STATE OP CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

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| COASTAL BERRY COMPANY, LLC,<br><br>Employer,<br><br>and<br><br>UNITED FARM WORKERS OF AMERICA, AFL-CIO,<br><br>Petitioner,<br><br>and<br><br>COASTAL BERRY OF CALIFORNIA FARM WORKERS COMMITTEE,<br><br>Intervenor | Case No. 99-RC-4-SAL<br><br>26 ALRB No. 2<br>(April 25, 2000) |

DECISION ON OBJECTION TO GEOGRAPHIC SCOPE OF THE UNIT

On March 6, 2000, Investigative Hearing Examiner (IHE) Thomas Sobel issued the attached decision in this proceeding. Thereafter, exceptions to the IHE's decision were timely filed by the Coastal Berry of California Farm Workers Committee (Committee), and a reply brief was filed by the United Farm Workers of America, AFL-CIO (UFW). No other party filed exceptions. On March 29, 2000, the Agricultural Labor Relations Board (ALRB or Board) granted the requests of the Ventura County Agricultural Association

(Ventura) and Western Growers Association (WGA) to file amicus briefs in this matter. Those, briefs were received, as well as a reply brief filed by the UFW.

The Board has considered the IHE's decision in light of the exceptions and briefs submitted by the parties and amici and the record herein, and affirms the IHE's findings of fact and conclusions of law, except to the extent they are inconsistent herewith, and adopts his recommended decision. BACKGROUND

On July 16, 1998, the Committee filed a petition for an election among the agricultural employees of Coastal Berry Company, LLC (Employer, Coastal, or Company) in Monterey and Santa Cruz Counties only. The UFW did not seek to intervene in the election.

In its response to the petition, Coastal attached a voter eligibility list containing the names of nineteen employees employed in its Oxnard operation. However, Coastal declined to take any position on the scope of the unit. On July 20, 1998, the Employer's attorney, Jim Sullivan, allegedly Faxed a letter to the Regional Director stating that the Company accepted the unit definition in the petition (Monterey and Santa Cruz Counties) , but the Regional Director apparently never received the FAX.

At the pre-election conference, the Board agent in charge announced that the election would be held in a statewide unit. No party objected.

The election was held on July 23, 1998. The results were: 523 votes for the Committee; 410 votes for No Union/ and 39 Unresolved Challenged Ballots. Coastal filed election objections, including one which the Executive Secretary set for hearing:

> Whether an outcome determinative number of voters were 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.

Before the hearing opened, the Regional Director sought to include in the hearing the question of the geographic scope of the unit. The Board rejected his motion, noting that he had cited no authority that would contemplate review of his own unit determination in the absence of any timely filed objections by any party. Further, the Board stated, the “new" information relied on by the Regional Director was either already in his possession prior to his determination or was irrelevant to that determination. (Admin. Order No. 98-12.)

In that initial objections hearing, the IHE found that the Employer had inadvertently left off an outcome determinative number of eligible employees from the list. He recommended that the election be set aside. The Committee appealed on grounds that the failure to include the Oxnard employees could not have affected the outcome of the election because they should not have been included in the unit.

On December 30, 1998, the Board set a hearing to determine the appropriateness of a statewide unit (Admin. Order No. 98-14), but upon appeal by Coastal, the Board granted reconsideration of this order. On May 6, 1999, the Board issued a new order vacating Admin. Order No. 98-14 and stating the following:

> Admin. Order No. 98-12 and Admin. Order No. 98-14 are in irreconcilable conflict. While Admin. Order No. 98-12 is thorough, detailed, and legally supported, Order No. 98-14 comes to an opposite conclusion without explanation. In its exceptions to the IHE's decision, the Committee added nothing legally or factually to the Regional Director's earlier motion. Just as the Regional Director's motion was untimely even if he had standing to file election objections, even more untimely was the Committee's belated attempt to file additional election objections.

The Board went on to state that, assuming arguendo that it had the authority to entertain sua sponte issues that were not the subject of timely filed election objections, such authority should be exercised only in extraordinary circumstances not present in that case.

INTRODUCTION

On May 21, 1999[1] the UFW filed a petition for an election among the agricultural employees of Coastal in a statewide unit. Coastal's response to the petition did not contest the scope of the unit.

When the Committee sought to file a petition for intervention, it was informed by the regional office in Salinas that it would not be allowed to file unless it conformed its unit to the unit sought by the UFW. The Committee therefore added the words "plus Ventura" in its description of the unit and amended the petition to state that the bargaining unit would be the State of California.

However, on May 21, the Committee's attorney, James Gumberg, wrote to the Executive Secretary to complain about the apparent ruling that the Committee's petition for intervention had to conform to the UFW's petition for certification. His letter stated that the Committee had amended its petition with the express understanding that it was not waiving its right to object to and litigate the issue of the appropriateness of the bargaining unit. He also stated that the Committee continued to contend that a statewide unit

[1]All dates hereafter refer to 1999 unless otherwise noted.

was inappropriate and that the proper bargaining unit was one for Monterey and Santa Cruz Counties and another separate unit for Ventura County.

On the day after Gumberg sent his letter, the Executive Secretary advised Gumberg that he had not ruled that the Committee had to petition for a statewide unit. The UFW thereafter filed a new petition for certification, and on May 24 the Committee filed an amended petition for intervention seeking an election among the Employer's employees in Monterey and Santa Cruz Counties only. At the pre-election conference, the Regional Director determined that a statewide unit was appropriate. However, in view of the Committee's cross-petition, he ordered the ballots segregated in order to keep separate tallies for each area and thus preserve the issue.

The election was held on May 25 and 26. No party received a majority of votes, making a runoff necessary. A runoff election was held June 3 and 4, resulting in a final tally as follows: Committee 725; UFW 616; Unresolved Challenged Ballots 19.

The UFW filed hundreds of election objections.[2] The Executive Secretary set a number of objections for hearing,

[2]Sergio Leal, President of the Committee, testified that, even though they believed they had grounds to do so, the Committee did not file election objections because they had won the election.

including an objection to the geographical scope of the unit. On November 29, pursuant to motion, the Executive Secretary ordered that the objection to the geographical scope of the unit be heard alone.

The unit question was heard by IHE Thomas Sobel on January 11, 12, and 13, 2000. On March 6, 2000, the IHE issued his decision finding that the separate geographical areas of the Employer's operations lacked the requisite community of interest to constitute a statewide unit.

TESTIMONY: SCOPE OF THE UNIT

l. Company Structure and Administrative Operations

Coastal is a limited liability corporation which grows strawberries, raspberries, and blackberries, but mostly strawberries. Its main office is in Watsonville, but it also maintains two offices in Oxnard. The President of the Company is Ernie Parley. Alan Thorne, Vice-President of Operations, oversees operations in the south (Oxnard) and Stuart Yamamoto, Vice-President of Production, does the same thing in the north (Watsonville and Salinas). Henry Leal manages operations in the north on a day-to-day basis, and David Murray does the same in the south. There are various supervisors who run specific ranches, as well as a number of foremen. The supervisors and foremen under Leal are different from those under Murray.

All of Coastal's accounting is conducted at its office in Watsonville, where all of its banking accounts are located. All purchases made by Murray must be authorized and approved for payment by Alan Thorne in Watsonville. Budgeting is done on a company-wide basis. The Company has one Workers' Compensation policy and one medical insurance policy applicable to both regions.

Oxnard has its own payroll department, but Watsonville performs certain payroll services for it. At certain times of the year, Oxnard will process its own payroll. However, when Oxnard is too busy to perform the calculations (approximately 80 percent of the year) the timecards are sent to Watsonville for processing. All payroll checks are cut in Watsonville and sent by courier to Oxnard.

2. Harvesting Operations

The two areas of harvesting operations (Watsonville/Salinas in the north and Oxnard in the south) are hundreds of miles apart. The harvest begins in Oxnard in January and continues through the second or third week of June, with peak coming in April. Watsonville/Salinas reaches peak in May and continues through November, though harvesting is 60 percent completed by the end of July.

Coastal produces fruit for the fresh, cannery, and juice markets. Both Company and employee witnesses testified

that if a worker can pick for the fresh market, the worker can also pick for juice or the cannery. In 1999, only 1 percent of Watsonville's pick was for cannery, as compared to 41 percent of Oxnard's. Parley testified that as a general rule, the Company does almost no cannery picking in the north.

In general, there is little exchange among field supervisors between the north and the south. Only Ezequiel Flores, Director of Quality Assurance, and Trino Ramirez, Pest Control Supervisor, were identified as moving back and forth between the two regions.

There is some interchange of equipment between the two regions. However, because of the overlap in the harvest between the two areas, the amount of equipment that can be interchanged is limited.

3. Hiring Practices

Oxnard keeps its own hiring, recall, and personnel records, although permanent personnel records are kept in Watsonville. Parley testified that hiring is done from "local lists." A prospective worker does not apply for both the Oxnard and Watsonville/Salinas areas, but for one or the other. Parley stated that seniority was Company-wide, although he acknowledged that hiring is predominantly local and there is little interchange of employees. He did say that

an employee fired in Oxnard could not go to work in Watsonville.

At the start of each season, the ranch managers (field supervisors) advise the personnel office of the number of employees they need in the respective job classifications. After receiving approval from Parley, they begin hiring. Applicants must register at the personnel office in the region where they want to work. Upon registration, they are told when work is expected to begin, and they are then responsible to check back every week in order to be hired.

Of the over 700 employees employed during the eligibility period in Oxnard, fewer than twelve lived outside the local area, and of the approximately 800 employees in the Watsonville/Salinas area, only one employee lived outside the Watsonville/Salinas area. In fact, out of the thousands of workers employed during the 1999 calendar year, the Company could identify only 34 who worked in both Oxnard and in Salinas.

4. Pay Rates

The Company adjusts its pay scales in order to keep Oxnard employees from following the harvest north to the Watsonville/Salinas area. Even though the wage rates are different in the two areas, the Company strives for what they call wage parity. Thus, an Oxnard paycheck would be roughly

the same as a Watsonville/Salinas area paycheck for the same number of hours worked. Except for the cannery rate, all the harvest rates are higher in the Watsonville/Salinas area than in the Oxnard area. However, employees in Oxnard could receive roughly similar pay for the same number of hours as the Watsonville/Salinas employees because they could harvest more in a shorter period of time.

In setting wage rates, David Murray does not exercise independent responsibility. Rather", he researches the going rates at other companies and recommends local rates to Watsonville management. Parley testified that Murray's recommendations would be weighed heavily, but would not be automatically accepted.

5. Discipline and Supervision

All seasonal workers are subject to the rules contained in the Company's Seasonal Employee Handbook. Parley is the final arbiter of all grievances, as well as terminations and suspensions. Discretion is given to local foremen or supervisors in applying the rules, including the ability of either local foremen or Ranch Managers to settle grievances before they reach Parley. Local crew foremen have the authority to enforce quality standards and to impose progressive discipline.

The handbook states that the Ranch Manager is in -charge of the ranch's daily activities, and the crew foreman is in charge of the crew and directs its activities. The foreman is responsible for the quality of the pick and production of the crew, and ensuring that all ripe fruit is picked. The punchers are responsible for quality inspection on all crates presented.

## IHE DECISION

### A. Factual Conclusions

The IHE made the following factual conclusions:

1. Coastal exemplifies a high degree of administrative centralization;
2. While many labor relations decisions are subject to the ultimate control of Parley, a great deal of day-to-day discretion in labor matters is lodged in Murray, who also effectively recommends most wages, and in local foremen, who not only enforce quality standards, but also routinely decide, among other things, whether or not to grant leaves of absence or to initiate discipline;
3. There is little common supervision of the employees in the two regions;
4. The nature of the work performed at the two locations is similar;

5. Oxnard employees typically receive lower hourly or piece -rate wages than the Watsonville/Salinas employees;

6. There is little or no interchange of employees between the two geographical locations;[3] and

7. Other terms and conditions of employment are pretty much the same.

B. IHE Analysis of Unit Question

The IHE noted that under the National Labor Relations Act (NLRA), the National Labor Relations Board (NLRB or national board) has the authority to decide, in each case, whether the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, or plant unit. (29 U.S.C. §159(b).) Under the Agricultural Labor Relations Act (ALRA or Act), however, this Board has been given discretion to divide an employer's[1] employees into more than one unit only where, as here, they are located in two or more noncontiguous areas.

The IHE observed that this Board has borrowed from the NLRB a variety of factors considered relevant in determining the appropriate unit when an employer operates in noncontiguous areas. These include:

[3] Even though the IHE found there was little or no employee interchange, he inadvertently failed to include this factor in his list of findings.

1. The physical or geographical location(s) in relation to each other;
2. The extent to which administration is centralized, particularly with regard to labor relations;
3. The extent to which employees at different locations share common supervision;
4. The extent of interchange among employees from location to location;
5. The nature of the work performed at the various locations and the similarity or dissimilarity of the skills involved;
6. The similarity or dissimilarity in wages, hours, and other terms and conditions of employment; and
7. The pattern of bargaining history among employees.

(*Bruce Church, Inc.* (1977) 2 ALRB No. 38.) As the IHE notes, there is no "rigid yardstick" for determining the appropriateness of a unit and no single criterion is determinative; the goal in all cases is to assure stable collective bargaining relations. (*Citing Bruce Church, Inc., supra,* 2 ALRB No. 38 and *John Elmore Farms* (1977) 3 ALRB No. 16.)

The IHE quotes the cautionary language in *Kalamazoo Paper Box Corporation* (1962) 136 NLRB 134 [49 LRRM 17.15], that in exercising its discretion in determining the appropriate unit, the national board:

> must maintain the two-fold objective of insuring to employees their rights to self-organization and freedom of choice in collective bargaining and of fostering industrial peace and stability through collective bargaining.... [E]ach unit determination, in order to further effective expression of the statutory purposes, must have a direct relevancy to the circumstances within which collective bargaining must take place. (Kalamazoo Paper Box Corporation, supra, 136 NLRB at 137, cited in John Elmore Farms, supra, 3 ALRB No. 16.)

Early NLRB cases make it clear, the IHE continues, that this can only be achieved by placing employees with the same interests in collective bargaining in a unit. Thus, as the NLRB stated in its Second Annual Report (1937):

> The chief object of the [national] Board-is to join in a single unit only such employees...as have a mutual interest in the objects of collective bargaining .To express it another way, is there that community of interest which is likely to further harmonious organization and facilitate collective bargaining? (*Id.,* at p. 125.)

The IHE herein found that a "legislative presumption" for statewide units was overcome by the facts in this case. He noted the obvious hostility between the group of employees who have organized as the Committee and the UFW. Even if the UFW's margin of victory in Oxnard had been large enough to carry the election statewide, he found, inclusion of

the anti-UFW Watsonville/Salinas employees in a unit represented by the UFW would have been a "recipe for mischief," because the pro-UFW and anti-UFW employees simply do not have that "community of interest which is likely to further harmonious organization and facilitate collective bargaining." (*Id.*)

The IHE noted that recent NLRB cases have held that the lack of significant employee interchange between two groups of the employer's employees is a strong indicator that the employees enjoy a separate community of interest. (Citing *Executive Resources Associates* (1991) 301 NLRB 400 [136 LRRM 1308] and *Spring City Knitting Co.* v. *NLRB* (9th Cir. 1981) 647 F.2d 1011 [107 LRRM 3307].) Similarly, in *Esco Corp.* (1990) 298 NLRB 837 [134 LRRM 1171], the NLRB held that a centralized administration and centralized labor relations policy (including the power to hire, fire and discipline) were not enough to warrant a single unit when there was not only no interchange of employees, but also no significant contact between employees at the different locations.

The IHE concluded that because of the different union majorities reflected in the voter tallies at Oxnard and Watsonville/Salinas, as well as the differences in the labor pools and the degree of autonomy possessed by Coastal's regional managers, the two geographic areas lacked the

requisite community of interest to make a statewide unit appropriate.

ANALYSIS

In section 1156.2, the ALRA provides that:

> The bargaining unit shall be all the agricultural employees of an employer. If the agricultural employees of the employer are employed in two or more noncontiguous geographical areas, the board shall determine the appropriate unit or units of agricultural employees in which a secret ballot election shall be conducted.

The statutory language contained in the NLRA pertaining to unit designation is quite different:

> Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representative of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment. (29 U.S.C. §159(a).)

NLRB case law has held that the above language gives the national board broad discretion in the selection of appropriate bargaining units, for it need only find that the unit requested is an appropriate unit, even if the employer or other objecting party suggests a more appropriate unit. (Federal Electric Corporation (1966) 157 NLRB 1130 [61 LRRM 1500].)

The express language of the ALRA limits the Board's discretion in designating appropriate bargaining units. Only when an agricultural employer operates in two or more

noncontiguous geographical locations does the Legislature grant the Board some discretion in selecting appropriate bargaining units.[4]

When an employer operates in two or more noncontiguous areas, the ALRB has borrowed the NLRB's community of interest factors to help the Board determine whether it is appropriate to certify a statewide unit or separate bargaining units. The Board has stated many times that the specific factors it will consider are the same factors the NLRB has relied upon in determining unit appropriateness.

As the IHE noted herein, the appropriateness of units is to be determined "not by any rigid yardstick, but in light of all the relevant circumstances of the particular case." (*Frisch's Big Boy Ill-Mar, Inc.* (1964) 147 NLRB 551 [56 LRRM 1246].) Further, the goal in all cases is to assure stable collective bargaining relations. (*John Elmore Farms, supra*, 3 ALRB No. 16.)

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[4]Where an employer's operations are literally noncontiguous but the Board finds that they lie within a single definable agricultural production area (SDAPA) on the basis of their similarity with regard to such factors as common water supply, labor pool, climatic and other growing conditions, the Board has on that basis also concluded that a single bargaining unit is mandated by Labor Code section 1156.2. (Foster Poultry Farms (1987) 13 ALRB No. 5.) No party in this case has

In its amicus brief, Ventura argues that there is a legislative preference for a statewide unit in separate sites which are not geographically contiguous. This is not the case. In early decisions, the Board determined that its discretion in designating the appropriate unit or units where an employer's operations are noncontiguous should be informed by the NLRB's traditional "community of interest" criteria, as modified to account for differences in agriculture and the requirement that all of the employer's agricultural employees be included in the unit or units designated. (See, e.g., *Bruce Church, Inc., supra,* 2 ALRB No. 38.) *In Prohoroff Poultry Farms* (1983) 9 ALRB No. 68, the Board included for the first time, without explanation, a so-called "legislative preference for comprehensive bargaining units" among the factors to be considered in determining whether a statewide unit or multiple units would be more appropriate. In *Cream of the Crop* (1984) 10 ALRB No. 43, this same factor was cited, but referred to as a "legislative presumption favoring broad 'wall to wall' bargaining units."

As the IHE noted, it is difficult to discern from the Board's prior decisions how much weight is to be given to this "preference" or "presumption." Indeed, this factor is

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contended that Coastal's Monterey/Santa Cruz and Ventura operations lie within a SDAPA.

not mentioned at all in some subsequent listings of community of interest factors. (See, e.g., *Foster Poultry Farms, supra,* 13 ALRB No. 5.) Nor was any such preference or presumption mentioned in *Exeter Packers, Inc.* (1983) 9 ALRB No. 76, a case issued in the intervening period between *Prohoroff Poultry-Farms* and *Cream of the Crop.* We need not resolve this issue, nor address the rationale utilized by the IHE in concluding that the presumption was rebutted in the present case, for we find that there is no statutory support for such a presumption or preference.

As is apparent from the language of section 1156.2 of the Act, provided above, the only presumption in favor of statewide bargaining units is the irrebuttable presumption in favor of statewide units where the employer's operations are in contiguous geographical areas. Where the operations are in noncontiguous geographical areas, section 1156.2 simply provides that the Board has discretion to determine the appropriate unit or units. There is no language in section 1156.2 or in any other provision of the ALRA which instructs the Board to favor or disfavor statewide units where the employer's operations are noncontiguous. Rather, the Board is free to determine in each case, based on all reasonable and relevant factors, whether a statewide unit or multiple units are more appropriate. The Board shall continue to rely on

traditional community of interest criteria, as outlined in *Bruce Church, Inc., supra* 2 ALRB No. 38.

In sum, we view the inclusion of a legislative preference or presumption in favor of statewide units as a factor in determining the appropriate unit where the operations are noncontiguous to be an anomaly without statutory support. Therefore, to the extent that Prohoroff Poultry Farms and Cream of the Crop, or any other Board decisions, appear to require the utilization of such a factor, they are hereby overruled.

The Committee, pointing to this Employer's high degree of centralization of administration, similarity of work, and the ultimate control of many labor relations decisions being under Ernie Parley, argues that the IHE disregarded the traditional community of interest factors in reaching his conclusion that separate units were appropriate. Similarly, amicus WGA argues that the Board should overturn the IHE's unit determination because there was "overwhelming evidence" of a community of interest for a statewide unit. However, the IHE did not disregard any of the community of interest factors; he simply found some of those factors more important than others, e.g. the lack of significant interchange between the two groups of employees. As the IHE noted, under recent NLRB unit cases the lack of significant

employee interchange between two groups of an employer's employees “is a strong indicator" that the employees enjoy a separate community of interest (*Executive Resources Associates, supra,* 301 NLRB No. 50), for:

> [t]he frequency of employee interchange is a critical factor in determining whether employees who work in different [groups] share a "community of interest" sufficient to justify their inclusion in a single bargaining unit. (Spring City Knitting Co. v. NLRB, supra, 647 P.2d 1011, 1015.)

Not only was lack of employee interchange a factor in this case, but there was evidence that the Employer was determined to keep the labor pools for its northern and southern operations separate by discouraging the migration of its Oxnard employees north to the Watsonville/Salinas area.

The Committee, Ventura and WGA also argue that hostility between the UFW and the Committee should not have been found a significant community of interest factor by the IHE. Ventura argues that the IHE applied “a new standard which focuses on the organizing activities between units." Bargaining history is only one of the factors which the NLRB considers, Ventura argues, and to date, this Board has given bargaining history no greater weight than the other community of interest factors. Thus, Ventura asserts, the IHE has over-emphasized the one factor regarding the organizing differences between the units to

defeat a long-established Board approach to weighing all factors in a way to uphold legislative intent and "presumption" in favor of a statewide unit.

First, we have found that there is no legislative presumption applicable to an employer's noncontiguous operations. Second, we conclude that we do not need to rely upon the IHE's consideration of the relationship between the two groups of employees (i.e., hostility, outcome of the election, and extent of organization) as part of his analysis of whether certification of a single unit would promote a stable collective bargaining relationship, because there are enough of the traditional community of interest factors present in this case to persuade us that two separate units are appropriate.[5]

The Committee contends that the IHE should have permitted the Committee to introduce evidence of UFW election misconduct. First, the IHE could not properly have considered evidence of objectionable conduct which was not raised by timely-filed election objections, regardless of the

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[5]As Ventura correctly observes, this Board has not accorded "bargaining history" more significance than other of the various NLRB factors when determining unit appropriateness. Indeed, it may be argued that "bargaining history" generally is not a factor under our Act. (See, e.g., ALRA §§1.5, 1153(f).) It should also be pointed out that "bargaining history" and "extent of organization" are distinctly different concepts.

Committee's strategic reasons for not filing election objections. (*Monterey Mushrooms, Inc.* (1995) 21 ALRB No. 2; *Silver Terrace Nurseries, Inc.* (1993) 19 ALRB No. 5.) Second, allegations of election misconduct on the part of the UFW would have been entirely irrelevant to the only question before the IHE: whether the separate geographical areas of the Employer lack the requisite community of interest to constitute a statewide unit.

The Committee also argues that the IHE erred in failing to allow testimony from workers on whether they prefer a statewide unit. The IHE properly rejected the introduction of such evidence. The IHE noted that this Board, like the NLRB, has always regarded the results of a secret ballot election as the only reliable evidence of employee desires and it does not accept subjective evidence on questions involving freedom of choice. (*Ideal Laundry and Dry Cleaning* (1963) 152 NLRB 1130, 1131, fn. 6 [59 LRRM 1281].)[6]

The IHE also properly rejected the Committee's claim that the UFW should be estopped from arguing for separate

[6]The NLRB will sometimes structure an election so that the vote will provide objective evidence of employees' desires as to unit configuration. These frequently are referred to as Globe elections, in reference to the first case in which such an election was held. (*Id.*, at p. 1130, fn. 3.) Here, the vote tally is not indicative of employee desires as to a single or separate units,

units because of its previous position that the unit should be statewide. As the IHE pointed out, the Committee itself made repeated efforts to obtain an election in a Watsonville/Salinas unit only, and specifically reserved the right to appeal the preliminary unit determination in this case. The UFW never made any promise to adhere to its position that a statewide unit was appropriate. As the IHE pointed out, the Committee had its own reasons for not filing election objections: it thought it had won the election and that its victory statewide carried the day. Thus, the Committee's decision not to file objections was based on its failure to recognize Board processes. There is no evidence that the Committee was "induced" by the UFW not to file election objections. Although the Committee apparently did not expect the UFW to be able to object to the unit description after having sought a statewide unit, the IHE properly found that this was due not to any deception on the part of the UFW, but rather was the result of the Committee's being unaware of Board procedures which permit such an appeal. The UFW cannot be penalized for exercising its right to file election objections on the unit question, which is

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especially in light of both unions' inconsistent positions as to the desired unit configuration.

specifically included as a ground for objection in Labor Code section 1156.3(c).

Further, the IHE correctly ruled that the Board's prior administrative rulings did not preclude a later finding that separate units were appropriate. As the IHE noted, the Board's prior rulings related to the questions of whether 1) a regional director had standing to file an election objection or to effectuate the same result by seeking to expand the issues set for an election objections hearing, and 2) whether, assuming the Board could entertain such issues sua sponte, the circumstances in this case warranted such extraordinary intervention. In answering these questions in the negative, the Board was not required to pass on the merits of the Regional Director's unit determination. It is only in the present proceeding that the issue of the appropriate configuration of a unit or units of Coastal employees has been squarely before the Board.[7]

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[7]As the IHE also notes, even if the Board's prior rulings could be construed to imply a determination that the Board would have made the same decision as the Regional Director did at the time it issued its Administrative Order, the Board is still free to make a contrary determination, exercising its sound discretion, in a subsequent proceeding. (Pacific Greyhound Lines (1938) 9 NLRB 557, 573 [3 LRRM 303].)

## CONCLUSION

We have concluded that, based on the lack of interchange of employees between the Employer's geographically noncontiguous operations; the Employer's determination to keep labor pools for the two operations separate; the degree of autonomy possessed by the Employer's regional managers and the general lack of common supervision of employees in the two regions; the fact that wages of the separate groups of employees are different; and the fact that quality standards and initiation of employee discipline are lodged in local foremen, the finding that the employees in the separate geographical areas of Coastal's operations lacked the requisite community of interest to constitute a statewide unit was correct. We therefore affirm the IHE's conclusion that two

units are appropriate: one for Monterey/Santa Cruz Counties and one for Ventura County.

DATED: April 25, 2000

GENEVIEVE A. SHIROMA, Chair

IVONNE RAMOS RICHARDSON, Member

GLORIA A. BARRIOS, Member

HERBERT O. MASON, Member

# CASE SUMMARY

COASTAL BERRY COMPANY, LLC 26 ALRB No. 2
Case No. 99-RC-4-SAL

## Background

An election was held among the agricultural employees of Coastal Berry Company, LLC (ER) on May 25 and 26, 1999. No party received a majority of votes, making a runoff necessary. A runoff election was held June 3 and 4, 1999, resulting in a final tally as follows: Coastal Berry of California Farm Workers Committee (Committee) 725; United Farm Workers of America, *AFL-CIO (UFW)* 616; Unresolved Challenged Ballots 19.

The UFW filed hundreds of elections objections. The Executive Secretary set a number of objections for hearing, including an objection to the geographical scope of the unit. On November 29, 1999, pursuant to motion, the Executive Secretary ordered that the objection to the geographical scope of the unit be heard alone. The unit question was heard by an Investigative Hearing Examiner (IHE) on January 11, 12, and 13, 2000. On March 6, 2000, the IHE issued his decision finding that the separate geographical areas of the ER's operations lacked the requisite community of interest to constitute a statewide unit.

Exceptions to the IHE's decision were timely filed by the Committee, and a reply brief was filed by the UFW. No other party filed exceptions. On March 29, 2000, the Board granted the requests of the Ventura County Agricultural Association and Western Growers Association to file amicus curiae briefs in this matter.

## IHE Decision

The IHE made the following factual conclusions: 1) The ER exemplifies a high degree of administrative centralization,-2) While many labor relations decisions are subject to the ultimate control of President Ernie Parley, a great deal of day-to-day discretion in labor matters is lodged in local foremen, who not only enforce quality standards but also routinely decide whether or not to grant leaves of absence

or to initiate discipline; 3) There is little common supervision of the employees in the two regions; 4) The nature of the work performed at the two locations is similar,- 5) Oxnard employees typically receive lower hourly or piece-rate wages than the Watsonville/Salinas employees; 6) There is little or no interchange of employees between the two geographical locations; and 7) Other terms and conditions of employment are pretty much the same.

In analyzing the unit question, the IHE noted that under the Agricultural Labor Relations Act (ALRA), this Board has been given discretion to divide an employer's employees into more than one unit only where, as here, they are located in two or more noncontiguous areas. The IHE observed that this Board has borrowed from the National Labor Relations Board (NLRB or national board) a variety of factors considered relevant in determining the appropriate unit when an employer operates on noncontiguous areas. These include: 1) The physical or geographical location(s) in relation to each other; 2) The extent to which administration is centralized, particularly with regard to labor relations; 3) The extent to which employees at different locations share common supervision,- 4) The extent of interchange among employees from location to location; 5) The nature of the work performed at the various locations and the similarity or dissimilarity of the skills involved; 6) The similarity or dissimilarity in wages, hours, and other terms and conditions of employment; and 7) The pattern of bargaining history among employees. (Bruce Church, Inc. (1977) 2 ALRB No. 38.)

The IHE included a quotation from the decision in *Kalamazoo Paper Box Corporation* (1962) 136 NLRB 134 [49 LRRM 1715] cited in *John Elmore Farms* (1977) 3 ALRB No. 16, cautioning that in exercising its discretion in determining the appropriate unit, the national board:

> must maintain the two-fold objective of insuring to employees their rights to self-organization and freedom of choice in collective bargaining and of fostering industrial peace and stability through collective bargaining.... (Kalamazoo Paper Box Corporation, supra, 136 NLRB at p. 137.)

The IHE noted that the NLRB has stated,

> The chief object of the Board…is to join in a single unit only such employees…as have a…community of interest which is likely to further harmonious organization and facilitate collective bargaining. (NLRB Second Annual Report (1937) at p. 125.)

The IHE found that a "legislative presumption" for statewide units was overcome by the facts in this case. He noted the obvious hostility between the group of employees who have organized as the Committee and the UFW. The pro-UFW and anti-UFW employees, he found, simply do not have that community of interest which is likely to further harmonious organization and facilitate collective bargaining.

The IHE noted that recent NLRB cases have held that the lack of significant employee interchange between two groups of the employer's employees is a strong indicator that the employees enjoy a separate community of interest. (Citing *Executive Resources Associates* (1991) 301 NLRB 400 [136 LRRM 1308] and *Spring City Knitting Co.* v. *NLRB* (9th Cir. 1981) 647 F.2d 1011 [107 LRRM 3307].) The IHE concluded that because of the different union majorities reflected in the voter tallies at Oxnard and Watsonville/Salinas, as well as the differences in the labor pools and the degree of autonomy possessed by Coastal's regional managers, the two geographic areas lacked the requisite community of interest to make a statewide unit appropriate.

Board Decision

The Board noted that the express language of the ALRA limits the Board's discretion in designating appropriate bargaining units. Only when an agricultural employer operates in two or more noncontiguous geographical locations does the Legislature grant the Board some discretion in selecting appropriate bargaining units. When an employer operates in two or more noncontiguous areas, the ALRB has borrowed the NLRB's community of interest factors to help the Board determine whether it is appropriate to certify a statewide unit or separate bargaining units. The Board has stated many times that the

specific factors it will consider are the same factors the NLRB has relied upon in determining unit appropriateness.

The Board concluded that there is no statutory language indicating a legislative preference or presumption for a statewide unit in separate sites which are not geographically contiguous. As is apparent from the language of section 1156.2 of the ALRA, the Board found, the only presumption in favor of statewide bargaining units is the irrebuttable presumption in favor of statewide units where the employer's operations are in contiguous geographical areas. Where the operations are in noncontiguous geographical areas, section 1156.2 simply provides that the Board has discretion to determine the appropriate unit or units. There is no language in section 1156.2 or in any other provision of the ALRA which instructs the Board to favor or disfavor statewide units where the employer's operations are noncontiguous. Rather, the Board is free to determine in each case, based on all reasonable and relevant factors, whether a statewide unit or multiple units are more appropriate. To the extent that prior Board decisions appeared to require the utilization of such a factor, the Board held that they were overruled.

The Board noted that under recent NLRB unit cases, the lack of significant employee interchange between two groups of an employer's employees "*is a strong indicator*" that the employees enjoy a separate community of interest. (*Executive Resources Associates* (1991) 301 NLRB 400 [136 LRRM 1308]; *Spring City Knitting Co*. v. *NLRB* (9th Cir. 1981) 647 F.2d 1011 [107 LRRM 3307] .) Not only was lack of employee interchange a factor in this case, but there was evidence that the Employer was determined to keep the labor pools for its northern and southern operations separate by discouraging the migration of its Oxnard employees north to the Watsonville/Salinas area.

The Committee's contention that "the desires of the employees" constitute one of the specific factors to be considered in determining the appropriate unit was in error, the Board found. That factor was not one of the traditional NLRB community of interest factors. Further, there was no need for the IHE to take testimony on "employees' desires" when there was sufficient other

evidence from which to conclude that the two groups of employees did not share a community of interest.

The IHE had also properly rejected the Committee's claim that the UFW should be estopped from arguing for separate units because of its previous position that the unit should be statewide. As the IHE pointed out, the Committee itself made repeated efforts to obtain an election in a Watsonville/Salinas unit only, and specifically reserved the right to appeal the preliminary unit determination in this case. There was no evidence that the Committee was "induced" by the UFW not to file election objections. The UFW could not be penalized for exercising its right to file election objections on the unit question, which is specifically included as a ground for objection in Labor Code section 1156.3(c).

The Board also found that the IHE had correctly ruled that the Board's prior administrative rulings did not preclude a later finding that separate units were appropriate. As the IHE had noted, even if the Board's prior rulings could be construed to imply a determination that the Board would have made the same decision as the Regional Director did at the time it issued its Administrative Order, the Board was still free to make a contrary determination, exercising its sound discretion, in a subsequent proceeding. (*Pacific Greyhound Lines* (1938) 9 NLRB 557, 573 [3 LRRM 303].)

The Board concluded that it did not need to rely on the IHE's consideration of the relationship between the two groups of employees (i.e., hostility, outcome of the election, and extent of organization) because there were enough other factors to persuade the Board that two units were appropriate under the traditional community of interest factors.

The Board concluded that based on the lack of interchange of employees between the Employer's geographically noncontiguous operations, the Employer's determination to keep labor pools for the two operations separate, the degree of autonomy possessed by the Employer's regional managers and general lack of common supervision of employees in the two regions, the fact that wages of the separate groups of employees are different, and the fact that quality standards and initiation of employee

discipline are lodged in local foremen, the finding that the employees in the separate geographical areas of Coastal's operations lacked the requisite community of interest to constitute a statewide unit was correct. The Board thus affirmed the IHE's conclusion that two units were appropriate: one for Monterey/Santa Cruz Counties and one for Ventura County.

* * * * *

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

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|---|---|
| In the Matter of:<br><br>COASTAL BERRY COMPANY, LLC,<br><br>Employer,<br><br>and<br><br>UNITED FARM WORKERS<br><br>OF AMERICA, AFL-CIO,<br><br>Petitioner.<br><br>and<br><br>COASTAL BERRY OF CALIFORNIA FARM WORKERS COMMITTEE,<br><br>Intervenor. | Case No. 99-RC-4-SAL |

Appearances:

James Sullivan
LOMBARDO & GILLES
for Employer

Thomas P. Lynch
MARCOS CAMACHO A LAW CORP.
for Petitioner

James Gumberg
FITZFATRICK, PATANE & GIFFEN
for Intervenor

DECISION OF THE INVESTIGATIVE HEARING EXAMINER

# DECISION OF THE INVESTIGATIVE REARING EXAMINER

THOMAS SOBEL, Investigative Hearing Examiner: I heard this case in Salinas, California on January 11, 12, and 13, 2000. Briefs were received on February 13, 2000.[1]

## I. INTRODUCTION

Technically, this case may be said to have begun on May 21,1999 when the United Farm Workers of America, AFL-CIO, sought an election among all the agricultural employees of the employer, Coastal Berry LLC, employed in the state of California. On May 24, 1999 the Coastal Berry of California Farm Workers Committee filed an amended petition for intervention seeking an election among the

[1] A brief word about the references to documents in the transcript. Prior to the hearing, the UFW subpoenaed a variety of documents from the Employer, returnable at the hearing. The Employer petitioned to revoke portions of the subpoena and 1 held a conference call to rule on the issues presented. Because I had either ruled on the hems requested in the subpoena or the Employer had conceded their materiality by not contesting their production, rather than take hearing time for the Union to examine the materials it had just received, I went on die record and used the Employer's markings for purposes of identifying the documents and permitting examination on them. When I realized that not all the documents would be introduced into evidence, I also realized that I would have to renumber them for purposes of taking them into evidence, which we did on the final day of hearing. On the first two days of the hearing, then, documents are referred to by the number the Employer gave them on its return to the subpoena although they have been received into evidence with different numbers. In genera], my markings are preceded by a party reference, e.g. UFW #X, Comite' #Y or Company #2, and the Employer's numbers are either preceded by a "Doc" reference or are circled. For the convenience of all who will review this record, I have attached as an Appendix to this decision a sort of conversion table which will allow one to move from the Employer's Document reference used early in the proceedings to the Official Exhibits. I regret any confusion that this might engender and I refer those who will review this record to pp. 492 et seq. of the transcript for a fuller explanation of what I have done.

employer's employees in Monterey and Santa Cruz counties only.

Now, the UFW is .seeking to have the Board do what the Committee asked the Board to do in its petition, namely, divide Coastal's employees into two separate units, while the Committee vigorously asserts that only a statewide unit is appropriate. To understand how we have come to this, it will be necessary to trace, in somewhat greater detail than is usual in an objections case, the larger history of this company and these labor organizations

That history goes back to attempts by the UFW to organize the Watsonville/Salinas employees of Coastal's predecessor during 1996, at which time there were angry encounters between some employees and UFW organizers. See, *Gargiulo Inc.* (1997) 23 ALRB No. 5[2].

The hostility between the two groups was not confined to the fields. In 1997, some of the employees now active on behalf of the Committee brought their complaints about the UFW's organizing efforts to the Board during its regulatory review hearings. Transcript of Hearing, Monterey, California, November 5, 1997.[3] The UFW would return the favor at a Joint Legislative Hearing before the Senate

[2]The Employer took over Gargiulo's operations in June 1997, See, 23 ALRB No. 1, IHED, p.3.
[3]1 take administrative notice of the Board's own proceedings.

Industrial Relations Committee where it complained about the activities of the Committee. Joint Legislative Hearing, Senate Industrial Relations Committee; 7/28/98. In any event, by summer of 1998, the UFW had not petitioned for an election.

A. 1998

1. The Committee Seeks an Election

On July 16, 1998, the Committee filed a petition for certification seeking an election among the agricultural employees of the employer in Monterey and Santa Cruz counties only. The UFW did not seek to intervene in the election.[4]

2. One Unit or Two?

As part of its required response to the petition, Coastal included a voting eligibility list that contained the names of 19 employees employed in its operations in Oxnard. Although these employees fell outside the scope of the unit sought by the petition, Coastal did not challenge the unit sought by the Committee.

Indeed, it declined to take any position on the unit for two related reasons. The first was that, in the face of the intense rivalry between the Committee and the UFW, all

[4]It did, however, seek to either block the election or to have the Regional Director impound the ballots. When the Regional Director denied both requests, the UFW appealed to the Board, which held that, as a

it wanted was an election to settle representative status;

the second was that, since company representatives .could not decide for themselves whether, the. unit should be statewide or consist solely of its "northern" operations, they were willing to live with any unit the Regional Director determined appropriate.[5]

By July 20, 1998, company officials had decided that the smaller, petitioned-for unit was appropriate. Its attorney, James Sullivan FAXed[6] the Regional Director:

> 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. . . . Dave Murray, Juan Robles and the foremen manage the Oxnard division. They are based in Oxnard and do not manage any of the northern divisions. No supervisors in the northern division have any responsibility for Oxnard.
>
> 25 ALRB No. 1, IHED, at p.10

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non-intervening labor organization, the UFW had no standing to request review of the Regional Director's decision. See, Admin. Order 98-9.

[5]1 am reciting the findings adopted by the Board in. 25 ALRB No. 1

[6]In speaking of Sullivan's having FAXed the Employer's new position, I am not ignoring testimony that the Regional Director never received the FAX and the fact that neither the IHE nor the Board ever made a finding about whether or not the FAX was received. I refer to the FAX solely as a reflection of the Employer's *position* on the unit question.

Inexplicably, the Regional Director never received the FAX and Sullivan, who testified he was sure he had sent it, did not have the transmittal sheet.

At the pre-election conference, the Board agent announced that the election would be held in a statewide unit. No one objected.

The election was held on July 23, 1998. The Coastal Berry Farm Workers Committee won by a majority of 113 votes over the No-Union choice, with 39 unresolved challenged ballots.

3. The Employer Objects

After the election, Coastal filed objections, including one to the Board's failure to provide notice of the election to approximately 162 Oxnard employees who were eligible to vote, but who had been left off the eligibility list.[7]

The Executive Secretary dismissed most of the objections, held some in abeyance pending the outcome of the General Counsel's investigation of charges alleging the same conduct, and set for hearing:

> Whether an outcome determinative number of voters were left off the eligibility list, either inadvertently or for reasons other than the bad faith of the employer, resulting in no reasonable efforts to

[7]I should note that the UFW also filed objections to the election, as did some employees; the Board dismissed both sets of objections in 24 ALRB No. 4 on the grounds that neither the UFW nor the employees were "panics" to the election and thus had no standing to object to it.

> 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.

4. The Scope of the Unit Ruled Not at Issue

Before the commencement of the hearing, the Regional Director sought to include the question of the geographic scope of the unit in the hearing on the grounds that if only he had received Sullivan's letter arguing for a "northern" unit, he would not have found a statewide unit appropriate, the Oxnard employees would not have been eligible to vote and their votes could- not be considered outcome determinative. The Board rejected the motion:

> The Regional Director has cited no authority . . that would contemplate review of [his] own unit determination in the absence of any timely filed objections by any party to an election. The only issue set for hearing . . . is whether eligible voters were left off the eligibility list and consequently denied the opportunity to vote in the election held on July 23, 1998.
>
> * * *
>
> Contrary to the Regional Director's contention, the geographical scope of the bargaining unit is not a necessary or a relevant issue to be considered in the hearing. Further, even if the issue concerning the scope of the unit were relevant to the inquiry as to whether eligible employees were denied the opportunity to vote in the election, the Regional Director has failed to point to any evidence that would, or should, have changed his initial conclusion that a statewide unit was appropriate. The Regional Director had all the critical evidence he needed to determine the unit when he made his determination, and [the letter Sullivan • testified he sent and the Regional Director testified he never received] added nothing new other than the Employer's position on the composition of the unit. However, the Employer's position on what the

> unit composition should be is irrelevant. * * * The positions of the parties is [simply not one of the] necessary elements. . .in making that determination.
>
> Admin. Order 98-12

5. The Election Is Set Aside

So far as pertinent here, the evidence adduced at the hearing showed:

Sullivan had asked Earl Pirtle, the Chief Financial Officer of the Company, to prepare a "standard" list of the employees employed during the payroll period immediately preceding the election, which is the statutory eligibility period. When Sullivan made his request, he was under the impression that the Oxnard season had already ended.

Unbeknownst to him, the Oxnard season had extended a week beyond normal and the company had employed 162 employees in Oxnard during the eligibility period. Because Pirtle understood that all Sullivan wanted was a period-ending payroll list, provided one that did not include any employees who had not worked through the end of the period. As a result, 162 employees, paid on special layoff payrolls, were left off the list. Because Sullivan believed the Oxnard season had already ended before the eligibility period began, he had no reason to question the small number of names from Oxnard listed as eligible to vote on the list that he provided the Board.

The IHE found that Sullivan's ignorance of the layoffs, and Pirtle's ignorance of what was actually required, were honest; mistakes and, therefore, that the employer had inadvertently left off an outcome determinative number of eligible employees from the list. He recommended the election be set aside.

6. The Committee Contends that
A Statewide Unit Is Inappropriate

As the Regional Director had argued, so now did the Committee, which appealed the decision of the IHE to the Beard on the ground that the failure to include the Oxnard employees on the eligibility list could not have affected the outcome of the election because, relying on the showing made in Sullivan's undelivered letter to the Regional Director, they should not have been included in the unit:

> * * *[I]t is undisputed that the Watsonville/Salinas locations operate in separate noncontiguous geographical areas apart from Ventura County. Second, there are different peak employment periods associated with each operating area. Third, there are differences in the wages- and benefit packages between the northern and southern employees. Fourth, there is separate supervision in each operating area. Lastly, there is no interchange between employees between the northern and southern location, and there is partially separate management and administration.
>
> Brief of Coastal Berry Farm Workers Committee in Support of Exceptions to IHED, Dated November 19, 1998, at p. 13

7. The Scope of the Unit Set for Hearing

On December 30, 1998 the Board responded to the Committee's argument by setting a hearing to determine the appropriateness of a statewide unit in furtherance of its "continuing obligation . . . to oversee all aspects of the representation process." Admin. Order No. 98-14, Committee Ex 8.

Upon appeal by Coastal, reconsideration of this Order was granted. On May 6, 1999, Admin. Order 98-14 was vacated. The Board now reasoned:

> Labor Code Section 1156.3, subdivision (c) provides that objections to an election be filed within five days after the election. * * * Well 'after the statutory time limit for filing objections, the Regional Director filed a motion seeking to have the issue of the unit set for hearing. * * *
>
> * * * The motion was dismissed because regional directors do not have standing to file objections or to effectuate the same result by seeking to expand the issues set for hearing. * * * In addition, the motion failed because the information allegedly withheld by Coastal was either already in the possession of the Regional Director prior to his determination on the appropriateness of the bargaining unit or was' irrelevant to their determination. * * *
>
> Thereafter. . . [the] IHE issued his recommended decision, to which the . . .Committee filed exceptions. Within those exceptions was a request that the Board do what it had already refused to do when requested by the Regional Director, i.e., examine the propriety of the Regional Director's determination that a statewide unit was appropriate.

[The denial of the Regional Director's request and the grant_ of the Committee's request] are in irreconcilable conflict.

> Assuming arguendo that the Board has the authority to entertain issues in election cases that were not the subject of timely filed election objections, it would be appropriate to exercise such authority only in the most extraordinary of circumstances, such as where a statutory mandate was clearly being contravened, resulting in manifest injustice. Here . . . there is no indication whatsoever that the Regional Director's unit determination was in any way incorrect.
>
> Admin. Order 99-2

B. 1999

## 1. A False Start

There matters stood until May 17, 1999 when the UFW filed a petition for certification seeking an election in a statewide unit consisting of all the agricultural employees of the employer. Coastal submitted its required response, which, once again, did not contest the scope of the unit. However, in a letter to the Regional Director sent on the same day the petition was filed, but sent in response to another matter, Sullivan now argued that a statewide unit was appropriate:

> All agricultural employees throughout the Company are subject to the policies stated in the Employer Manual. All agricultural employees receive the same benefits, including the Company's medical plan. The wages are similar, but not identical, between Oxnard and the Watsonville/Salinas areas.
>
> The Company believes that a single statewide unit is appropriate. The ALRB -has recognized the statutory

> preference for a single statewide unit. [Cite.] The Company runs its administrative and labor functions out of the Watsonville headquarters. Throughout Coastal Berry's operations, employees perform the same work. . . . Coastal Berry's Employer 'Manual applies state wide. A significant number of employees work in both the Oxnard and the Hatsonville/Salinas areas. The wages, hours and working conditions are almost identical. While there is no bargaining history, the Board found a state wide unit appropriate for the election last year. Finally, both the United Farm Workers of America and the Coastal Berry of California Farm Worker Committee have described a statewide unit in their respective Notices of Intent to Take Access. * * * [T]here should be no question but that Coastal Berry is properly one statewide unit.
> UFW 1

Notwithstanding this letter, Sullivan testified that the company accepted the concept of a statewide unit, not out of conviction, but because it understood that the parties wanted it:

> [W] e wanted an election and both parties were requesting a single unit and we saw no reason to argue that so we were neutral in saying, fine, we'll say it's one state unit and we continued to be neutral. * * * The company really doesn't have a position on it. Whatever the [Board] rules. RT pp. 224, 229

Sullivan was not quite correct that both parties wanted a single unit. Neri Hernandez testified that when The Committee sought to file a Petition for Intervention for a northern unit only, "neither the union nor the ALRB accepted that paper," TR. p. 416. Of course, the UFW had no authority to act on the Committee's petition, which was a matter entirely for the Board, and Hernandez's

misapprehension about what actually happened was clarified by the parties' stipulation that:

> [When the] Committee Went to file its Petition - • for Intervention, [it] Was informed by . . .the region here in Salinas that they would not be allowed to file . . . unless they conformed their unit to the unit sought by the [UFW.] So, the Committee . . . added in the words 'plus Ventura' [in its description of the bargaining unit and] amended the petition to state that the bargaining unit would be the State 'of. California." TR. p. 505-6.

It was doubtless the amended petition that Sullivan was referring to when he spoke of the parties' agreeing to a statewide unit. In fact, there, was no agreement.

To underscore the reluctance with which the Committee complied with the Region's demands, its attorney, James Gumberg, wrote Executive Secretary J. Antonio Barbosa on May 21, 1999 to complain about what he understood as a ruling by the Executive Secretary that the Committee's petition for intervention had to conform to the UFW's petition for certification:[8]

> The purpose of this letter is to set forth the Committee's objection to the Executive Secretary's oral ruling . . . that the Committee must amend its Petition for Intervention. . .to conform with the bargaining unit sought by the UFW.
>
> * * *
>
> The UFW's election petition asked for a statewide bargaining unit. I was informed that the ALRB was treating the Committee's Petition as an "objection to the election • petition" because the Committee was

[8]Under the Board's Regulations, the petitions do not have to conform to each other. Title 8, California Code of Regulations Sec. 20330.

> asking for a different bargaining unit, composed of Monterey and Santa Cruz counties only . . . .
>
> * * *
>
> [T]he Committee amended its Petition. . . . Again, the Committee did so with . the express understanding that it was not waiving Its right to object to and litigate . the issue of the appropriateness of the bargaining unit.
>
> * * *
>
> The Committee was notified. . .last night that the UFW was requesting to withdraw its election petition. I understand that the UFW has filed another election petition this morning. The Committee will be filing a Petition for Intervention . . . . The Committee continues to contend that a statewide unit is inappropriate and that the proper bargaining, unit is one for Monterey and Santa Cruz counties and another separate unit for Oxnard. However, in light of the Executive Secretary's ruling of last night, the Committee will respond to the question concerning the bargaining unit in conformity with the statewide unit petitioned for by the UFW. Please be advised that the Committee does so under protest and without waiving its right to litigate the appropriateness of the bargaining unit. . . .

2. An election is conducted-

The UFW had filed a new petition for certification, which was to lead to this case. The Committee initially filed a petition for intervention for a statewide unit, apparently still under the impression that it had to do so in order to intervene. However, Gumberg separately advised the Regional Director that the Committee continued to believe that a single statewide unit was inappropriate:

"[T]he Committee respectfully requests that the Region establish a separate bargaining unit for the Watsohville- Salinas area and another for the Oxnard area."

The following day, the Executive Secretary advised Gumberg that he had not ruled that the Committee must petition for a statewide unit. Accordingly, the Committee filed an amended petition calling for an election in Monterey and Santa Cruz counties only and took the same position at the pre-election conference held on the same day.

According to Hernandez, when Committee members pressed their case at the pre-election conference "that two units might be appropriate", UFW representatives "insulted" them, saying they "didn't know what they were doing." RT p. 410. Although the Regional Director determined that a statewide unit was appropriate, in view of the Committee's cross-petition, he ordered the ballots segregated in order to keep separate tallies for each area in order to preserve the unit issue.

Sergio Leal testified that the Committee did not campaign much in Oxnard because:

> [W] e believed we had confidence when they told us that it was all just one. RT p. 366, 11. 17-19
>
> * * *
>
> [The Committee] was organized during Watsonville. And then we were aware that if we didn't get at least half of them in Oxnard just -- then we thought that just appearing there for the few times that we showed up, we thought that was enough, that we didn't have_ to spend so much time. Because we trusted or we confide on - We believed the word of the company and the union

and also the ALRB when they told us that it was all one unit, and we have all the backing over here. We knew we were going to win. RT p. 366-7

The election was held on May 25 and 26, 1999. The Tally of Ballots was:

| | |
|---|---|
| Coastal Berry Farm Workers Committee | 646 |
| UFW | 577 |
| No-Union | 79 |
| Unresolved Challenged Ballots | 60 |
| Void Ballots | 12 |

3. A runoff is necessary

Since no party received a majority of the valid votes cast, the Regional Director performed an expedited investigation of what was projected to be a determinative number of challenges, issued his report, considered exceptions, and counted the ballots in accordance with his recommendations.[9] When a majority still had not been achieved under the expedited procedure, the parties waived resolution of the few remaining challenges and consented to a runoff election to be held between the Committee and the UFW on June 3 and 4, 1999.

The Tally of Ballots in the runoff election was:

| | |
|---|---|
| Coastal Berry Farm Workers Committee | 688 |
| UFW | 598 |
| Unresolved Challenged Ballots | 92 |

[9]See, Title 8, California Code of Regulations, Sec. 20375(b).

However, the parties split the regions between them, the Committee winning a majority in Watsonville/Salinas (422 votes to 287} and the UFW a majority in Oxnard (311 votes to 266.)

With the number of challenges again being outcome determinative, the Regional Director commenced an investigation, which was ongoing at the time objections were due. Only the UFW filed Objections.

On June 25, 1999 the Regional Director issued his report on challenged ballots. Only the UFW filed exceptions. On August 12, 1999, 'the Board dismissed the exceptions and ordered the Regional Director to count the ballots in accordance with his conclusions and to issue a revised tally.

The Final Tally of Ballots was:

| | |
|---|---|
| Coastal Berry Farm Workers Committee | 725 |
| UFW | 616 |
| Unresolved Challenged Ballots | 19 |

Again, the two organizations split the regions: the Committee won a majority in Watsonville/Salinas, 448 to 295, and the UFW a majority in Oxnard, 321 to. 277.

Leal testified that, even though they believed they had grounds to do so,[10] the Committee did not file election objections because they had won the election.

The UFW filed hundreds of objections. After screening the UFW's Objections, the Executive Secretary issued an order setting a number of them, including one to the geographic scope of the unit, for hearing. On November 29, 1999, pursuant to motion, the Executive Secretary ordered that the objection to the geographic scope of the unit be heard alone.[11]

## II. PRELIMINARY DISCUSSION

The Committee makes a number of legal arguments challenging the propriety of my even considering the UFW's objection to 'the scope of the unit, arguing, first, that the UFW should not have been permitted to raise the unit issue since the election was held in the unit it sought; and second, that the Board has already determined that a statewide unit is appropriate.

---

[10] During the hearing, the Committee sought to introduce evidence about the allegedly objectionable behavior, namely threats by UFW organizers directed at Committee members. I initially permitted Committee Counsel to pursue the matter, not to prove mat the Oxnard election should be set aside, but to permit the Committee the opportunity to make a record on its claim that the UFW should be estopped from objecting to the scope of the unit. Once it became apparent that permitting investigation of the threats would consume the hearing, I struck all testimony relating to the threats. I will deal below with the, Committee's estoppel claim as though it were an offer of proof, that is, assuming that the Committee had grounds to object to the election, did the UFW cause it not to do so?

[11] In the meantime, and continuing while this decision is being written, the board is entertaining the UFW's Request for review of the parts of the Executive Secretary's Order dismissing certain Objections.

A. Waiver and Estoppel

The short answer to the waiver argument is that, since I 1977, our Board has taken the position that, even where a party has agreed to a particular unit designation, it can nevertheless challenge it in post-election proceedings:

> This Board does not have the authority granted to the National Labor Relations Board to determine appropriate units except where employees work in non-contiguous geographic areas, and so decisions of the NLRB binding parties to stipulations[12] regarding what constitutes an appropriate unit are not applicable to decisions regarding bargaining units under the ALRA.
>
> *R. C. Walter & Sons* (1976) 2 ALRB No, 14, p. 3.[13]

The Committee also argues that the UFW should be estopped from now seeking separate units "in that [the Committee] put more resources into their campaign in the northern than in the southern units, given that there were less [sic] workers in Oxnard and all votes would be counted together." Post-Hearing Brief, p. 12. If I understand the argument correctly, the Committee is contending that had it known that the UFW might seek a separate unit in Oxnard, it would have campaigned more in Oxnard in order to prevent any possibility of a UFW victory which might arise from different majorities in a split unit.

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[12] I might add that under the NLRA, such stipulations are considered binding, not on waiver principles, but as "contracts", and there is obviously no contract in this case since the panics disagreed about foe scope of the unit.

[13] I recognize that the Waiter case concerns an employer that did not operate in non-contiguous areas and might be thought distinguishable on that ground; however, the principle the Board used in deciding the case appears to apply to all unit cases under the Act.

The argument is unconvincing on the. record as a whole. As will be discussed, there is practically no interchange' between the Watsonville/Salinas and Oxnard employees, so Leal'a testimony that the Committee was organized "during Watsonville, must be taken to mean not only that it was organized *within a particular period of time*, but also that it was organized *among a particular group of employees*.

In view of this, as well as 1) the Committee's repeated efforts to obtain an election in a Watsonville/Salinas unit only, 2) its specific reservation of the right to appeal the unit determination in this case, I can only conclude that it did not campaign "hard" in Oxnard because whatever happened there was of little concern to it: it expected to win in Watsonville/Salinas; if it won in Oxnard, it would win statewide; if it lost in Oxnard by a margin of victory large enough for the UFW to swamp its expected victory in Watsonville/Salinas, it could appeal the unit designation in order to preserve its victory in the smaller unit.

That it did not expect the UFW to be able to object to the unit description after having sought a statewide unit, was not due, as far as the record shows, to any deception on the part of the UFW, but was, instead, the result of t-he-Committee's being unaware of Board procedures, which

permitted such an appeal. In any event, the committee' campaign decisions were based upon both confidence of its. own strength in Watsonville/Salinas and its unawareness of Board procedures.

For similar reasons, I reject the Committee's related argument that the UFW should be estopped from claiming separate units because its filing for a statewide unit -- and the Regional Director's determination that such a unit was appropriate, -- induced it "not to file election objections on the conduct of the Oxnard election even though it had fertile grounds to do so" since, in the next breath, the Committee actually admits, as I have found above, that its decision not to file objections was "strategic" and "based on the Committee's overwhelming election victory throughout the state." Post-Hearing Brief, p.13. In other words, the Committee thought the election was over because it had won: Board processes are rarely so simple, not just for the Committee, but for all unions and all employers alike.

B. The Effect of the Board's Prior Rulings

Relying upon 1) the Board's statement in Admin. Order 98-12 that "the Regional Director has failed to point to any evidence that would, or should, have changed his . . . conclusion that a statewide unit was appropriate", and 2)

the Board's statement in Administrative Order 99-2 that there [was] no indication whatsoever that the Regional Director's unit determination [in 98-RC-4-SAL] was in any way incorrect," the Committee argues that the Board has implicitly affirmed the Regional Director's determination that a statewide unit was appropriate.

Since the gist of both rulings was that the Board did not regard the unit question as properly before it, I do not understand either ruling to imply a finding as to the appropriateness of the unit. The Board's language is strong, but its acquiescence in the Regional Director's unit determination took place within the context of a debate, reflected in dissents by then-Chairman Stoker in 98-12 and then-Member Stoker in 99-2, about the scope of the Board's authority to permit exceptions to the statutory requirement that objections be filed within five days of the Tally of Ballots.

When urged to exercise a doubtful jurisdiction, a tribunal that expresses satisfaction that matters are not so wrong as to require its intervention, should not be understood as making a mature judgment about what it would do if the matter were before it. The law is filled with cases in which a party's claim, rejected as grounds for

extraordinary relief, is nevertheless upheld through ordinary appeal.

Moreover, even if the rulings could be construed to imply a determination that the Board would have made the same decision that the Regional Director did, "a prior decision in regard to whether a unit of certain employees is appropriate for purposes of collective bargaining is a circumstance, but not a decisive one, which the Board in the exercise of its sound discretion will consider should such question present itself in a subsequent proceeding involving the representation of such employees." *Pacific Greyhound Lines*(1938)9 NLRB 557, 573

We are now in that subsequent proceeding.

C. An Argument by the Employer

In determining the appropriate unit, Coastal seeks to have me take into account the potential difficulties in bargaining with two unions. In the first place, difficulties of this kind are inherent in the discretion possessed by the Board and are faced by any employer under the national Act when single plant units are determined to be appropriate for an employer with multiple locations. More importantly, unit determinations must fulfill the employees' interest in self-organization, not the employer's desire for simplicity.

## . III. THE SCOPE OF THE UNIT

### A. -FACTS

#### 1. Introduction

Coastal Berry Company is a limited liability corporation. The Company grows strawberries, raspberries and blackberries, though mostly strawberries[14]. It has two general areas of operation: Watsonville/Salinas in the north and Oxnard in the south. The two areas are hundreds of miles apart. Because it operates in both southern and northern California, it can harvest nearly year round. Harvest begins in Oxnard[15] in January and continues through the second or third week of June, with peak coming in April. Watsonville/Salinas picks up in March so that the two regions briefly overlap from March until June, when the Oxnard season ends. Watsonville/Salinas reaches peak in May, and while harvesting will continue through November, it is about 60% complete by the end of July. RT p. 98[16]

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[14] Ernie Parley testified that the company has 80 acres of blackberries and raspberries out of a total of 780 acres planted in the Watsonville/Salinas area. RT p.12-13. Apparently, blackberries and raspberries are grown only in the north.

[15] In speaking of the company's harvest cycle as "beginning" in January, I am speaking in terms of the calendar year: in terms of crop cycles, the strawberry harvest begins in late December or early January. RT p. 296

2. Structure of the Company

The Company's main office is in Watsonville at the cooler it owns there, RT p. 10, but it also maintains two offices in Oxnard, one, at one of the ranches it leases[17] and the other at the commercial cooler it uses, RT pp. 157, 317, 326. Besides these offices, it has a shop in Oxnard.

Ernie Parley is President of the Company. Because Parley's testimony is not entirely consistent with some of the documentary evidence provided by the Company, it is not possible to lay out the exact structure of the Company with confidence. Although two organizational charts, one prepared in June 1998 and the other in August 1999, show Stuart Yamamoto in charge of two, separate northern divisions, Inland and Coastal, corresponding to the Watsonville and Salinas areas, and Alan Thorne in charge of the Oxnard Division, by the time of the hearing, Yamamoto's and Thorne's job titles had changed (Yamamoto had become Vice-President of Production and Thorne, Vice-President of Operations,) and, according to Parley, the company no longer

[16] While I have outlined the usual harvest cycle. Farley testified the company experimented this year with a summer planting in Oxnard for a September-November harvest cycle. RT pp. 94,98

[17] Intervenor emphasizes that the office on the ranch is "an old World War II bunker-trailer" and is not a permanent fixture. It is true that Parley testified that the office is "not technically" a permanent fixture, RT p. 327, but I am not prepared to conclude from this mat the Company's administrative presence in Oxnard is unstable or evanescent I can take administrative notice, as a fact of common knowledge, that many public school systems have trailer structures in schoolyards for decades.

divided the Watsonville/Salinas operations into two separate divisions. See, UFW 6.[18]

3. Supervision

For present purposes, it is clear enough that Yaraamotp oversees operations in the north, that Thorne does the same in the south, RT pp. 33, 78 and that, on a day-to-day basis, Henry Leal manages operations in the north and David Murray in the south.[19] Arrayed beneath Murray are a variety of "supervisors", RT. p. 247, such as Sabino Pitones, Diego Luna and Jose Torres, who apparently run specific ranches, and Juan Robles, who "supervisee[s] labor," RT p. 300[20], as well as a number of foremen. For his part, Leal has his own supervisors and foremen and they are different from Murray's. See UFW 6.

4. Interchange of Supervisors

In general, there is little exchange among the field supervisors between the north and the south. Sullivan and Parley could identify only Ezequiel Flores and Trino Ramirez as moving back and forth between the two regions:

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[18] In its Post-Hearing Brief, the Employer asserts that Parley testified that it has unified its operations and no longer has northern and southern divisions, relying on RT p. 33 and 181. This reads Parley's testimony too broadly: in both cases he was speaking of the collapse of any distinction between the Coastal and Inland divisions.

[19] In his testimony, Parley characterized Henry Leal as currently a ranch manager, and David Murray and Stuart Yamamoto as currently General Managers of Oxnard and Watsonville/Salinas respectively, See, RT pp 33-35. Murray described himself as "production manager, division manager of Coastal Berry Company' Oxnard." RT p. 292

[20] Robles is referred to as a 'lead foreman' in a letter written by Sullivan to the Region on May 17,1999, shortly before the petition was filed.

as Director of Quality Assurance,Flores goes to Oxnard to inspect the pack,RT p.104;Ramirez, the Pest Control supervisor, also travels back and forth. UFW 1, See also, RT. p. 271-2.

5. Centralization of Operations

This is not to say that Flores and Ramirez alone share responsibility for both regions. It is clear from the testimony of Parley and Earl Pirtle, the Company's Chief Financial Officer, that Watsonville personnel perform a' variety of functions for the southern operation. Pirtle, for example, characterized Coastal as a "shared services operation" and testified that all the Company's accounting, including grower accounting, fixed asset accounting and accounts payable and receivable, are conducted from the Watsonville office. Thus, all the company's banking accounts are in Watsonville, all credit applications are prepared there, and all of Murray's purchases must be, first, authorized, and finally, approved for payment by Alan Thorne in Watsonville, RT pp. 77, 78.

Budgeting is done on a company wide basis with Murray having the opportunity to shape it by advising Parley and Thorne about Oxnard's particular needs, RT p. 210; but the final budget is Parley's and Thorne's work. It is also Thorne who purchases all the plants and plastic mulch used

north and south, and all the boxes and labels, RT p. 74, which, by the way, bear Coastal's Watsonville address. RT p. 220

The Company has one Workers' Compensation and one medical insurance policy applicable to both regions, RT p. 201, and while Oxnard has its own payroll department, Watsonville nevertheless performs essential payroll services for it. Depending upon the time of year, and correlatively how busy each office is, Oxnard will, in Murray's words, "process" the payroll, which I take to mean actually compute the wages from the raw data of the timecards, See RT pp. 188, 328. However, when Oxnard is too busy to perform the calculations, which, according to Murray is 80% of the year, the timecards will be sent to Watsonville for processing. RT p. 188. No matter whether the payroll is originally computed in Oxnard or in Watsonville, it is always entered into the mainframe computer in Watsonville and payroll checks are cut in Watsonville and sent by courier to Oxnard.

Margie Alcantar from Watsonville coordinates all the health and safety programs and both Alcantar and Juan Gomez do training in both areas. RT p. 250. In addition to these two, Comite 4 lists, some twenty other employees in various categories - Management, Sales and Marketing, Operations,

Accounting/Personnel and Field Support - who travel between Oxnard and Watsonville/Salinas and eight other employees who, while they do not travel between the two locations, nevertheless perform functions that affect both of them.

6. Interchange of Equipment

Although there is some interchange of equipment between the two regions, Thorne testified that the overlap in the harvest between the two regions - which occurs for about eight months of the year, See, UFW 16 -- limits the amount of equipment that can be interchanged. RT p. 264 Specifically, he recalled sending "a lot of flatbed trucks" to Oxnard in January and then bringing them back in May, RT p. 263, and sending a few pick up trucks, but generally speaking the Company now rents most of the equipment they use in Oxnard "once [they] pick up steam up north." RT p. 264

7. Type of Work Performed

Coastal produces fruit for the fresh, cannery and juice markets.[21] In general, berries picked for the fresh market are the highest quality, with somewhat riper berries going for cannery and "pretty bad berries" going for juice. RT p. 254[22] Company and employee witnesses agreed that if

[21] The "cannery" characterization is somewhat misleading since cannery fruit is actually frozen; "cannery", therefore, refers to a form of processing, not packaging.

[22] Normally, juice berries are berries that have been rain-damaged, RT p. 112.

one can pick for the fresh market, one can pick cannery or juice. For example, Parley, testified that basically all that changes when a picker changes from fresh market to cannery is that he places his berries into a reusable plastic box instead of a cardboard box, RT p. 162, and all that changes when a picker goes from cannery to juice is that he exchanges the plastic box for a bucket.

Company figures indicate that in 1999, only 1% of Watsonville's pick was cannery as compared to 41% of Oxnard's, See, UFW Ex 7. Parley repeatedly emphasized that this difference in "styles" was entirely dependent on market conditions so that, I take it, if relatively warmer weather caused the crop to ripen faster than usual in Watsonville, or if rain came as the Watsonville harvest was in full swing, and if prices were high enough to offset wages, the company would pick cannery or even juice in the north. RT pp. 168, 235

Even if it is simply a matter of external factors, the factors have remained stable enough so that none of the Watsonville employees who testified at the hearing[23] had picked cannery at Coastal and Company officials could testify that, even though they have picked more cannery in

[23] See, e.g., Tesimony of Maria Isela Mendoza, RT p. 438; Salvador Manzo, RT p. 447; Manin Vasquez, RT p. 458; Sergio Leal, RT. P. 362.

Watsonville in previous years than they picked in 1999 [1%], as a generalrule they do "almost no cannery in the north," RT. E. 240[Parley.]

8. Hiring

Oxnard keeps its own "hiring, recall, and personnel records", RT p. 42, and although permanent personnel records are kept in Watsonville,[24] and Watsonville generates-the computer list which both regions use in determining hiring preferences in accordance with the Employee Handbook, See UFW 10, Parley testified that hiring is done from "local lists", RT p. 54. The Employee Handbook confirms his testimony. According to the Handbook, "the requirements of individual ranches . . . will be considered separately," UFW 10, p. 4, which appears to mean that one does not apply for both Oxnard and Watsonville/Salinas, but for the one or the other.

Farley testified that seniority is company wide, RT p. 54-55, but given the evidence that hiring is predominantly local, and there is little interchange of employees, as a practical matter, his testimony appears to mean little more that, as he also testified, an employee fired in Oxnard could not work in Watsonville. RT p. 204

[24] In its Post-Hearing Brief, Intervenor asserts that "all personnel files are maintained in Watsonville" Brief, p. 4. This is not true: all *permanent* flies are maintained mere. RT p.331.

The hiring process works this way: At the start of each season, Ezequiel Flores in the north and Murray in the south advise Parley of their prospective labor needs and; upon receiving approval, begin hiring.[25] Applicants must register "at the personnel office", in the region where they want to work, RT pp. 54, 68. Upon registration, they are told when work is to begin, after which they are responsible to check back every week in order to be hired. RT p. 306-307. Since regular checking is necessary to being hired, it seems reasonable to conclude that local residence would greatly enhance one's chances of being hired and UFW 14, the eligibility list for the last election, confirms this. It shows that of the over 700 employees employed during the eligibility period in Oxnard, less than a dozen lived outside the local area[26] and that of the approximately 600 employees in the Watsonville/Salinas area, only one employee lived outside the Watsonville/Salinas area and he came from Berkeley.

[25] I might add that, just as Parley must signal his approval for the normal hiring process to begin, he must approve all use of labor contractors, whether in the north or the south.

[26] Farley testified that the employees on UFW 14, pp. 1-10, who worked in LOG 22 worked in Oxnard. Of the over 700 employees listed as working in LOG 22,1 count only Samuel Ortiz Merino (Watsonville), Amparo Merino (Watsonville), Gabino Torres (Fresno), Maria Reina Torres (Fresno), Alfredo Aviles (Fresno), Reina C. Carillo (Fresno), Guadalupe Elizarraz (Fresno), Jesus Tapia (Watsonville) as coming from other than Oxnard, Santa Paula, Port Hueneme, and Ventura.

9. Interchange of Employees

Besides the difference in the labor pool, generally speaking there is little interchange between the Oxnard harvest workforce and the Watsonville/Salinas area harvest workforce and whatever interchange there is, is entirely voluntary, RT pp. 130, 132. The Company could identify only 34 employees, out of the thousands employed during the calendar year, who worked in both Oxnard and in Salinas. See, UFW 15.

10. Rates of Pay

The fact that the labor pools are separate also reflects company policy. Pirtle testified that the Company structures its pay scales in order to keep Oxnard employees from following the harvest north to the Watsonville/Salinas area:

> "We try to equalize wages primarily in order to keep the Oxnard from having people leave early to come up north. I mean, we do have people who migrate with the season. And we typically find Oxnard operation is short handed late in the season. And if there's no reason to go to Watsonville, they clearly wouldn't." RT p. 391.

However, he emphasized that in order to do so, the company strives for what he called wage parity by which he meant that an Oxnard paycheck would be roughly the same as a Watsonville/Salinas area paycheck for the same number of hours.

Wage rates are different north and south, as the following chart, drawn from UFW 17, reveals:

| JOB FUNCTION | WATSONVILS/SALINAS RATES | OXNARD RATES |
|---|---|---|
| Harvest foreman | $9.80 | $8.00 |
| Aast . Foreman | $8.25 | $7.50 |
| Quality Checker | $9.00 | $9.00 |
| Punchers | $7.70 | $6.85 |
| Asst. Puncners (Oxnard Only) | | $6.45 |
| Truck Drivers | $7.70 | $7.70 |
| Forklift Drivers | $7.70 | $7.50 |
| Stackers | $6.50 | $6.75 |
| Picker-Hourly | $6.50 | $6.00 |
| Picker- Standard and Consumer | $4.60/hr + $.75* | $4.50/hr + $.60* |
| Picker-Sysco | $4.60/hr + $.85* | $4.50/hr + $.70* |
| Picker-Stem | $4.60/hr + $1.00* | $4.50/hr + $.85* |
| Picker - Export | $4.60/hr + $2.10* | $4.50/hr + $2.10* |
| Picker - Cannery | $2.00/hr + $.10* | $2.00/hr + $.10* |

* Murray explained that when work is slow at the beginning of the season, the company pays hourly, but as the 'harvest picks up', the company switches to an incentive system, consisting of an hourly rate plus "so much per tray." RT p. 322, see also, RT p. 115 [Farley]. Not reflected in the chart is a minimum guarantee when the company makes the shift to incentive pay. See, RT p. 115 [Farley]

Except for the cannery rate, all the harvest rates are higher in the Watsonville/Salinas area than in the Oxnard area. Pirtle explained that, despite receiving generally lower rates for the same work, employees in Oxnard could receive roughly similar pay for the same number of hours as the Employer's Watsonville/Salinas employees because they could harvest more in a shorter period of time, RT p. 403.[27]

[27] In its Post-Hearing Brief, the UFW contends that workers achieve greater speed because, among other reasons, Oxnard plants four rows in a bed instead of two, as the Company does in the Watsonville/Salinas area. Pirtle, however, resisted any correlation between "acreage" and gross pay. Rather, he attributed the Oxnard worker's ability to equal the wages of his northern counterpart to the fact that a harvester can pick more fruit in a shorter period of tune because the growing cycle is shorter in Oxnard than h is in Salinas. RT pp. 405-6 Martin Vasquez appeared to provide another reason why hourly wages in Oxnard could be so similar to those in the north when he testified that that one can pick cannery "easier", and there is

11. Local Discretion

Murray does not nave independent responsibility for setting wage rates. Rather, at the beginning of every season, he researches the competition for pay rates, takes into account the job itself, and recommends local rates to Watsonville. Farley, Pirtle, Thorne and Libby Mine look at his recommendation. While Parley testified that Murray's recommendations would be weighed heavily, he also insisted they would not be accepted automatically, RT p. 72. Murray could not recall his entire wage package being rejected although he did recall that some of his recommendations were rejected apparently because he was recommending higher wages than the company was paying in Watsonville. RT pp. 349-351.

All Seasonal Employees are governed by the rules contained in the Seasonal Employee Handbook, UFW 10, which covers Hiring and Recall Procedure, Work Rules, Benefits, Leave of Absence Policy, Grievances and the like.

Not surprisingly, the parties emphasize different aspects of the Handbook in their characterizations of the Company's labor relations policy. In general, the Employer and the Committee emphasize the uniformity of the rules

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obviously more cannery pick in Oxnard. RT p.435. However, he immediately shied away from generalizing too broadly and I make no finding on the issue.

themselves while the UFW emphasizes the amount of discretion remitted to local foremen or supervisors in applying them. For example, where the Company points to Parley's role as the final arbiter of all grievances, the UFW points to the ability of either local foremen at the Step 1 level and Ranch Managers at the Step 2 level to settle them before they reach Parley; where the Company and the Committee point to Parley's role in all terminations and suspensions, the UFW points to the authority of local crew foremen to enforce quality standards and to impose progressive discipline; where the Company points to its uniform standards of conduct, the UFW points to the authority of foremen to interpret them.

Indeed, so thoroughly has the UFW mined the Employee Handbook for examples of local discretion that to repeat all it has discovered would unduly burden this decision. I will content myself with including the general language from the Handbook as illustrative of the kinds and amount of discretion possessed by Murray and his foremen:

> a. The Ranch Manager is in charge of the ranch's daily activities.
>
> b. The crew foreman is in charge of the crew and directs its activities. The primary responsibility is the quality of the pick and production of the crew, and ensuring that all ripe fruit is picked.
>
> c. The punchers are responsible for quality inspection on all crates presented.
>
> Handbook, UFW 10, p. 8

## B. CONCLUSIONS

I find from the foregoing 1) that Coastal exemplifies a high degree of administrative centralization; 2) that, while many labor relations decisions are subject to the ultimate control of Parley, including the number of employees to hire, when to begin hiring, the wages to be paid, all terminations and suspensions and whatever other disciplinary matters may be appealed to him, a great deal of day-to-day discretion in labor matters is lodged in Murray, who also effectively recommends most wages, and in local foremen, who not only enforce quality standards, but also routinely decide, among other things, whether or not to grant leaves of absences or to initiate discipline; 3) there is little common supervision of the employees in the two regions; 4) that, except for the type of pick, which I do not regard as of major importance, the nature of the work performed is similar; 5) that Oxnard employees typically receive lower hourly or piece-rates than sonville/Salinas employees in the context of the company's striving to keep the labor pools separate; and 6) that other terms and conditions of employment are pretty much the same.

## IV. ANALYSIS

### A. The Standards Outlined

Under the National Labor Relations Act, the national Board has the authority to decide "in each case, whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed under [the] Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit", 29 USC Sec. 159(b).

Since the national Act specifically permits the Board to certify plant-wide, or, in the language of this case, single-location, units, under that Act having two separate units, would be the prima facie correct choice. Dixie Belle Mills, Inc. etc (1962) 137 NLRB 629. So strong is the presumption that single location units are appropriate that it must be overcome even when two plants of the employer are located some 200 feet apart from each other, See, e.g. *The Kendall Company*. (1970) 184 NLRB 847.

A presumption that, absent other considerations, would operate to make two units out of a single employer's fields merely because they were separated by a wide country road, would obviously not do under our Act, and it is clear that the Legislature intended to prevent the proliferation of units that would flow from it. Missing from our Act, then,

is any language that would divide employees by skill or plant (field) and the Board has been given discretion to divide an employer's employees only where, as here, they are located in two or more non-contiguous areas.[28]

In the earliest unit cases arising under our Act, the Board clearly recognized that the discretion it possessed in such cases was analogous to that possessed by the NLRB in multi-location or multi-plant cases.

> The Employer's farming operations are in California are conducted in four valleys separated from each other by distances up to several hundred miles. There is no dispute that these valleys constitute separate and non-contiguous geographic areas in relation to one another. Hence, the Board must determine the appropriate unit or units.
>
> In making that determination it is appropriate to look for guidance to decisions of the National Labor Relations Board in cases involving choice between single location and multiple locations of the same employer.
>
> *Bruce Church, Inc.* (1977) 2 ALRB No. 38, at p. 4

Borrowing from the national Board, the Board identified a variety of factors that it considered relevant to determining the appropriate unit when an employer operates in non-contiguous areas:

> NLRB decisions yield a number of factors which that agency has relied upon in determining unit

[28] There is one holdover in our Act of something like a single plant "presumption," although it is expressed in terms of non-contiguity. The Legislature has given the Board discretion to create a separate unit of an employer's off-the-farm packing shed, that is, to treat the shed as non-contiguous, no matter how close the shed is to the fields. See, Statement of Intent, Hearing before Senate Industrial Relations Committee, May 21,1975.

> appropriateness. These include: (1) the physical or geographical location of the locations in relation ,to each other [Cite]; the extent to which administration is centralized, particularly with regard to labor relations [Cite]; (3)the extent to which employees at different locations 'share common supervision [Cite]; (4) the extent of .interchange among employees from location to location [Cite]; (5) the nature of the work performed at the various locations and the similarity or dissimilarity of the skills involved [Cite]; (6) similarity of dissimilarity in wages, hours, and other terms and conditions of employment [Cite]; and (7) the pattern of bargaining history among employees [Cite.]
>
> 2 ALRB No. 38, at p.5

In setting forth these factors, the Board was careful to point out that unit determinations under the Act were not to be approached in a mechanistic way, so that, for example, the factors of centralization and similarity of work which I have found to be present in this case, would not always trump any other factors or any combination of factors: "there is no "rigid yardstick" for determining the-appropriateness of a unit [and] no single criterion is determinative . . . what may be determinative in one situation may not be determinative in another," *Bruce Church*, p. 3; the goal in all cases is to assure stable collective bargaining relations. John Elmore Farms (1977) 3 ALRB No. 16.

In the earliest cases to apply the Bruce Church criteria, the Board found single-statewide units appropriate, only where the evidence showed that, besides

the high degree of administrative centralization, which we find in this case, the employer's employees, followed the harvest from one location to another.

Thus, in *Bruce Church*, the Board found that out of approximately 1700 employees, nearly 60% worked in two of the four valleys farmed by the employer and nearly 25% worked in at least three valleys. Individuals who desired full-time year round employment moved from valley to valley with the season, as did supervisory personnel, including the same general manager, who oversaw the work at all locations, and a substantial amount of equipment travelling between the valleys. In *Bud Antle*, 3 ALRB No. 7, at p. 4, and in J. R. Norton, 3 ALRB No. 66, at p. 6, it was similarly shown that there was a year round interchange of most employees, supervisors and equipment.

By way of contrast, in *Mike Yurosek* (1978) 4 ALRB No. 54, the Board found a separate unit of the Employer's El Centro harvesting employees appropriate when: a different manager controlled labor relations in El Centro than controlled the Employer's "northern" operations, employees in El Centro received different wages and benefits than did their northern counterparts, there were different jobs in El Centro than in the north, different foremen worked north and south, and employees had separate area seniority. These

factors were held to outweigh considerable administrative centralization, including centralized crop and acreage decisions, as well as collaboration in the setting of wages between El Centro's manager and the Employer's northern manager.

After several years of applying this manifold approach, in 1983 the Board introduced a so-called legislative preference for single statewide units as a starting point in unit analysis. In the first case to identify such a preference, the Board found a single unit appropriate on the basis of considerable centralization, integration of operations, and uniform benefits, but relatively little overlap in job functions, no common supervision, separate hiring, different wages, and a Union majority in one part of the unit and a No-union majority in the other part. *Prohoroff Poultry Farms* (1983) 9 ALRB No. 68

In view of the differences between the statewide units found appropriate in the Board's earlier cases and the statewide unit found appropriate in *Prohoroff*, it is difficult not to conclude that the presumption was a potent factor in the Board's determination. Nevertheless, it was clearly not the only one for, in addition to the other

factors recited above, the Board also emphasized the fact that no other union was competing for a smaller unit.

For present purposes, the importance of the presumption was underscored by two decisions, the' first, a few months after *Prohoroff* issued when, without resort to it, the Board found separate units appropriate where, as here, there was similar work, but no interchange of employees, *Exeter Packers, Inc*. (1983) 9 ALRB No. 76, and the second, a year later, when the Board found a statewide unit appropriate despite considerable distance between the two locations, relatively little interchange of employees, the lack of any previous bargaining history favoring an employer-wide unit, and different work being performed at the different locations. The Board nevertheless held a statewide unit appropriate, relying on the presumption, but also the fact that similar skills were needed in both locations and there was both common supervision and common control of labor relations. *Cream of the Crop* (1984) 10 ALRB No, 43, at p. 4.

B. The Standards Applied

1. The Effect of the Presumption

The Committee and the Employer argue that the presumption, aided by the proof of centralization, argue for a single statewide unit. For its part, the UFW

recognizes the existence of the presumption, but argues for separate units based upon all the facets of local discretion possessed by supervisors or foreman, the lack of interchange among supervisors and employees, the different : electoral majorities, north and south, and the differences in wages.[39] Thus, if the Employer and the Committee may be said to concentrate on the head, the UFW concentrates on the extremities. It is apparent from the Board's cases that I have outlined above that, utilizing the presumption, a statewide unit would be appropriate; without the presumption, although Board cases incline towards separate units, the matter must still be analyzed in accordance with the ordinary *Bruce Church* criteria.

Since I have found no case in which our Board has discussed what is required to swing the balance away from the preference for a statewide unit,[30] I will consider the matter in terms of basic principles of unit determination. The goal in all unit determinations is to promote stable collective bargaining relationships, for "if the unit

[29] I should note that the UFW also argues that the job skills are different, north and south, relying on die emphasis on cannery in die south, die lack of cane berries in die south, and differences in some of the job classifications. On this record, I do not find significant differences in skills between fresh market and the other packs. Since all the employees of the employer are included in whatever unit is deemed appropriate, the fact mat some job classifications may be different between the two regions does not seem to me to be very important.

[30] Indeed, it is not even clear "what sort of presumption the Board has created. Although it appears grounded in policy, from die way it is deployed, as simply one of die factors (none of which is determinative) to be weighed by the Board, albeit heavily, along with die conventional multi-location criteria, it does not seem to be one dial affects die burden of proof.

determination fails to relate to the factual situation within which the parties must deal, efficient and stable collective bargaining is undermined rather than fostered," *Kalamazoo Paper Box Corporation*, (1962) 136 NLRB 134, 137:

> [In exercising our discretion,] the Board must maintain the two-fold objective of insuring to employees their rights to self-organization and freedom of choice in collective bargaining and of fostering industrial peace and stability through collective bargaining. In determining the appropriate unit, the Board delineates the grouping of employees within which freedom of choice must be given collective expression. At the same time it creates the context within which the process of colective [sic] bargaining must function. Because the scope of the unit is basic to and permeates the whole of the collective bargaining relationship, each unit determination, in order to further effective expression of the statutory purposes, must have a direct relevancy to the circumstances within which collective bargaining must take place. *John Elmore Farms, (1977)* 3 ALRB No. 16, at p. 4, citing *Kalamazoo Paper Box*, Ibid.

While our Board has not elaborated upon this theme, early NLRB unit cases make it clear that this can only be achieved by placing employees with the same interests in collective bargaining in a unit:

> The chief object of the Board . . . is to join in a single unit only such employees, and all such employees, as have a mutual interest in the objects of collective bargaining. The appropriate unit selected must operate for the mutual benefit of all the employees included therein. To express it another way, is there that community of interest which is likely to further harmonious organization and facilitate collective bargaining?

NLRB Second Annual Report (1937) p. 125.[31]

Thus, the "community of interest* sought by the Board refers not merely to the employees' interests as employees in the objects of collective bargaining, but also to their interests in self-organization. This latter factor, which came to be called the extent of organization, was often relied upon by the national Board to the exclusion of all other factors in making unit determinations. See, German, *Basic Text on Labor Law*, pp. 72-73

In 1947, Congress eliminated the extent of organization as the sole criterion for determination of the appropriate unit by amending section 9 ( b ) to read, as it now does, that "in determining the appropriate unit for collective bargaining the extent to which the employees Lave organized is not [to be] given controlling weight." However, cases after the enactment of 9 ( b ) make it clear that the national Board may consider the extent of organization in defining an appropriate unit, provided there, are other factors that play a significant role in its conclusion. *Beck Corp. v NLRB* (9th Cir. 1978) 590 F2d 290.

Our Act, of course, contains no language limiting how much weight the Board may assign the extent of

[31]I should note that the United States Supreme Court has specifically approved reliance on NLRB Annual Reports as the repositories of the Board's "cumulative experience" in unit cases. *NLRB v. Metropolitan Life Insurance Co*. (1965) 380 US 438,444, at n. 6.

organization, from which I take it that the Board has discretion about how to assess its importance.

C. The Presumption Overcome

I think it fair to say that no one who has followed the course of events at Coastal Berry over the last few years can fail to be struck by the hostility between the group of employees that have organized as the Committee and the UFW. The hostility is so great that, even if (having lost the election in the north) the UFW's margin of victory in Oxnard were large enough to have carried the election statewide, inclusion of the anti-UFW Watsonville/Salinas employees in a unit represented by the UFW would have been a recipe for mischief: the pro-UFW and anti-UFW employees simply do not have that "community of interest which is likely to further harmonious organization and facilitate collective bargaining harmonious interests." Since the effect of the presumption is to make a statewide unit appropriate before the voting even begins, where it can be shown that the appropriateness of such a unit depends upon which organization won the election, it follows that the presumption has been overcome.[32]

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[32] Before leaving this point, I should address one further argument made by the Employer that the Supreme Court decision in *Vista Verde Farms ALRB* (1981) 29 Cal 3d 307 at 323-24, supports a finding of a statewide unit. The Court's discussion about why labor contractor employees are included in the same - that is, in a wall-to-wall - unit as other employees refers to the matter of unit composition, not the matter of unit determination. A simple example will illustrate the difference. Suppose a unit of an employer's

However, in view of the Committee's present, and the Employer's slightly more enduring, insistence on a statewide unit, it remains to determine whether the record otherwise shows a sufficient community of interest among the employees of the Employer to warrant certifying the Committee as the collective bargaining representative of all the Employer's agricultural employees in the State of California.[33]

D. One Unit or Two

Final determination of the appropriate unit must now proceed under the *Bruce Church* (or NLRB single location) criteria. As I have already indicated, critical in finding statewide units in early ALRB cases was the fact of employee interchange and common supervision; indeed in *Bruce Church*, *Antle*, and *Norton*, the Employer's work force resembled nothing so much as a travelling army, conducting operations now in one area and then another. In Yurosek, however, where the lack of employee interchange and common supervision did not present the picture of a unified, mobile force, separate units were found appropriate.

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employees in Fresno County only is determined to be appropriate. Under the certification, the employer must bargain over the wages to be paid its labor contractor supplied employees in Fresno. It is under no obligation to bargain over contractor supplied employees in Imperial, even though they are also employees of the employer.

[33] On this record, the question, If the UFW had won a statewide election, should the northern employees be included in the unit?, is not symmetrical to the question, Is a statewide unit appropriate with the

Under recent NLRB unit cases, it has been similarly held that the lack of significant employee interchange between two groups of the employer's employees "is a strong indicator" that the employees enjoy a separate community of interest, *Executive Resources Associates* (1991) 301 NLRB No. 50, for "the frequency of employee interchange is a critical factor in determining whether employees who work in different [groups] share a 'community of interest' sufficient to justify their inclusion in a single bargaining unit." *Spring City Knitting Co. v NLRB* (9th Cir. 1981) 647 F2d 1011, 1015. Reinforcing lack of employee interchange as a factor in this case is the difference in wages between the north and the south and Coastal's own determination to keep the labor pools separate by discouraging the northern migration of its Oxnard employees.

Similarly, in *Esco Corp*. (1990) 298 NLRB No. 120, centralized administration and centralized labor relations policy, including the power to hire, fire and discipline, (which Parley possesses, were held not to warrant a multi-location unit when there was not only no interchange of employees, but also not even any significant contact

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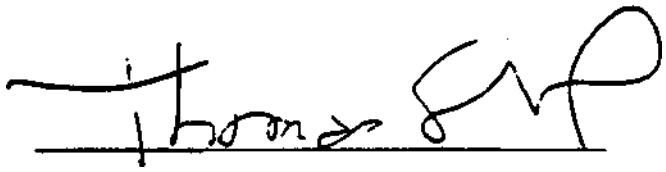
Comminee's having won the statewide election? We know less about the extent of organization in the south than we do about the extent of organization in the north.

between employees at the different locations. See also, *Courier Dispatch Group Inc.* (1993) 311 NLRB No. 72.

With, the different union majorities reflected in the Individual tallies,[34] added to the differences in the labor pools and the degree of autonomy possessed by the various Regional Managers, I find the separate geographic areas lack the requisite community of interest to constitute a statewide unit.



THOMAS SOBEL
INVESTIGATIVE HEARING EXAMINER

DATED: March 6, 2000

[34] Committee Counsel sought to introduce evidence from Committee supporters concerning their desire for a single statewide unit I rejected the evidence. Like the NLRB, our Board has always regarded the results of a secret ballot election as the only reliable evidence of employee desires and it does not accept subjective evidence on questions involving freedom of choice. *Ideal Laundry and Dry Cleaning*, (1963) 152 NLRB 1130, at n. 5, *Triple E Produce Co*. (1991) 17 ALRB No. 1.