STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of: COACHELLA GROWERS , INC . , Employer, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Petitioner.	No. 75-RC-57-R 2 ALRB No. 17

This case involves objections by the employer to an election conducted November 19, 1975 in which the United Farm Workers of America, AFL-CIO ("UFW") received a majority of the votes cast.[1/] Together with six other cases in the El Centro area, it was considered on December 2, 1975 at a preliminary hearing before Member Joseph R. Grodin for the purpose of identifying for Board decision the legal issues posed, and to arrange for prompt investigatory determination of factual issues in dispute. At the preliminary hearing, the UFW contended that the declarations accompanying the petition were legally insufficient. Nevertheless, because of the novel nature of the proceeding, the attorney for the employer was permitted to and did supplement the declarations with certain offers of proof. A report containing Member Grodin 's summary of the preliminary hearing was served on both parties, and each had opportunity to and did respond.

[1/]The tally shows: UFW 74; No Union 22; Challenged Ballots 28. The challenged ballots are not sufficient in number to affect the outcome.

Based on the objections, accompanying declarations, Report on Preliminary Hearing, and the response of the parties thereto, the Board has determined that the objections are legally insufficient and that the election should be certified.

I.

The employer's first objection is that a Board agent interrogated an officer of the employer without the presence of or notice to the employer's attorney, although the Board agent was aware that the employer was represented by counsel. The declaration accompanying the objections petition states that the Board agent inquired as to the names of the employees by specific crew and location; the names of foremen, tractor drivers, and fork lift operators; the names of growers for whom the employer renders picking services; the names of any outside labor contractors; and the rates of pay of pickers and time sheets showing the rates.

The process by which Board agents investigate facts relevant to a pending election[2/] is not adversary in nature. It takes place within rigorous time constraints imposed by the statute. Under these conditions it would be inappropriate to impose upon Board agents an absolute obligation to communicate with parties only through or with the permission of their attorneys. Of course

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[2/]The employer points out that the communication complained of occurred after the eligibility list had been filed and the existence of a sufficient showing of interest had already been determined, and argues on that basis that the inquiry was not relevant. The Board's interest In facts relating to a representation proceeding does not cease with the determination that an election should be held, however. There may -be questions of notice, election arrangements, and voter eligibility to which additional information is pertinent.

Board agents should not deliberately by-pass counsel who have made it known that they represent a party involved in a proceeding; and they should not persist in questioning a party who insists that he wishes to consult with counsel. [3/] But subject to those limitations there must be room for the reasonable exercise of discretion on the part of the Board agents, having regard to the accessibility of counsel and the nature of the matter under investigation, as well as the dictates of fairness and common courtesy.

On this record we cannot say that the Board agent abused her discretion in failing to notify the employer's attorney in advance of her communication with his client. But even viewing the facts in a manner most favorable to the employer's position, there is neither suggestion nor evidence that the employer was in any way prejudiced by the Board agent's conduct, or that the conduct affected the election in any manner. Accordingly, the incident is not a ground for setting the election aside.

II.

The employer's second objection is that the Board agent who investigated the petition and conducted the pre-election conference and the election itself was not fair and impartial, and

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[3/] We do not mean to suggest that a party may rely upon the absence of counsel as an excuse for failing to fulfill its statutory obligations. If a party fails to provide information required by the statute and applicable regulations in a timely fashion, the fact that counsel was not available will not be a defense.

engaged in conduct which was prejudicial to the employer and biased in favor of the union. The employer's declaration in support of this contention contains four allegations:

(a) The Board agent at the pre-election conference refused the request of the employer's attorney that she sit "as a presiding individual normally does," and instead "did then and there align herself with the representatives present from the United Farm Workers." The Board agent appeared at the preliminary hearing and testified, without contradiction, that she sat at one corner of a rectangular table with UFW representatives seated to her right and employer .representatives to her left. The employer contends she should have sat at the head of the table.

(b) The Board agent refused to answer any questions or give any assurance that the authorization cards showed that a bona fide question of representation existed. It appears from the preliminary hearing that the employer's attorney sought information concerning the details of the union's showing of interest, and that the Board agent stated only that the showing of interest had been determined.

(c) The Board agent attempted to set up two voting polls, which the employer contends might have permitted employees to vote twice. It appears from the preliminary hearing that the proposal for election arrangements referred to in the declaration was opposed by the employer's attorney, and in response the Board agent made arrangements to satisfy that objection.

(d) The Board agent permitted an assistant Board agent to use preliminary voting information of the election for the benefit of the union. It appears from the preliminary hearing that the conduct alleged related not to this election but to a companion election in Cal-Pac, Case No. 75-RC-58-R. We found the allegation without merit in that case. 2 ALRB No.18 (1976).

We agree with the employer's premise that Board agents should not only be free of bias but should refrain from any conduct that would give rise to the impression of bias. We do not regard the facts alleged, however, as constituting evidence of bias or of an appearance of bias. Moreover, to constitute grounds for setting an election aside, bias or an appearance of bias must be shown to have affected the conduct of the election itself, and have impaired the balloting's validity as a measure of employee choice. No such relationship is demonstrated or ever alleged.

III.

The employer's third objection consists of an allegation on information and belief that a day or two immediately prior to the election, a Board agent or assistant agent participated in ex parte communications and/or social activities with the union. The supporting declaration states merely that "I am advised that a day or two immediately prior to the election . . . that one or more Board agent met unilaterally with the UFW officials and organizers and supporters."

The supporting declaration fails to meet the requirements set forth in Interharvest/ Inc., 1 ALRB No. 2 (1975), that if any declaration is made upon information and belief, the declaration

should specify the source and basis for the declarant's belief. Moreover, the declaration fails to assert facts constituting prima facie basis for setting the election aside.

The rules against ex parte communications, 8 Cal. Admin. §§ 20700.1 et. seq., are applicable to specified types of on-the-record proceedings. § 20700.3. In the course of investigating facts relating to an election petition and of making arrangements for an election, if it is determined that an election should be conducted, Board agents must of necessity have some communications with the parties independently.[3/] An allegation that a Board agent "met unilaterally" with representatives of the parties or their supporters does not in itself charge improper conduct.

Notwithstanding the legal insufficiency of the petition and accompanying declarations, the issue raised by this objection was explored at the preliminary hearing. It appears that the employer was referring to two meetings which Board agents attended prior to the election. Board agents testified at the preliminary hearing that it was their practice, prior to an election and at the request of any party, to attend meetings of employees to explain

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[3/] The Board's rules on ex parte communications were patterned after the rules of the National Labor Relations Board on the same subject. Section 20700.3(a), which makes reference to "investigative preelection proceeding pursuant to Labor Code sections 1156.3 or 1156.7" is based on section 102.128 of the NLRB's Rules and Regulations, which make reference to "preelection proceeding pursuant to section 9(c)(1) or 9(e)." In both sets of rules the prohibition applies only to "on the record proceedings," however. Since the ALRA does not provide for an on-the-record proceeding prior to an election, inclusion of this portion of the NLRB's rules was an oversight.

the workers' rights under the statute and the election procedures. This was done at two UFW meetings prior to the Coachella Growers election, one in Blythe and the other at a labor camp. In both instances the Board agents appeared before the meeting started, read from a prepared statement, and responded to questions. The employer makes no offer of proof with respect to any different or contrary facts.[4/]

We find the procedure described entirely proper. For Board agents to appear before meetings of employees to explain the workings of the new statute is appropriate so long as the agents conduct themselves in such a way as not to align themselves with a particular party. Nothing in the employer's offer of proof suggests that the agents exceeded permissible bounds.

IV.

The employer's fourth objection is that union organizers, members and supporters trespassed upon private property, electioneered during hours of voting, and did "otherwise pressure said employees and did violate their right of self-determination." The accompanying declaration contains no allegation concerning trespass. The only allegation which could be said to relate to electioneering during voting hours is that the union "attempted at the election, and prior thereto, to induce others than those on the eligibility list to vote at said election." The sole allegation as to "pressure" consists of a conclusionary statement that the union, by and through

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[4/] This portion of the Report on Preliminary Hearing was inadvertently included in the report of another case. The parties have called the Board's attention to this error.

its agents, members, and supporters, used "excessive pressure" on employees, which intimidated employees from serving as company election observers, and caused many workers not to vote, or even, among the members of the picking crew, not to come to work on the day of the election.

Again, these declarations are insufficient. An attempt to induce persons not on the eligibility list to vote is not improper, since the union may well believe that persons not on the list are eligible to vote. The employer is in no way prejudiced by such conduct, since such voters' ballots would automatically be challenged by the Board agent and their eligibility determined in post-election proceedings if their number were sufficient to affect the outcome. An allegation of "excessive pressure", without a statement of the specific conduct alleged to constitute such pressure, is far too general and conclusionary to establish a prima facie case. [5/]

Moreover, the objection is legally insufficient even on the basis of the offer of proof made by the employer at the preliminary hearing. From that hearing it appears that the union considered 28 piece-rate workers to be eligible to vote though

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[5/] The employer calls the Board's attention to federal rules of pleading, which permit allegations of a general nature. The analogy misconceives the function of the declarations, which is to set forth evidentiary facts sufficient to establish a prima facie case. In this respect, the declarations serve a purpose similar to that performed by affidavits in a motion for summary judgment. When such a motion is made, under the federal rules, an adverse party "may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." If he does not-so respond, judgment may be entered against him. Fed. R. Civ. P. 56 (c). See, also Calif. Code Civ. Proc., § 437c

their names did not appear on the employer's eligibility list, and solicited from them affidavits stating that they did in fact work during the relevant payroll period. These 28 workers did vote subject to challenge, but the challenges were not determinative of the outcome. The employer offered to prove that one worker signed such an affidavit because of "pressure" by the union, though she believed she was not in fact eligible to vote. The union contends the worker in question did in fact work during the relevant payroll period, and the reason she was not listed on any payroll is that she worked under the name of her husband. No evidence was offered as to the nature of the "pressure" alleged. The employer also offered to prove that this worker and her husband signed authorization cards for the union only after repeated requests and visits to their home by business agents. Even if true, such conduct on the part of the union does not constitute interference by the union with the free choice of employees expressed through secret ballot vote.

In addition to the fact that persistence by organisers could hardly be said to be improper per se, the contention goes to the union's showing of interest, which is not a matter review-able in a post-election proceeding. 8 Admin. Code. § 20315(c) . See John V. Borchard, 2 ALRB No. 16 (1 9 7 6) .

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Accordingly, the United Farm Workers of America, AFL-CIO, is certified as bargaining representative for all agricultural employees of the employer in Imperial Valley, California.

Certification issued.

Dated: January 22, 1976

Roger M. Mahony, Chairman

LeRoy Chatfield, Member

Joseph R. Grodin, Member

Richard Johnsen, Jr., Member

Joe C. Ortega, Member