorney, James Sullivan, duly filed its Response to the Petition, consisting of both the standard Form 42, as well as a letter. TR: p. 14, Committee Ex. 1. In both the Form 42, and in the letter, the company took no position regarding the scope of the unit.[6]

Sullivan's letter also purported to contain "the employee list, from the payroll period ending Sunday, July 12, 1998", and specifically included "the Oxnard area employees currently on payroll", as well as a variety of information relevant to a determination of the scope of the bargaining unit. 'Nineteen employees were shown as employed in Oxnard during the eligibility period and Sullivan represented that the Oxnard season ran from January to June. Sullivan testified that he thought the list was complete when he submitted it. TR: 113. Smith denied seeing a draft of the letter, although he generally discussed "the concept of it" with Sullivan, TR: 148, and Sullivan's best recollection is that Smith did not see a draft. TR: 90.

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[6]The Employer's response itself, ALRB Form 42, is not in evidence. I may take official notice that an Employer is asked:

> (5)(d) Does the employer agree that the unit sought in the Petition for Certification is appropriate?
> Yes No

Capuyan testified without contradiction that Sullivan checked neither box. TR: p. 23, 11. 9 -14.

Although Sullivan's letter was in direct response to the Petition for Certification, it just so happened that he had begun gathering information about the Employer's operations even before the Petition had been filed. Both Regional Director Freddie Capuyan and Board agent Jennie Diaz had earlier spoken to him about details of the Employer's Oxnard operations in connection with a Notice of Intent to Organize (NO) filed by the UFW.[7] Capuyan recalled speaking to Sullivan about the Oxnard operation sometime around the end of June, TR: 25, and Sullivan's telling him that the Employer's Oxnard operations were ending or would end in June. TR: pp. 25 - 26. When specifically asked upon what he based his statement about the length of the Oxnard season, Sullivan indicated that he based it upon what he had been told while he was gathering information for Diaz in connection with the NO: "I had been pulling this together since Jennie's letter

[7]When an NO is filed, Board regulations permit the Regional Director to undertake "an investigation of any issues raised in connection with a Notice of Intention to Take Access or a Notice of Intention to Organize which might affect any subsequent election, including . . . questions of appropriate unit. . . ." Title 8 Code of California Regulations, Section 20915(a). Although the Regulations are permissive, Diaz testified that, "as a matter of course", the region investigates the scope of the unit "if it appears there might be a question on the unit in anticipation of any RC that might be filed." TR: 39. Both Capuyan and Diaz expressed frustration over the length of time it took Sullivan to reply to their questions concerning the unit in connection with the NO. Sullivan testified plausibly that he had not replied to the Region's inquiry before the filing of the Petition for Certification because he did not have some of the information they wanted and he had been too busy to get it sooner. TR: 83.

of June 25th. And I had talked with people at the Company and this is what they had cold me." TR: 92.

Sullivan and Smith, both testified that by taking no position on the unit issue in the Response they meant to abandon it; all they wanted was an election. Smith emphasized that the company could not even decide for itself what it thought the appropriate unit should be. Since the Committee had petitioned for a "northern" unit, they were willing to live with that unit or with any another unit the Regional Director determined to be appropriate. Despite the Company's willingness to accept the unit sought by the petition, Sullivan included the Employer's Oxnard employees because he "wanted to give the Board all the information it might be able to use in connection with the election." TR: 94 .

With respect to the list, Sullivan testified that he asked Earl Pirtle, the Chief Financial Officer of the Employer, to prepare a list of all agricultural employees working for Coastal Berry in the pay period immediately preceding the filing of the petition. Sullivan testified that he "was under the impression that the Company had a unified payroll running from Monday to Sunday." TR: 84. Sullivan testified that he had no idea there had been layoffs of employees between July 6 and July 12; it was his

understanding, as he had advised Capuyan in June, that the Oxnard employees would be laid off at the end of June. TR: 84 - 86.

Pirtle recalled Sullivan's asking him to provide a list including "all employees on the standard payroll for the weekending July 12."[8] Pirtle prepared such a list; he also testified that he did not discuss the matter with Smith prior to sending it to Sullivan, but that he believed he copied what he sent to Sullivan to Smith. TR: 75

Capuyan testified that he relied on the list supplied by Sullivan as accurately reflecting the number of eligible voters in Oxnard. The small number of employees was consistent with Sullivan's repeated representations that the Oxnard operation would wind down at the end of June.

Despite the Employer's initial reluctance to take a position on the scope of the unit, by July 20, it had decided to explicitly accept the smaller northern sought in the petition. By accepting the unit as described in the petition, Sullivan emphasized that the Company was trying to eliminate a potential unit issue, TR: 99, especially because with most of the Oxnard

[8]The company has a weekly payroll running from Monday to Sunday. The payroll is processed once a week and.the checks are sent out the Thursday after the Sunday which ended the payroll period. TR: 72

employees having been laid off, the election would, essentially be decided only by voters in the Watsonville-Salinas area. TR: 91 [Sullivan] ,156 [Smith]. Exactly when this decision was made is not clear from the record, but on July 20 Sullivan soughz to give Capuyan notice that the Employer now accepted the unit sought by the Petition. He wrote:

> Coastal Berry hereby accepts the unit definition in the above-referenced petition. That definition is all the agricultural employees in Monterey and Santa *Cruz* Counties. * * *
>
> Monterey and Santa Cruz counties are a single definable agricultural production area, and Oxnard is a different agricultural production area. There is no interchange of Coastal Berry employees between the northern divisions and Oxnard. Because Oxnard is a different labor market, the wage rates are somewhat lower than in the northern divisions, as shown in the attached schedule. Dave Murray, Juan Robles and the foremen manage the Oxnard Division. They are based in Oxnard and do not manage any activities of the northern divisions. No supervisors in the northern divisions have any responsibility for Oxnard.
>
> Most importantly, a single unit would effectively disenfranchise the Oxnard employees. During the Oxnard harvest season earlier this year, fully 200 employees worked for Coastal Berry. The Oxnard harvest season is over, and there are fewer than 20 agricultural employees in Oxnard at present.
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> Committee Ex.2

Although Sullivan testified that he "tried" to FAX this letter, TR: 95, and even thought he had, he has no FAX cover sheet indicating that it was either sent or received. Capuyan testified that he never received the FAX. He also testified that

" [n]ormally, if the parties agree to the scope of the unit . . . the Region would normally go along with it." TR: 24.

The Pre-election Conference was held on July 21, 1998. Diaz testified, and everyone agrees, that she announced that the election would be held in a state-wide unit. No one objected to the scope of the unit. Fernandez, who was present, testified he did not know he could; for his part, Sullivan said nothing both because Diaz did not invite comment and because the employees had scattered and would be impossible to locate.

Smith testified that prior to the Pre-election Conference he knew the company had laid off a significant number of employees in Oxnard and that he understood at the Pre-election Conference that only 19 Oxnard employees were on the eligibility list because Diaz "went down the roll call, how many people were working and how many people will be required to monitor it [the election]. So, yes, I was very much aware there was only approximately 19 employees working at the time." TR: 153

According to him, he had intended to lay off most of the Oxnard crews before July 4, but the layoff was delayed by Oxnard Production Manager Dave Murray's decision not to pull the plastic from the fields until July 6:

> * * * I had known since May that . . . towards the end of June we were going to lay off the bulk of the employees in

> Oxnard. As to the specific day, it was never determined because it [was] a function of harvesting. * * * In fact, my intention was to make sure it was before the July 4th weekend.
>
> * * *
>
> Mr. Murray controlled the operations, therefore by his decision to pull the plastic on the 6th, he delayed the layoff until that week versus doing it the prior week. TR: 167

Although Smith had known by July 1st that there would be layoffs on July 7th, TR: 167, and that, as a result, there would have been special payrolls "the fact that they were run on the dates they were run, I didn't even know the specific dates, the number of employees involved, until I looked into [it] " after the election. TR: 168

The election was held on Thursday, July 23, 1998.

Diaz was in charge of the election. She testified that notice was left up to the parties. Murray testified that on the morning of the election, Company representatives went into the fields to tell all the employees there would be an election and where they could vote. It is undisputed that only the 19 employees currently employed in Oxnard were notified in this way and no other efforts of any kind were made to notify any other employees who worked in Oxnard.[9]

[9]Although Capuyan testified at one point that he doubted that Board agents "only gave notice to those employees who were actually working", TR: 9, he also testified that it was

Sometime during the day, Murray received a call from Stephanie [Bullock], an ALRB attorney, telling him that voting in the Oxnard unit would take a little longer than expected because about 4 - 6 employees who were not on the list had appeared to vote. After the election, Murray spoke to Pirtle and Smith and told them what he had heard. Pirtle told, him that it was not their issue, it was an ALRB issue, "Let them handle it." Smith recalled Murray's telling him that some employees not on the list were showing up to vote in Oxnard, but he did not think much of it until Monday, July 27, when he was told "there was a problem."

Upon hearing that there had been a problem, Smith asked Pirtle how the list was compiled and Pirtle told him what he had done. TR: 137. Smith then asked Murray who worked that week and Murray told him that he "had a layoff earlier in the week." TR: 137.[10] Smith then asked Pirtle again what payroll they had run and Pirtle reported back to him that there "had been two special payrolls earlier in the week", one, involving approximately 130 - 40 employees, and another, smaller one involving some 20 - 30

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correct that "the Region only notified the 19 prospective voters who were on the eligibility list." TR: 16- 19

[10]It is undisputed that the Labor Code requires employees to-be paid within 24 hours of their layoff so that the "special payrolls" were required by law. TR: 85, 168.

employees. TR: 137 - 38

Pirtle testified, that his review of the payroll records revealed there were 170 non-supervisorial employees working in Oxnard on July 6; 174 working on July 7; 31 working on July 8; 38 working on July 9; 36 working on July 10; and 17 working on July 11. See, Er. Ex. 5. Murray testified that he laid off somewhere between 145 - 157 employees on July 7 and another 20 - 25 employees on July 10. These estimates are borne out by a comparison of the day-by-day figures in Er Ex. 5 from which it appears that the Oxnard workforce decreased by 142 between July 6 and July 8, increased by seven on July 9, decreased by 2 on July 10 and again fell by 21 by Friday July 11.

Smith wrote Capuyan on July 29, 1998 advising him that there were additional employees who worked during the weekending July 12. Er. Ex. 6 Attached to the letter was a list of 181 employees (including the 19 on the original eligibility list.) I have compared the names on this list with the Farm Address roster of names attached to the payroll register in Er. Ex. 3 and each of the 181 employees named in Er. Ex 6 appears on the roster.[11]

[11]The Er. Ex. 3 consists of both the Payroll Register list and the Farm Support Address listing. Some of the names on the Register are difficult to read because of the quality of the photocopying. However, the attached Farm Address listing is clear. I used these rosters for the purposes of checking the names on Er Ex. 6. It is a Farm Address List that accompanied

ANALYSIS

Before considering the question(s) presented by the Executive Secretary's Order, I would like to quickly address one of each of the parties' arguments.

The Employer contends that once a statewide unit was determined to be appropriate, Regional staff had a duty to verify that the eligibility list was complete in order to insure that all eligible voters were notified of the election and that it was the Region's failure to do so that caused the employees to be. disenfranchised. I am not sure that the Executive Secretary's Order contemplates any inquiry into the Regional Director's duty to have undertaken an independent investigation into the Employer's Oxnard payroll. While it is true that the Employer's Objection to the election was to the Board's conduct of it[12], and especially to the Region's failure "to secure an updated list of employees eligible to vote after the Region determined that the

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the Employer's Response and constituted the Eligibility list. See, Er. Ex. 1.

[12]As written, the Employer's Objection stated:

> The ALRB failed to include 162 Oxnard workers as part of the bargaining unit eligible to vote . . . and the number of disenfranchised workers who were not notified about the election was outcome determinative.

unit would be statewide", after taking into account the materials in support of the objection and obtaining additional information,[13] the Executive Secretary construed it as going to the cause of the *Employer's* failure to provide a complete eligibility list. Inquiry into what the Region did to provide notice to those whom it believed were eligible is fairly implied by the Executive Secretary's Order, but the matter of any duty on the part of the Region to conduct an independent investigation into the number of eligible employees is not.

Nevertheless, to the extent: I am misreading the Executive Secretary's Order, I will quickly address the Employer's argument. The crux of it is that once

> the Regional Director enlarged the scope of the unit, the Employer's July 17th Response -- which had been tailored to the unit described in the election petition -- had become obsolete. Had the Regional Director carried out his requisite investigation, and requested actual payroll records, he would have discovered that there were employees in Oxnard who had been laid off during the eligibility week, who should have been given the opportunity to vote.
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> Post-Hearing Brief, p. 2

However, the premise of the Employer's argument is not true: the Employer's Response was not tailored to the unit described in the Petition. Sullivan testified he included the Oxnard employees in

[13]I can take official notice of the Executive Secretary's Order Directing Regional Director to Provide Information Concerning Notice to Employees, dated August 4, 1998.

case the Regional Director thought a statewide unit was appropriate. Second, although the decision to have a statewide unit was not announced before the Pre-election Conference, since so far as Capuyan and Diaz knew, Sullivan's list purported to include the Employer's Oxnard employees, and the small number of Oxnard employees on it was consistent with the information he had twice provided the Region, they had no reason to seek additional information.

For its part, the Committee argues that the election should not be set aside because, even if the Employer did not submit an incomplete eligibility list in bad faith, it was either grossly negligent in compiling it or so recklessly indifferent to its accuracy, that it still should not be permitted to benefit from its own conduct.

In setting the matter for Hearing, the Executive Secretary explicitly relied upon *Republic Electronics, Inc.* (1983) 266 NLRB No. 154. In *Republic,* the Board stated:

> [W]hile a party is ordinarily estopped from profiting from its own misconduct, the Board has recognized a limited exception to this rule. Thus, where a party to the election causes an employee to miss the opportunity to vote, the Board will uphold the wrongdoer's objection if the vote is outcome determinative, there is no evidence of bad faith, and the employee was disenfranchised through no fault of his or her own . . . . *Republic Electronics, Inc,* 266 NLRB at 853

Although *Republic* speaks of disenfranchisement caused, by "bad faith" as outside the boundaries of the exception it recognizes, it does not specifically define "bad faith." Nevertheless, "bad faith" is a concept used repeatedly in labor law, and generally speaking, it implies intent, See, e.g. *Grow Art* (1983) 9 ALRB No. *67* [Conduct that evinces *intent* not to reach agreement is bad faith bargaining]; *United Parcel Service* (1991) 305 NLRB No. 44, 434 [Deliberate conduct is said to be in bad faith.]

Since the concept of bad faith is so frequently used in labor law, it is difficult for me to regard either the national, or our Board's, use of the term as merely illustrative and not definitive. Accordingly, the Committee's arguments about what more Sullivan or Pirtle *might* have done to find out about either the length of the Oxnard season or the Oxnard payroll, are irrelevant. I turn now to consideration of what I understand to be the issues set for hearing. The Order of the Executive Secretary outlines three questions to be answered:

> 1) Were an outcome determinative number of voters left off the eligibility list?
>
> 2) Were they left off either inadvertently or due to the Employer's bad faith?

3) Did the failure to include such employees on the eligibility list result in no reasonable efforts to notify them of the election?

In light of what I have already said about the reasonableness of Capuyan's and Diaz' reliance on the list, Question 3 may be quickly answered: since it is clear that only the 19 employees the Region believed were eligible were, in fact, given notice of the election, the lack of notice to any others must be said to have been the result of the incompleteness of the list. Only the first two questions remain.

(1)

Was an outcome determinative number of voters left off the eligibility list?

To answer this question, I must determine: who was eligible to vote and how many of these eligible voters were left off the eligibility list.

Labor Code Section 1157 provides that "[a]ll agricultural employees whose names appear on the payroll applicable to the payroll period immediately preceding the filing of the petition of such an election shall be eligible to vote." Board regulations provide:

(a) Those persons eligible to vote shall include:

(1) Those agricultural employees of the Employer who were employed at any time during the employer's last payroll period

> which ended prior Co the filing of the petition, except that if the employer's payroll . . .is fewer than five working days, eligible employees shall be all those employees who were employed at any time during the five working days immediately prior to the filing of the petition.
>
> 8 Code of California Regulations Section 20352

Here, the Employer had several payrolls: special payrolls occasioned by the mid-week layoffs and a standard weekly payroll. In such circumstances, the Board has held that any employee employed during the entire seven-day payroll period is eligible to vote. *Jack Brothers & McBurney, Inc.* (1978) 4 ALRB No'. 97. I conclude that any employee who worked during the weekending July 12, 1998 was eligible to vote.

The tally of ballots indicates that the Committee's margin of victory was 113 (523 - 410) votes with 39 challenged ballots. Assuming that every challenged ballot was cast for the Committee, 152 additional voters would be outcome determinative (113 + 39.)[14] Er. Ex 6 indicates that, besides the 19 employees on the eligibility list, 162 other employees were employed between July 6 and July 12. 162 potential votes would be outcome

[14]By counting the challenges as cast for the Committee, I am aware that I am omitting a step in my analysis. Technically, a shift of only 113 votes would make the *challenges* outcome determinative and they would have to opened and counted and a Revised Tally issued to measure the precise number of potential voters that is outcome determinative in this case. Since, even with a Revised Tally, the Committee's margin of victory could never be more than 162,1 believe we can ignore resolving the challenges and treat 162 as outcome determinative in any case.

determinative.[15]

Thus, an outcome determinative number of voters was left off the eligibility list.

(2)

Were they left off inadvertently
or due to the Employer's bad faith?

According to the Employer, Sullivan, knowing that the Employer has a weekly payroll, and believing that the Employer's Oxnard operations end in June, asked for the payroll required by the statute and Pirtle supplied exactly what he had been asked to supply. Because Sullivan turned out to be mistaken about the length of the Oxnard season, he did not anticipate that there were special layoff payrolls and nobody else caught the omission. That the list was incomplete, therefore, was a good faith mistake.

That Sullivan was unaware that there had been special layoffs is, of course, primarily supported by his earnest and credible testimony. But it is also supported circumstantially by his testimony that he responded to the inquiry about the length of the Oxnard season based upon information he had earlier

[15]I should note that the Committee does not take issue with the number of voters left off the list.

gathered in connection with the NO. Since he had already obtained the information about the length of the Oxnard season -- indeed, had provided it to Capuyan before the petition was even filed in this case -- it is entirely plausible that, absent some reason to re-visit the matter, he would simply provide the Region with what he thought he knew in his 48 Hour Response. And since voter eligibility under the Act is defined by payroll periods, there is nothing exceptionable in his asking Pirtle, who is in charge of payroll, to prepare the list, as opposed to calling Murray, for example, to find out who worked for him during the eligibility period.

Despite the plausibility of the Employer's account, the Committee contends that it should not be credited. It argues, instead, that the Employer is biased against the Petitioner and in favor of the UFW and that, as *a* result, Sullivan deliberately misled the Region into designating a statewide unit and deliberately provided a defective list to the Board. Before passing final judgment, then, on the veracity of the Employer's account, I will consider the Committee's evidence which is said to detract from it.

(a)

The Employer's alleged bias

According to the Committee, the record establishes that the Employer is biased in favor of the UFW and against the Committee. In support of this contention, it cites: 1)Fernandez' version of his exchange with Gladstone in which Gladstone told him to "Follow the leader, sign the cards and have an election"; 2) what it characterizes as the Company's strenuous resistance to "all attempts by the Regional Director to resolve any bargaining unit issues" despite its agreement with the UFW not to contest the scope of an appropriate unit; and 3) the fact that the Company paid its employees to listen to a UFW organizers, but would not give the Committee the same opportunity.

Although Smith did not mention Gladstone's telling Fernandez to "follow the leader", he did corroborate Fernandez' testimony that Gladstone told him to sign the cards if he wanted to have an election. Assuming that Gladstone did say, "Follow the leader," I do not know what it means; but even *I* were to take it as a flattering reference to the UFW, in view of Smith's uncontradicted testimony that no one even knew there was a rival "labor organization"[15] at the time of the conversation, and that Gladstone told the employees they could vote "any way they wanted" in such an election, Gladstone's remarks 'taken as a whole

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[16]In speaking of a rival "labor organization", I am speaking of a group seeking to represent employees.

appear to do little more than correctly describe the process of having an election. With only one union circulating cards, only those cards *can* count towards the showing of interest necessary to trigger an election. I cannot count this as evidence of bias in favor of the UFW.

Since I am not sure I understand the Committee's next argument, I will repeat: it in its entirety:

> [T]he so-called Neutrality Agreement . . .provides for the Company to not contest a bargaining unit determination. Yet the Company resisted strenuously all attempts by the Regional Director to resolve the bargaining unit issues in • . this matter.
>
> Committee Post-Hearing Brief, p. 10

If the argument refers to Sullivan's failure to either agree or disagree with the unit sought in the Petition, I cannot conclude that his failure to do so evidenced any sort of resistance to resolving the unit question. Determination of the proper scope of the unit is a matter for the Board and Sullivan provided all the information the Region needed to make its determination. Indeed, so far as Sullivan's level of cooperation goes, he was apparently more "resistant" to providing the information to the Region when it solely concerned the NO filed by the UFW since both Capuyan and Diaz became frustrated by his failure to provide what they needed in connection with their investigation of that

matter.[17] I find no evidence of bias in the Company's failure to take an affirmative position on the scope of the unit.

The final element relied upon by the Committee in demonstrating the Employer's bias against the Petitioner is Fernandez' testimony that the Company permitted the UFW to address its employees on company time, but refused to permit the Committee to do so. Since it is not clear when either of the events Fernandez referred to took place, I am wary of drawing any conclusions on the basis of such fragmentary testimony. Where there is only one union, an employer's permitting it to come on its property to address its employees, even if on company time, is not an unfair labor practice. *Coamo Knitting Mills, Inc* (1964) 150 NLRB No. 35[18] Where there are rival labor organizations, however, which would have been the case as soon as the Committee filed the petition, an employer commits an unfair labor practice

[17]As noted, I find the argument obscure, but to the extent that the Committee may mean that it evidences bias for the Employer to contest this election when it promised the UFW not to contest any bargaining unit issue, the Board has ruled that this case is not about the scope of the bargaining unit. See, Order Denying Regional Director's Appeal to Board of Acting Executive Secretary's Denial of Regional Director's Motion to Ensure that the Evidentiary Record Is Fully Developed. Admin. Order 98 - 12, October 19, 1998.

[18]I am aware of the potential difference between what constitutes unlawful support under the statute and an expression of preference. However, if the Employer prefaced the UFW's address by stating the employees were perfectly free to make up their own minds about the Union, that it didn't care whether they voted for it or against it, the mere fact that the UFW was permitted to address its employees is may not even indicate a preference.

if it provides access to one union and not to the other. Consolidated *Edison. Company of New York, Inc.* (1961) 132 NLRB No. 127 Thus, depending upon when the Committee made its request, quite legitimate considerations might have occasioned the Employer's refusal. In view of the fact-sensitive nature of the rules in this area, the record in this case is simply too sparse for me to draw any conclusion about the Employer's alleged bias against the Committee from the bare juxtaposition of events Fernandez related. I conclude the Committee has not demonstrated that the Employer is biased against the Committee.

I now turn to the Committee's evidence of bad faith.

(b)

The evidence of bad faith

The Committee next argues that the Employer's bad faith is exemplified by what it characterizes as the Employer's elaborate efforts to mislead the Regional staff into holding an election in a statewide unit, all the while knowing that the eligibility list was defective.

Did the Employer deliberately mislead Region about the scope of the unit

The Committee argues that, at every step of the

proceedings when the Employer had a chance to advise the Region that it believed a norchern unit was appropriate it failed to do so, and that these omissions misled the Region into holding an election in a statewide unit.

It is true that the Employer did not take a position on the unit in the 48 hour Response, but both Sullivan and Smith plausibly testified that they could not decide for themselves what they thought the unit should be and they were willing to live with either a "northern" unit or a statewide unit. I find no evidence of an intent to mislead in the failure to take an explicit position about the scope of the unit in the Employer's Response. It is also true that Sullivan failed to effectuate delivery of his FAX assenting to a northern unit and that he failed to respond to Diaz' announcement of a statewide unit. Why the FAX didn't reach Capuyan is a puzzle, but, for the reasons stated below, the solution does not much concern me.

We can never know what Diaz or Capuyan would have done *if* they had received the FAX, or *if* Sullivan had spoken up during the Pre-election Conference. It is clear, however, that, despite knowing that only 19 of approximately 160 - 300[19] Oxnard

[19]It will be recalled that Sullivan's Response indicated that Oxnard had 4 - 5 crews of between 40 - 60 employees.

employees were on the eligibility list, Diaz still designated a statewide unit as appropriate. It is thus difficult to credit the argument that, if Sullivan had only advised the Region again of what it had already rejected as decisive in determining the unit issue, that the unit determination would have been different. Since I cannot find that the failure to send the FAX or to object to the unit caused the Region to decide the unit question the way it did, it is even more difficult to credit the Committee's further argument that, by deliberately failing to send the FAX or by choosing to remain silent at the Pre-election Conference, Sullivan could have *intended* to mislead the Region into designating a statewide unit.[20]

(2)

Did the Employer' knowingly provide
a defective eligibility list

Finally, the Committee argues that the Company knowingly submitted a defective eligibility list. In support of this contention, it relies upon 1) Sullivan's failure to check the

[20]I am not overlooking Capuyan's testimony that "normally" when the parties agree to a unit, the Region will go along with it. Given the considerations outlined above — that Capuyan had to have disregarded all the information Sullivan had previously given him hi order to determine that a statewide unit would be appropriate — I cannot take this testimony as meaning that Capuyan *would have* acceded to a northern unit if Sullivan had only told him the Employer agreed to one.

accuracy of the eligibility list with Murray; 2) Pirtle's alleged negligence in not including the employees on special layoff payrolls on the list; 3) what it contends is Smith's failure to correct Sullivan's representation in the Employer's Response that the Oxnard harvest had ended in June; and, finally, 4) the Company's failure to alert Regional staff that employees not on the eligibility list were showing up to vote.

There is nothing in the record to indicate that Sullivan had any reason to believe that the information he conveyed in his 48 Hour Response was inaccurate and I have credited his testimony that he believed the list was complete. The Committee is doubtless correct that *if* Sullivan had checked the eligibility list with Murray, Murray would have caught the oversight; but it does not follow that the failure to do so means that he knew the list was incomplete. Indeed, so far as the record shows, Sullivan did not check with any of the managers of the Employer's other divisions and there is no question about the completeness of those payroll records.

I also reject the argument that Pirtle put "forth [so] little . . . effort in ensuring that the omitted names be placed on the list," that the Employer must be found to have been "avoiding" discovering the truth about the eligibility of

employees in the Oxnard division.[21] As a general matter, 'I have already rejected the Committee's suggestion that I consider what else the Employer might have done, but I would like to add that Pirtle's failure to include the special payroll employees flowed from Sullivan's ignorance that there *had been* special payrolls, and not, so far as the record shows, from Pirtle's "putting his head in the sand."

So far as Smith's alleged failure to correct Sullivan's representation about when the Oxnard season had ended in the 48 Hour Response, there is no evidence that Smith ever saw Sullivan's letter. However, it is clear that Smith knew the Oxnard season had extended into July during the Pre-election Conference and that he failed to say anything to Diaz when she indicated there were only 19 eligible Oxnard employees. Smith explained that he simply failed to make the connection between what he knew about the end of the season and the "size" of the eligibility list. The Pre-election Conference took place on July

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[21]Thus, the Committee argues:

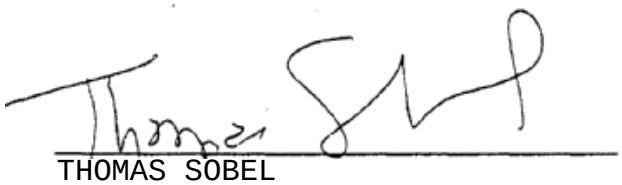
> Company Controller Pirtle convincingly testified that he understood labor laws and takes care to ensure that employees timely receive their paychecks at layoff. * * * What can be deduced from Mr. Pirtle's testimony is that the Company put little or no effort into ensuring that the omitted names be placed on the list. They simply did not care that the appropriate names were submitted . . . .
>
> Post-Hearing Brief, p. 6

22, over two weeks after the first layoff; I do not find it implausible that Smith overlooked the layoffs.

Finally, the Committee relies on the Employer's failure to advise the Board that employees not on the eligibility list were showing up in Oxnard to vote. In the first place, only a handful of employees had showed up and the Board already knew about it because it was Stephanie Bullock, one of the Board's Regional attorney's, who told Murray about it. But more important, by that time the election was underway and the failure of notice had already occurred.

Accordingly, on the record as a whole, I find that the provision of a defective eligibility list was inadvertent. In view of the complete failure to attempt to provide any sort of notice to the otherwise eligible voters left off the Oxnard list, I recommend the election be, and hereby is, set aside. *Sequoia Orange Co.* (1987) 13 ALRB No. 18.

Dated: November 5, 1998



THOMAS SOBEL
Investigative Hearing Examiner