San Clemente, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

SAN CLEMENTE RANCH, Ltd., Employer, and ROBERTO REYES MAGANA, Petitioner, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Certified Bargaining Representative.	Case No. 99-RD-l-EC(SD) 25 ALRB No. 5 October 22, 1999

AMENDED

DECISION OVERRULING PARTIAL DISMISSAL OF ELECTION OBJECTIONS

This case is before the Agricultural Labor Relations Board (ARLB or Board) on the United Farm Workers of America, AFL-CIO's (UFW or Union) Request for Review of the Executive Secretary's order (attached hereto) partially dismissing the Union's election objections. A decertification election was conducted among the agricultural employees of San Clemente Ranch, Ltd. (San

Clemente or Employer) on June 18, 1999[1], resulting in a tally of 69 votes for the UFW, 135 votes for No Union, and 14 Unresolved Challenged Ballots. On June 25, the UFW timely filed ten objections to the election. On September 17, the Executive Secretary issued a Notice setting some objections for hearing,[2] dismissing some, and partially dismissing others. On September 21, the UFW timely filed a Request for Review of the Executive Secretary's partial dismissal of Objections Nos. 2 and 9. The Board has reviewed the Executive Secretary's Notice in light of the Request for Review and supporting arguments and has decided to overrule the Executive Secretary's partial dismissal of Objection No. 2 and to affirm his dismissal of Objection No. 9, for the reasons stated below.

Objection No. 2

The UFW alleges that San Clemente made an illegal promise of benefits when it assured the entire workforce that all benefit levels would remain in place if the Union were voted out. Because the Employer's proposal in contract negotiations at that time was to impose a cap on employer contributions to the medical plan, and

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[1] All dates herein refer to 1999 unless otherwise specified.
[2] A hearing before an Investigative Hearing Examiner on the objections which were set is scheduled to be conducted on November 3.

correspondingly to increase employee contributions in the event of a premium increase above that cap, the Union argues that this election promise offered the workers more in the way of medical plan benefits if they voted out the Union. Declarations of several workers state that San Clemente management representatives told employees that all their benefits, including the medical plan, would remain the same if they voted against the Union. Two declarants stated that during meetings before the election, San Clemente gave the workers a flyer which discussed, among other things, what the Employer planned to do with employee benefits. The flyer stated, in part, "Our intentions are to continue giving you the same benefits if you vote against the Union." One of the declarants states that this promise of benefits was contrary to the Employer's contract proposal on the table at that time, and that the promise gave the workers the impression that their benefits could be maintained only by their voting against the certified bargaining representative (UFW).

The Executive Secretary dismissed Objection No. 2 to the extent that it alleged a promise to maintain benefits in exchange for employee support for decertification of the Union. The Executive Secretary reasoned that a promise to maintain existing benefits is

not a promise of new benefits, but only *a* promise to maintain the status quo. (Citing *Crown Chevrolet Co.* (1981) 255 NLRB 826, fn. 3; *El Cid, Inc.* (1976) 222 NLRB 1315.)

In *NLRB* v. *Gissel Packing Co.* (1969) 395 U.S. 575 [89 S.Ct. 1918] (Gissel), the U. S. Supreme Court held that, in the course of an organizational campaign, an employer may freely communicate to its employees its views on unions in general or a particular union, as long as it does not violate the law by including threats or promises.[3] In *El Cid, Inc.* (1976) 222 NLRB 1315, the National Labor Relations Board (NLRB) held that in the context of a decertification election, an employer does not promise new or increased benefits by advising its employees that it intends to maintain the status quo under an existing contract. The employer in *El Cid* had promised that if the union lost the election, employees would receive health insurance comparable to that provided under the existing contract with the union. The NLRB held that the employer had to the right to assure its employees that it would continue to make comparable payments to a private plan and that they would continue to receive comparable health

coverage. In these circumstances, the NLRB ruled, the employer was not offering or promising new or increased benefits to the employees, but was simply advising them he would maintain the status quo.

The situation in the instant case can be distinguished from *El Cid.* Here, the Employer was allegedly not just promising to maintain existing benefits if the employees voted to decertify the Union. Rather, it was impliedly promising to withdraw its current proposal to institute a premium cap on what it would pay toward employee health benefits. This was more than simply promising to maintain the status quo, because the status quo *included* the Employer's intention to impose a premium cap, and all the employees knew this at the time the Employer made its promise. Further, the language contained in the Employer's leaflet ("Our intentions are to continue giving you the same benefits if you vote against the Union.") clearly implies that the Employer's promise to maintain the current benefits (rather than imposing a premium cap) is tied to the employees' voting against the Union. A reasonable employee could conclude that the

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[3] The principles of *Gissel* are not limited to the organizational campaign context. *(Mon River Towing, Inc.* v. *NLRB* (3d Cir. 1969) 421 F.2d 1.)

Employer was promising to *change* the status quo by withdrawing its plan to institute a premium cap on medical benefits in *exchange for* a non-union vote by the employees. The circumstances are distinguishable from *El Cid* and the objection makes a prima facie showing that the Employer made an unlawful promise of benefit under the *Gissel* standard.

Therefore, the Investigative Hearing Examiner (IHE) will be directed to take evidence on the previously dismissed portion of Objection No. 2: Whether the Employer made an unlawful promise of benefits when it assured workers that all benefits would remain the same if the employees voted against the Union, thus impliedly promising to withdraw its current plan to institute a premium cap on Employer contributions to the Employer's medical plan if the employees voted to decertify the Union.[4]

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[4] Member Stoker would affirm the Executive Secretary's dismissal of Objection No. 2. The supporting declarations reflect that the Employer distributed and discussed a flyer which contained the Employer's view of various issues which had arisen in the election campaign. The flyer listed various benefits presently provided to employees, such as vacation pay and medical insurance, bathrooms, and drinking water, and further stated that the employees would continue to receive these same benefits if they voted to decertify the Union. In Member Stoker's view, the reasonable interpretation of this message is simply that the employees would continue to receive all of the listed categories of benefits, not that they would necessarily remain unchanged in all respects. Consequently, Member Stoker believes

Objection No. 9

The UFW objects that the Employer conducted "captive audience" meetings within a period less than 24 hours prior to the election. The Union cites *Peerless Plywood Co.* (1953) 107 NLRB 427 [33 LRRM 1151], an NLRB case which established a rule prohibiting employers or unions from making speeches to massed assemblies of employees within 24 hours of the scheduled time for an election.

The Executive Secretary dismissed Objection No. 9 on the grounds that it assumed, without discussing the applicability of the NLRB's rule to ALRB proceedings, that it is improper for an employer to hold mandatory employee meetings within 24 hours of a representation election. The Executive Secretary notes that the ALRB has never adopted the NLRB's Peerless *Plywood* rule. (Citing *Dunlap Nursery* (1978) 4 ALRB No. 9.)

We find insufficient declaratory basis for setting Objection No. 9. Therefore, we need not reach the issue of whether the Peerless *Plywood* rule is applicable

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that, consistent with the facts in *El Cid, Inc.* (1976) 222 NLRB 1315, the supporting declarations in the present case reflect only that the Employer promised to maintain the status quo.

under the ALRA. The Executive Secretary's decision to dismiss Objection No. 9 is therefore affirmed.

DATEJP: October 22, 1999

GENEVIEVE A. SHIROMA, Chair

IVONNE RAMOS RICHARDSON, Member

MICHAEL B. STOKER, Member

GLORIA A. BARRIOS, Member

CASE SUMMARY

San Clemente Ranch, Ltd. (UFW)

25 ALRB No. 5
Case No. 99-RD-1-EC(SD)

Background

Following a decertification election conducted on June 18, 1999, which resulted in a majority for No Union, the United Farm Workers of America, AFL-CIO (UFW), filed ten election objections. On September 17, 1999, the Board's Executive Secretary issued a ruling setting some objections for hearing, dismissing some, and partially dismissing others. The UFW requested review of the Executive Secretary's dismissal of Objection No. 2, alleging that San Clemente Ranch, Ltd. (Employer) made an unlawful promise of benefits when it assured employees that all benefit levels would remain in place if the UFW were voted out, and Objection No. 9, alleging that the Employer conducted unlawful "captive audience" meetings within a period less than 24 hours prior to the election.

Board Decision

The Board overruled the Executive Secretary's dismissal of Objection No. 2 and set it for hearing. The Board held that the UFW had made a prima facie showing that the Employer was not just promising to maintain existing medical benefits if the employees voted to decertify the UFW, but was impliedly promising to withdraw its current proposal to institute a premium cap on what it would pay toward employee health benefits. Thus, a reasonable employee could conclude that the Employer was promising to change the status quo by withdrawing its plan to institute a premium cap on medical benefits in exchange for a nonunion vote by the employees. The objection therefore made a prima facie showing that the Employer had made an unlawful promise of benefit under the standard of *NLRB* v. *Gissel Packing Co.* (1969) 395 U.S. 575.

The Board found insufficient declaratory basis for setting Objection No. 9. Therefore, the Board found it did not need to reach the issue of whether the "captiye audience" rule adopted by the NLRB in *Peerless Plywood Company* (1953) 107 NLRB 427 is applicable under the ALRA. Therefore, the

Board affirmed the Executive Secretary's dismissal of Objection No. 9.

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This Case Summary is furnished for information only and is not an official statement of the case, or of the ALRB.

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

SAN CLEMENT RANCH, Ltd., A Employer and ROBERTO REYES MAGANA, Petitioner, IO, Certified Bargaining Representative.	Case No.99-RD-l-EC(SD) NOTICE OF ELECTION OBJECTIONS SET FOR HEARING; NOTICE OF PARTIAL DISMISSAL OF OBJECTIONS; NOTICE OF OPPORTUNITY TO FILE REQUEST FOR REVIEW

PLEASE TAKE NOTICE : pursuant to Labor Code section 1156.3(c), An investigative hearing on the llowing objections filed by the United Farm Workers of America, AFL-CIO (UFW or Uni in the above-captioned matter will be conducted on October 27, 1999 at 10 a.m., and on consecutive days thereafter until completed in San Clemente, California, to be later noticed by the Executive Secretary. The investigative hearing shall be conducted in accordance with the provisions of Title 8, California Code of Regulations, section 20370. The Investigative Hearing Examiner shall take evidence on the following issues raised by the allegations in the objections petition:

Objections Nos. I and n to the extent they allege that the Employer advised employees that in the event they voted to oust the incumbent Union, the Employer would institute a new complaint procedure under which employees could present their problems

directly to specific management official s. (See Selkrik Mettalbestos (1996) 321 NLRB 44 in which the national Board held that a promise to develop a grievance procedure may be a prohibited promise of benefits if it is linked to the election results.) Accordingly, hearing is necessary to determine whether, based upon the Employer representatives' statements, unit employees reasonably believed that a new complaint procedure represented a benefit obtainable only in the event the Union was defeated.

Objection No.III, which alleges that the Employer engaged in "direct dealing" with employees. As a general rule, "direct dealing" with employees may be found where an employer has withdrawn recognition from the incumbent union or did in fact deal directly with employees concerning their terms and conditions of employment. (See, e.g., Modern Merchanizing (1987) 284 NLRB 1377.) Declaratory support establishes that the Employer and/or its spokespersons addressed employees on several occasions in order to announce that the Employer's son was *now* stationed on the premises for the purpose of being available to employees in order to address "any problems" they may have. While such conduct will be considered as a potential promise of new benefits under Objection No. 1, it may also be considered as a form of present "direct dealing" in contravention of the Employer's continuing obligation to discuss such matters only with its employees' certified representative.

Objection No. V, insofar as it is alleged that the Company provided *assistance* to employees seeking to perfect a decertification petition. It is impermissible for an employer to actively solicit, encourage, promote or provide assistance in the initiation, signing or filing of an employee petition seeking to decertify an incumbent bargaining representative. (See, e.g., Central Washington Hospital (1986) 279 NLRB 60; Place Tovota. Inc. (1974) 215 NLRB 395) Since declarations in support of the objection describe efforts by fellow

employees to obtain signatures on a decertification petition prior to work in the employee parking lot, as well as during breaks including lunch time, there is no showing that the Employer *initiated the* decertification effort. However, those same declarations suggest that the signature gatherers, without intervention by Company supervisors or foremen, drove private vehicles onto Company premises in violation of an alleged Company rule which prohibits the use of such vehicles during work time and thereby rendered assistance to the decertification effort.

Objection No. VI which alleges that, on the day of the election, the Employer directed one employee to remove a UFW flag from his private vehicle in the employee parking lot and directed another employee to remove the UFW button he was wearing and whether such conduct is impermissible and, if so, did such actions reasonably tend to interfere with employee free choice. (Republic Aviation Corp. v. National Labor Relations Board (1945) 324 U.S. 793; Control Services (1991) 303 NLRB 481: Nordstrom. Inc. (1982) 264 NLRB 698)

Objection No. VII insofar as it alleges that the Employer misrepresented the UFW's wage proposal in flyers distributed to numerous employees by contending that the proposal would actually result in a loss of earnings to employees due to deductions for Union dues. (See, generally, Hollywood Ceramics Company. Inc. (1962) 140 NLRB 221 Shopping Kart Food Market. Inc. (1977) 228 NLRB 1311; General Knit of California. Inc.(1978) 239 NLRB 619: Midland National Life Insurance Co. (1982) 263 NLRB 127)

PLEASE TAKE FURTHER NOTICE that the following objections are dismissed.

Objection No. II is dismissed insofar as it alleges that the Employer promised to maintain benefits in exchange for employee support for decertification of the incumbent Union. A promise to maintain existing benefits is not a promise of new benefits; it is only

a promise to maintain the status quo. (Crown Chevrolet Co. (1981) 255 NLRB 826, fh.3; El Cid. Inc. (1976) 222 NLRB 1315)

Objection No. IV, which alleges that the Company improperly advised employees of the pending decertification election before the petition for the election had been filed, is dismissed. The only evidence in support of the objection establishes (1) at some time, perhaps as many as six days prior to the election, employees were advised by a Company supervisor that the ALRB would be holding an election to determine the status of the UFW as the exclusive representative and (2) a packing shed supervisor apprised employees of supervisor's statements is concerned, it is settled that an employer's providing assistance of a ministerial nature to employees who have already initiated a decertification effort is not grounds for setting aside an election. (Amer-Cal Industries [check cite in 274 NLRB No. 1046, 1051]]. With reference to the alleged statement that an election would take place, the fact that it may have been made no more than six days prior to the holding of the election may suggest that it was made after the petition for decertification had already in fact been filed in the Board's regional office.

Objection No. VIII, which alleges that the Employer threatened employees when it promised to maintain existing benefits if the Union were decertified, is dismissed as discussed above, since a promise to maintain benefits is not a promise of new benefits, the employer's assurance that present benefits would continue cannot be construed as a threat. (See, e.g., Arrow Lettuce Company (1988) 14 ALRB No. 7)

Objection No. IX is dismissed because it assumes, without more, that it is improper for an employer to hold mandatory employee meetings within 24 hours of a representation election. The objection is based on a rule adopted by the National Labor

Relations Board which prohibits "captive audience" meetings 24 hours prior to the start of a representation vote. (Peerless Plywood Company (Peerless') (1953) 107 NLRB 427) The ALRB has never adopted the Peerless rule. (See, e.g., Dunlap Nursery (1978) 4 ALRB No. 9.)

Objection No. X . insofar as it alleges an illegal promise of a wage increase contingent on employees voting to remove the Union is dismissed. The supporting declarations establish only that the employees sought support for the decertification petition by suggesting that removal of the Union would result in better wages. There is no declaratory support to suggest that the Employer promised to improve wages if the Union is ousted.

PLEASE TAKE FURTHER NOTICE that pursuant to Title 8, California Code of regulations, section 20393(a), the Union may file a request for review of the Executive Secretary's partial dismissal of the Union's Objection Petition with the Board by September 24, 1999.1

DATED: September 17, 1999

J. ANTONIO BARBOSA
Executive Secretary, ALRB

1. The five-day filing period is calculated in accordance with the provisions of Title 8, California Code of Regulations, section 20170, which excludes intervening Saturdays, Sundays and Holidays.