STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

JOHN V. BORCHARD FARMS, Employer, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Petitioner.	)	75-RC-l-E 2 ALRB No. 16

In an election conducted among agricultural employees of John V. Borchard Farms on November 13, 1975, 74 workers voted for the United Farm Workers of America, AFL-CIO (UFW) , two voted for no union, and there was one challenged ballot. The employer filed objections to the election asserting that "the UFW did improperly obtain the support of employees in order to bring about the election", and that the conduct of UFW agents in that regard was "unwarranted, improper, illegal, and had a direct effect on the results of the election. " Declarations accompanying the petition assert that UFW organizers had requested employees to sign documents which were presented as insurance forms or without any explanation of their contents, whereas the forms were actually authorization cards used to demonstrate employee support necessary to obtain an election. In addition, the declarations stated that union organizers entered the employer's property during working hours and refused to leave when requested to do so.

The objections were set for preliminary hearing before Board Member Joseph R. Grodin, for the purpose of identifying for Board decision whatever legal issues might be posed by the objections,

and to arrange for prompt investigatory hearing of disputed material and factual issues.

At the preliminary hearing on December 2, 1975, the employer and the UFW presented arguments pertaining to certain legal issues as discussed below. In addition, with respect to the issue of access by UFW organizers during working hours, attorneys for the employer consulted with their prospective witnesses, who were present, and made the following offer of proof:

(a) That Ray Gutierrez would testify that when he came to work at approximately 6:00 a.m. on November 11, 1975, there were two UFW organizers in the shop talking to employees, and that they remained for 30 to 45 minutes after he arrived. Work is scheduled to commence at 6:00 a.m. The workers in question, however, were not actually working but were waiting to be assigned to work.

(b) That Augustine Reyes would testify that on November 11, 1975 two UFW organizers arrived at approximately 6:30 a.m. and remained for 10 to 15 minutes talking to workers engaged in work and left when requested to do so.

With respect to the contention that the UFW improperly obtained the support of employees by misrepresentation, the UFW argued (1) that the declarations in support of the petition were inadequate; and (2) that in any event, the objection related to showing of interest which is not reviewable in a post-election proceeding. 8 Cal. Admin. Code, § 20315(c). With respect to the access contention, the UFW argued (1) that the declarations in support of the petition were inadequate; and (2) that the

conduct complained of was not sufficient to warrant setting the election aside, even assuming the allegations to be true, which the UFW did not concede.

Following the hearing Member Grodin issued a Report on Preliminary Hearing, which set forth the legal arguments and the offer of proof, and concluded that the issues should be referred to the Board for decision. Both parties were given opportunity to respond to the report. The UFW filed a response in which it asserted that Mr. Gutierrez stated initially at the preliminary hearing that he arrived at 5:30 a.m. and that the organizers stayed for half an hour or 45 minutes; and that he changed his story only after it was brought to his attention that this version would mean that UFW organizers were not on the employer's property after 6:00 a.m., the start of work.

The issues presented by the declarations and the record of the preliminary hearing have been certified by Member Grodin to the full Board for decision.

I.

The employer objected to the preliminary hearing on the grounds that: (1) there was insufficient notice to prepare written contentions of fact and law; (2) the statute does not authorize such a preliminary hearing; and (3) due process of law; entitles the employer to an evidentiary hearing where substantial questions are raised.

As to the first, ground for objection, the parties were notified of the preliminary hearing by telegram on November 26, 1975. The parties had full opportunity to present contentions of both fact and law orally at the hearing, and thereafter if they so desired.

As to the second ground for objection, there is nothing in the statute or in applicable regulations which precludes the use of preliminary hearings as a means of identifying questions for decision, determining whether disputed and material questions of fact exist, and arranging for prompt investigation of such factual issues in dispute. On the contrary, such a procedure would appear to further the statutory purpose of resolving objections to elections as promptly as possible consistent with procedural due process for all parties. Samuel S. Vener, 1 ALRB No. 10 (1975); Interharvest , Inc. , 1 ALRB No. 2, n. 1 (1975).

As to the third ground for objection, neither the statute nor constitutional principles require an evidentiary hearing to be held needlessly, i.e., where there are no material factual issues in dispute. The objections procedures provided for in Labor Code section 1156. 3 (c), and section 20365 of the Regulations (8 Cal. Admin Code, § 20365) are patterned after those in existence for many years under the National Labor Relations Act. The courts have uniformly upheld the NLRB in dismissing objections without an evidentiary hearing "unless by prima facie evidence the moving party presents substantial and material factual issues which, if resolved in its favor, would warrant setting aside the election". Polymers, Inc. v. NLRB, 414 F. 2d 999 (2d Cir. 1969) . To the same effect, see NLRB v. Smith Industries, Inc., 403 F.2d 889 (5th Cir. 1968); NLRB v. Harrah's Club, 403 F.2d 865 (9th Cir. 1968). And while the ALRA, unlike the NLRA, contains an explicit hearing requirement , precedents under analagous statutes make clear that statutory provisions for

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a hearing are to be interpreted with a view to the function served by the requirement.[1/]

We proceed, therefore, to the merits.

II.

If it were not for the application of experimental procedures in this case, this objections petition would have been screened by the regional director for legal sufficiency under applicable regulations. If such screening had occurred, dismissal of the petition would have been appropriate.

[1/]In Dygstuffs & Chemicals, Inc. v. Flemming, 271 F.2d 281 (8th Cir. 1959), cert. den. 362 U.S. 911 (1960), the court confronted a statute which provided that upon the filing of objections stating the grounds therefor, and requesting a public hearing, "the Secretary, after due notice, shall hold such a public hearing for the purpose of receiving evidence relevant and material to the issues raised by such objections." In holding that a hearing was unnecessary in the particular case, the court declared:

> "The hearing is solely for the purpose of receiving evidence 'relevant and material to the issues raised by such objections.' Certainly, then, the objections, in order to be effective and. necessitate the hearing requested, must be legally adequate so that, if true, the order complained of could not prevail. The objections must raise 'issues.' The issues must be material to the question involved, that is, the legality of the order attacked. They may not be frivolous or inconsequential. Where the objections stated and the issues raised thereby are, even if true, legally insufficient, their effect is a nullity and no objections have been stated. Congress did not intend the governmental agencies created by it to perform useless or unfruitful tasks." Id. at 286.

See also U.S. v. Storer Broadcasting Co, 351 U.S. 192 (1956); Federal Power Comm'n v. Texaco, 377 U.S. 33 (1964).

With respect to the employer's claim that the UFW engaged in misrepresentation in order to obtain authorization cards, regulation section 20315 (8 Cal. Admin. Code, § 20315) provides that matters relating to the sufficiency of employee support shall not be reviewable by the Board in any proceeding under Chapter 5 of the Act. That provision is in accord with the long-standing policy of the National Labor Relations Board to the same effect:

> "An integral and essential element of the Board's showing of interest rule is the nonlitigability of a petitioner's evidence as to such interest. The Board reserves to itself the function of investigating such claims, and in its investigation it endeavors to keep the identity of the employees involved secret from the employer and other participating labor organizations . . . . The Board's requirement that petitions be supported by a 30 percent showing of interest gives rise to no special obligation or right on the part of the employers." S&H Kress & Co., 137 NLRB 1244, 1248-49 (1962).

That policy of the NLRB has been uniformly supported by the courts. E.g., NLRB v. Air Control Products of St. Petersburg, Inc., 335 F.2d 245 (5th Cir. 1964); NLRB v. Swift S Co., 294 F.2d 285 (3rd Cir. 1961).; Kearney S Trecker Corp. v. NLRB, 209 F.2d 782 (7th Cir. 1953). The requirement of a 'showing of interest serves the limited purpose of enabling the Board to determine whether the surrounding circumstances justify the election, thereby screening out obviously frivolous petitions. NLRB v. Air Control Products.

> "It is the election . . . which decides the substantive issue whether or not the union . . . actually represents *a* majority of the employees involved in a representation case." NLRB v. J. I. Case Company, 201 F.2d 597 (9th Cir. 1953).

The facts that under the 'ALRA the showing of interest requirement is statutory rather than administrative, and that it calls for

50 percent rather than 30 percent, does not alter the basic function of the showing of interest requirement, nor in our judgment the manner in which it is to be applied.

The rule of non-litigability of matters relating to the sufficiency of employee support does not mean that substantial questions as to the propriety of the manner in which a union obtained its showing of interest should or will be ignored in the context of a representation proceeding. [2/] Under NLRB procedures, when a party contends that a showing of interest was obtained by fraud, duress, or coercion, or that signatures on authorization cards are not genuine, the proper procedure is for that party to submit to the regional director any proof it might have. Pearl Packing Company, 116 NLRB 1489 (1956); Georgia Kraft Company, 120 NLRB 806 (1958). When evidence is submitted to the regional director which gives reasonable cause for believing that the showing of interest may have been tainted by such conduct, an administrative investigation will be made, and if it is determined that the showing of interest is inadequate because of such conduct, the petition will be dismissed. Determination by regional directors in such matters are subject to administrative review by the Board, based on the file developed by the regional director in his investigation. National Gypsum Co., 215 NLRB No. 16 (1974).

Our statute and regulations contemplate a similar procedure. Any party having evidence concerning alleged improprieties in the manner in which a labor organization obtains its showing of employee support should submit that evidence to the reginal director. 8 Cal. Admin. Code, § 20315(b). If it is not submitted within 48 hours

[2/] The rule has no application to unfair labor practice proceedings, nor does it preclude consideration in a post-election objections hearing under Labor Code section 1156,3(c) of unlawful conduct, such as unlawful threats or assistance, which, independently of its relationship to showing of interest, is of such a nature as to constitute a basis for setting the election aside.

after the filing of the petition, the regional director may refuse to consider it. Whether he should refuse depends upon the nature of the evidence, what reasons may exist for the delay, and what impact the delay will have upon the conduct of an election. If the evidence is timely filed, or if the regional director considers it even though it has not been timely filed, and the regional director determines that the evidence establishes probable cause to believe that improper means have been used to obtain evidence of employee support, the regional director should conduct an investigation appropriate to the circumstances. Where that inquiry discloses serious misconduct which undermines the showing of interest, the petition should be dismissed. It is undisputed that the facts underlying the employer's claim that the UFW obtained authorization cards by misrepresentation were not called to the attention of the regional director.

In any event, the declarations in support of that claim are clearly insufficient under standards established by the Board in Interharvest, Inc., 1 ALRB No. 2 (1975). Those standards require that the declaration contain "only factual, evidentiary matter as opposed to general conclusions or argument;" that they contain "the observations of the declarant;" and that "if any statement is made upon information and belief, the declarations should specify the source and basis for the declarant's belief." The two declarations filed with the petition on this issue state in identical language that the declarant was informed "by fellow employees of John V. Borchard Farms" that UFW organizers were present on the farm; that he "was made aware" that the organisers had asked the employees to

sign documents presented as insurance forms or without any explanation of their contents; and that he was subsequently "made aware" that the documents were in fact authorization cards. The declaration does not identify any fellow employees nor does it state how or in what manner the declarant was "made aware" of either of the facts asserted. The conduct of an evidentiary hearing is an expensive and time-consuming process. It should be triggered only by the presentation of facts sufficient to constitute a prima facie case. The declarations do not meet that requirement.

The allegation that UFW organizers were on the premises during nonworking hours is not contained in the objections petition and could properly have been dismissed on that ground. Moreover, the supporting declarations are marginal in terms of specificity. We consider the issue on the merits, however, in light of the employer's offer of proof.

Assuming that the employer could establish the facts presented in its offer of proof, we find such conduct insufficient basis to set aside the election. The proposed testimony does not suggest that the union's conduct intimidated employees or interfered with work. The sole basis for the employer's claim of impropriety is that the organizers allegedly continued to talk to employees after work commenced in the morning. Our access rule, 8 Cal. Admin. Code, § 20900, permits organizers to meet and talk with workers for 60 minutes "before the 'start of work," 60 minutes "after the completion of work,"' and for one hour during the working day, to include the lunch break if one exists.

The testimony offered by Ray Gutierrez does not establish conduct beyond the parameters of the access regulation, since the employees with whom the organizers were talking had not yet begun work. As to the incident involving Augustine Reyes, the organizers' conduct constituted only a minimal and insubstantial encroachment upon the employer's premises beyond the scope of the rule which did not interfere with the workers' ability to freely choose a collective bargaining representative. Samuel S. Vener Co., 1 ALRB No. 10 (1975).

Accordingly, the UFW is certified as bargaining representative for all agricultural employees of the employer in Imperial Valley, California.

Certification issued.

Dated: January 22, 1976

Roger H. Mahony, Chairman

LeRoy ChatfieId, Member

Joseph R.Grodin, Member

'Richard J0hnsen, Member

Joe Ortega, Member