STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of: YODER BROTHERS, INC. Employer, and GENERAL TEAMSTERS, WAREHOUSEMEN & HELPERS, LOCAL 890, Petitioner, and UNITED FARM WORKERS OF AMERICA, AFL-CIO. Intervenor.	No. 75-RC-24-M 2 ALRB No. 4

On September 4, 1975, the General Teamsters, Warehousemen & Helpers, Local 890 ("Teamsters"), filed a petition for certification as exclusive bargaining representative of the agricultural employees of Yoder Brothers, Inc. ("Employer"). The Employer filed a list of its employees with the Board pursuant to Emergency Regulation 20310(d)(2), 8 Cal. Admin. Code § 20310(d)(2), [1/] and the Board

[1/] This regulation states as follows:

"(d) Upon service of a petition, as set forth above, the employer so served shall be under an immediate obligation to provide to the Board or its designated agent the following information:

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"(2) A complete and accurate list limited to the complete and full names and addresses of all employees in the bargaining unit sought by the petitioner appearing on the payroll applicable to the payroll period immediately preceding the filing of the petition. If the employer contends that the unit sought by the petition is inappropriate, the employer shall additionally and immediately provide the Board or its agent with a complete and accurate list of the names and addresses of the employees in the unit the employer contends to be appropriate, together with a written description of that unit. The Board will transmit a copy of such a list to each of the parties upon the regional director's determination that a showing of interest has been made by the petitioner."

on September 8, issued a Direction and Notice of Election to be held on Thursday, September 11. The United Farm Workers of America, APL-CIO ("UFW"), intervened on September 10, at which time it was provided with a list of eligible voters prepared by the Board from, the list furnished by the Employer. The election was held as scheduled on the following day, and the Teamsters received a majority. The tally of ballots shows: Approximate number of eligible voters -160, Teamsters - 81, UFW - 46, no labor organization - 7, unresolved challenged ballots - 0.

The UFW filed a petition under section 1156.3(c) of the Labor Code seeking to have the election set aside on grounds related to the eligibility list. Specifically, it is the UFW's contention that (1) the list omitted the names of certain workers who should have been included, (2) the list included the names of certain worker who should have been omitted, (3) the list contained a number of inaccurate addresses, and (4) the UFW never received the final page of the list prepared by the Board. The UFW presented witnesses at the hearing on objections who testified that in the day remaining before the election after they had received the list, the names and addresses on the list were transposed onto cards which were then divided among four sets of organizers who attempted to contact as many employees as possible. It is contended that the organizers' efforts were impeded by the alleged deficiencies in the list, in that they were prevented from contacting some eligible voters and were caused to waste time and effort in attempting to contact some persons who were not eligible to vote.

I.

Before evaluating the UFW's contentions, it will be helpful to examine the legal basis and the functions served by the requirements set forth in Regulation 20310(d)(2). The obligation" of employers to maintain "accurate and current payroll lists containing the names and addresses of all their employees" is imposed by the Act itself. Labor Code § 1157.3. That section provides that employers "shall make such lists available to* the Board upon request". Regulation 20310(d)(2) implements that statutory obligation by requiring the employer to furnish such a list, upon service of a petition for election, limited to the employees "in the bargaining unit sought by the petitioner appearing on the payroll applicable to the payroll period immediately preceding the filing of the petition".

The list furnished by the employer serves several important functions. It aids in determining whether the petition satisfies the statutory requirements with respect to seasonal peak [Labor Code, § 1156.4] and showing of interest [Labor Code, § 1156.3(a)]. Subject to appropriate modification in the course of pre-election proceedings, it serves as a basis for determining the eligibility of workers to vote in the election if one is conducted. [8 Cal. Admin. Code, § 20350(c)] Substantial compliance by the employer with the requirement of Regulation 20310(d)(2) can be critical to the timely determination of these issues, and failure to comply may give rise to certain presumptions

on these issues against the employer. [8 Cal. Admin. Code, § 20310(e)] [2/]These functions of the employer list are not involved here.

Additionally, however, the list serves as information to the unions participating in the election for the purpose of enabling them to attempt to communicate with eligible voters and to determine what names on the employer's list they may wish to challenge at the election. This information function of the employer's list has an analogue in the National Labor Relations

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[2/]The Emergency Regulations [8 Cal. Admin. Code Section 20310 (e)] provide for the invocation of the following presumptions against an employer who fails to comply:

> "(1) That there is adequate employee support for the petition;
> (2) That the petition is timely filed with respect to the employer peak of season;
> (3) That all persons who appear to vote, who are not challenged by any other party, and who provide adequate identification (as required by section 20350), in an election pursuant to the petition are eligible voters."

It is important to note that these presumptions are an aid to implementation of the statutory mandate, and not a penalty. Invocation of a particular presumption is appropriate only where the employer's failure to submit timely and complete information has frustrated the determination of facts which relate to the presumption which is being invoked. For example, where no list is timely filed, it may be appropriate to immediately invoke the first two presumptions in order to provide due notice of the election as required by Labor Code Section 1156.3(a), rather than delaying determination that an election will be held until the end of the seven-day limit. If the list is still not filed, it may be necessary to invoke the third presumption. In cases where it appears to the regional director, in the exercise of his or her discretion, that the list is incomplete, inflated, or inaccurate to such an extent that it cannot be relied upon as a basis for determining seasonal peak, showing of interest, or eligibility, any or all of the relevant presumptions may be invoked. In such cases, an employer objecting to the action of the regional director must prove that the invocation of presumptions constituted an abuse of discretion and resulted in prejudice.

Act. The National Labor Relations Board's "Excelsior Rule" requires the employer to file with the regional director, within seven days after approval of an election agreement or direction of election, a list of names and addresses of all eligible voters; and the regional director makes this list available to all parties in the election proceeding. Excelsior Underwear, Inc., 156 NLRB 1236 (1966). The employer's failure to comply substantially with the Excelsior Rule is ground for overturning an election. Ponce Television Corp., 192 NLRB No. 20 (1971); Sonfarrel, Inc., 188 NLRB No. 146 (1971); Pacific Gamble Robinson Co., 180 NLRB No. 84 (1970). The rule is not applied mechanically, however, and an election will not be set aside for an insubstantial failure to comply in the absence of gross negligence or bad faith. The Lobster House, 186 NLRB No. 27 (1970); Telonic Instrument, 173 NLRB No. 87 (1968).

We recognize that there are differences in context between the two statutes with regard to application of the names-and-addresses rule. Under the NLRA, the contours of the electoral unit are normally determined, by hearing and order or by stipulation, before the list is submitted, so that the employer can have little doubt as to what names should be included. By contrast, under the ALRA the employer may have reasonable and good faith doubt as to inclusion or exclusion of particular employees or groups of employees, based on issues which are subject to preliminary determination by the regional director and final determination by the Board after the election is conducted. Moreover, an agricultural employer with a casual work force may experience greater difficulty than the typical industrial employer in obtaining the necessary

information. Nevertheless, the mandate of ALRA Section 1157.3 is clear, and employers will be expected to exercise due diligence in obtaining and supplying names and addresses of workers as required.[3/]

[3/]The obligation imposed by section ,1157.3 ,applies with equal force to employers utilizing farm labor contractors to supply any portion of their work force. Section 1140.4(c) of the Act defines "agricultural employer" to exclude "any person supplying agricultural workers to an employer, any farm labor contractor as defined by Section 1682, and any person functioning in the capacity of a labor contractor. The employer engaging such labor contractor or person shall be deemed the employer for all purposes under this part." (Emphasis added.) Therefore under section 1157.3, the agricultural employer is responsible for maintaining and making avilable to the Board upon request accurate and current payroll lists containing the names and addresses of workers supplied by a labor contractor, as well as those employed directly.

This obligation is congruent with existing laws and regulations administered by the California Department of Industrial Relations. Labor Code Section 1174(c) states, in part, "Every person employing labor in this State shall keep a record of the names and address of all employees employed and the ages of all minors." Labor Code Section 1175(d) states: "Any person, officer, or agent who fails to keep any of the records required by Section 1174 is guilty of a misdemeanor." The specific requirements for maintaining such records are contained in Industrial Welfare Commission Minimum Wage Order No. 1-74.

It is therefore to be expected that labor contractors will have available current, accurate, and complete names and addresses of workers supplied by them. An agricultural employer utilizing a labor contractor must require that the contractor turn over such information in order that the employer may maintain payroll lists under the terms of the Act. The obligation to provide a list of employees under regulation 20310(d)(2) is in no way affected by the fact that a particular employer may utilize a labor contractor.

Failure to do so in a manner which substantially impairs the utility of the list may be grounds for setting an election aside.[4/]

II.

Turning now to the facts of the case before us, we consider first the allegation that the list omitted the names of certain workers who were eligible to vote. The evidence at the hearing indicates there were two groups of such workers: (1) six employees who were hired, during the week preceding the petition, and who appeared on the payroll list for that week; and (2) three high school students who appeared on the applicable payroll list as having worked in excess of forty hours but who were considered by the employer to be temporary since they would shortly return to school. The first group was omitted by an admitted clerical error

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[4/]In considering whether to set an election aside because of the employer's failure to comply with the Excelsior Rule, the NLRB will not consider a defense based on claims that a union had adequate access to employees in other ways, or that employees omitted from an Excelsior list were in fact aware of the election issues, since litigation of such a defense, would create an "administrative monstrosity". Sonfarrel, Inc., supra.

We find that precedent has application here. The fact that the Board has adopted specific regulations with respect to access, 8 Cal. Admin. Code § 20900, does not require a different result. On the contrary, the Board's access rule is designed in part to compensate for the fact that even a substantially complete and accurate employee list cannot be used as effectively in an agricultural election as in an industrial election, because of time constraints and the mobility of many agricultural workers. The names-and-address rule and the access rule thus stand on independent though complementary footings. We therefore decline to consider the defense raised in this case that the union had access to the workers under the Board's access rule, as well as the union's response that the access was tainted by surveillance.

on the part of the employer. The applicable payroll period ended on August 29, but the payroll check register for that payroll had not yet been run when the list was submitted. Consequently (and inappropriately) the employer used the payroll check register for the payroll ending August 23, and the six new hires did not appear on that payroll. [5/]The high school students were omitted based on the employer's erroneous belief that the unit under the ALRA would be the same as the unit covered the employer's then existing contract with the Teamsters.[6/]

There were a total of nine omissions from the list by the employer in a unit of approximately 160 eligible voters. The Teamsters led the UFW on the tally by 35 votes. In Telonic Instruments, supra, the employer omitted four names out of a unit of 111 employees. The vote there was 52 to 51 against the union with three challenged ballots. The NLRB held that there was substantial compliance by the employer with the Excelsior Rule, noting that there was no evidence of gross negligence or unwillingness on the part of the employer to allow the union to organize among all eligible employees. Similarly, in the present case, we cannot

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[5/]The error was discovered during the tally of ballots when five voters who had been challenged for not appearing on the eligibility list were checked against the proper payroll and found to be newly hired. These five challenges were resolved and the votes counted without objection by any party.

[6/]The record does not reveal whether any of the high school students actually voted. The Teamsters had had a contract with the employer since 1960, and the Teamsters were the petitioning union, with the UFW intervening only after the pre-election conference.

find any evidence of gross negligence or bad faith on the part of the employer in omitting the nine names.

Second, with respect to the UFW's contention that the list contained names of certain workers who were not on the relevant payroll, and should therefore have been excluded, the evidence at the hearing indicates that there were four groups of such workers (1) two employees who had worked the previous week but who had been terminated prior to the applicable payroll period; (2) seventeen individuals who did not appear on the applicable payroll because they were on sick leave, personal leave of absence, or vacation, but whose names were maintained on the master employee list by the employer; (3) twelve employees who the UFW contends were supervisory personnel; and (4) two employees who the UFW contends to be security guards. With respect to the first group, the reason for their inclusion is the same as that for the omission of the new hires: the employer was relying upon the check register for the previous week. With respect to the remaining three groups, the reason for their inclusion is the same as that for the omission of the high school students: the classifications in question were

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included in the bargaining unit covered by-the pre-existing contract between the Employer and the Teamsters. [7/]

[7/]There is no evidence that any of these individuals voted in the election; if they did vote, however, they did so without challenge.

For purposes of clarification we would note explicitly that the determination of the employer to list those persons in the bargaining unit under the previous Teamsters contract was incorrect both under the terms of the Act, and also under the terms of Regulation 20310(d)(2). Labor Code Section 1156.2 states in pertinent part, “The bargaining unit shall be all the agricultural. employees of an employer." The statutory definition of "agricultural employee" [Labor Code Section 1140.4(b)] in turn incorporates the definitions of Section 2(3) of the NLRA, as amended, and Section 3(f) of the Fair Labor Standards Act. Clearly, the legal requirements of who is an "agricultural employee" within the meaning of the ALRA cannot rest upon a previous contractual unit definition, worked out under the exigencies of collective bargaining without reference to any legal standard.

Regulation 20310(d)(2), by requiring a list of employees "in the bargaining unit sought by the petition," might have led this employer to believe that by supplying a list of employees covered by the existing Teamsters contract, it was complying with the regulation. The regulation, however, makes the standard of who should be on the list the employees "appearing on the payroll applicable to the payroll period immediately preceding the filing of the petition". For this reason, the omission of three employees appearing on the payroll and the inclusion of seventeen who did not appear on the payroll was incorrect under the regulation. The employer should have provided the names and addresses of all employees appearing on the payroll list, excluding supervisors and ot subject to challenge under Regulation 20350(b), 8 Cal. Admin. Code § 20350(b), calling to the attention of the Board agent any employees appearing on the list who the employer contended were not appropriately in the bargaining unit. At the same time the employer should have listed separately those employees not appearing on this particular payroll who were contended nevertheless to be eligible voters. In the future when similar questions arise, the Board may consider the failure to follow this procedure as grounds for overturning an election.

It appears, therefore, that the Employer acted in good faith and without intent to mislead the Board or any party with respect to the names of employees alleged to have been erroneously included in the list. And with the possible exception of the two employees who were terminated prior to the applicable payroll period, it cannot be said that the Employer was negligent in determining the names of employees to be included. Indeed, as to the twelve employees whom the UFW contends were supervisory personnel, the record indicates that they might not in fact be supervisors within the meaning of the applicable statutory definition.[8/]

[8/]While the ALRA, unlike the NLRA, does not explicitly exclude supervisors from the definition of "employee", ALRB regulations reflect the uniform principle of private sector labor relations in the United States that because of problems of divided loyalty a supervisor should not by operation of law be included in the same bargaining unit with employees under his supervision. Emergency Regulations Section 20350(b)(1). That principle was adopted by the NLRB even before the 1947 amendments which required it, see, NLRB v. Bell Aerospace Co., Div. of Textron, Inc., 416 U.S. 267 (1974), and is reflected in decisions of the California courts. See, Safeway Stores v. Retail Clerks International Association, 41 Cal. 2d 567 (1953) (as a matter of state public policy a union may not force an employer to bargain over union membership for supervisors); Firefighters v. City of Vallejo, 12 Cal. 3d 608 (1974) (even in the public sector, and under a charter provision which made no mention of supervisors, based on analogous federal precedents a union can claim no right to bargain as to supervisory positions).

Labor Code Section 1140.4(j) adopts virtually the same definition for the term "supervisor" as contained in Section 2(11) of the National Labor Relations Act:

> "The term 'supervisor' means' any individual having the authority, in the interest of the employer, to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward, or discipline other employees, or the responsibility to direct them, or to adjust their grievances, or effectively to recommend such action, if, in connection with the foregoing, the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment."

 (fn. cont. on page 12)

While we are prepared to accept the proposition that guards employed to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises should be excluded on the same basis as supervisors that issue had not been determined at the time the Employer submitted his list. Similarly, while we are of the

(fn. 8 cont.)

The evidence reflects that the employees in question here are mainly crew leaders responsible for quality control within each crew. They do not have independent authority to hire, fire, or discipline workers. They are paid on an hourly basis, at a higher rate than regular workers. There are salaried supervisors who have overall control of the work force, who direct the crew and the crew leaders on where to work, and who investigate any complaint made by a crew leader with regard to an individual worker. On this record it cannot be concluded that the employees are supervisors within the meaning of the Act.

[9/]Explicit statutory exclusion of guards from bargaining units under the NLRA Section 9(b)(3) was the product, as in the case of supervisors, of the 1947 amendments. The basis for the exclusion was essentially the same: "to insure to an employer that during strikes or labor unrest among his other employees he would have a core of plant protection employees who could enforce the employer' rules for protection of his property and persons thereon without being confronted with a division of loyalty between the Employer and dissatisfied fellow union members." McDonnell Aircraft Corp., 109 NLRB No. 147 (1954). Even before the 1947 amendments, however, some courts had reached the same conclusion. E.g. NLRB v. Jones and Laughlin Steel Corp., 154 F.2d 932 (1946).

While the ALRA contains no mention of guards, the principle that they should be excluded is so well established, and so well founded, that we find it implicit in the statutory scheme. We do not view Labor Code Section 1156.2 (which provides in part that the bargaining unit shall be "all the agricultural employees of the employer") to preclude this conclusion. Rather we regard the thrust of that section to prevent the fractionalization of agricultural employees covered by the Act, and employed within the same or a contiguous geographical area, into craft or departmental units based on community of interest or other similar factors commonly considered by the NLRB. The exclusion of guards, like the exclusion of supervisors, is based on the legitimate interests of management rather than on factors of community of employee interests. See, generally, NLRB v. Bell Aerospace Co., Div. of Textron, Inc., supra.

opinion that, with the exception of eligible economic strikers, only those employees who are paid or are entitled to be paid for the applicable payroll period are eligible to vote,[10/] that issue was one on which reasonable doubt might well have existed at the time. For these reasons we do not consider it appropriate to regard the Employer's conduct in including these employees on the list submitted to the Board as grounds for setting the election aside.

Third, with respect to the UFW's contention that the list contained inaccuracies as to addresses* the testimony of UFW organizers identified (a) six instances in which the location identified by the listed address did not exist, and (b) seven instances in which organizers could not locate the employee at the listed address. In several of the latter instances, organizers were told by neighbors that the employee had moved.

It is the employer's practice twice a year to distribute among employees a verification form requesting certain information, including addresses. The forms were last distributed in July, 1975

[10/]Labor Code Section 1157 provides in part "All agricultural employees of the employer whose names appear on the payroll applicable to the payroll period immediately preceding the filing of the petition of such an election shall be eligible to vote". While the NLRB permits voting by employees who are on unpaid leave if they are automatically to be restored to their duties when ready to resume work, or even by employees on layoff status if they have "reasonable expection of permanent employment," Beattie Mfg. Co., 77 NLRB 361, the more restrictive language of Section 1157 appears to preclude those results. Presumably the Legislature considered that the typical impermanency of agricultural employment, as well as the necessity for speed in the conduct of elections and determination of the results, required a different definition of the electorate. Employees on paid vacation or paid sick leave during the applicable payroll period, however, would appear to meet the test of Section 1157. Similarly, employees who have been discriminatorily discharged and who are subsequently found to be entitled to back pay for the applicable payroll period would be eligible voters.

and it was from the information received on those forms that the addresses were compiled for Board use. On this record, the errors in the form of non-existent locations do not appear to be the product of negligence on the part of the employer. Arguably the remaining errors, and particularly those attributable to changed addresses, could have been avoided by a more recent update of the employer's verification procedure. These errors are relatively small in number, however, and are clearly not the product of bad faith or gross negligence. See, Texas Christian University, 220 NLRB No. 72 (1975); The Lobster House, 186 NLRB 148 (1970; Fontainbleau Hotel Corp., 183 NLRB 1134 (1970); Valley Die Cast Corp., 160 NLRB 881 (1966). Cf. Rite-Care Poultry Co., 185 NLRB No. 10 (1970).

Fourth, with respect to the UFW's claim that the list as transmitted by the Board contained certain omissions and a missing page containing eleven names, the evidence is clear that in the process of transposing the employer's list into alphabetical order for delivery to the union, Board agents inadvertently omitted two names. The allegation that the final page of the Board list was missing appears doubtful under the evidence. The list was given to UFW organizers Brian Lavell and Alfredo Santos at the time it was determined that the UFW had satisfied the requirements for intervention. Mr. Lavell testified that he did not immediately examine the list for accuracy or completeness. The recollection of Mr. Santos with regard to what specifically happened with the list was extremely vague because, as he stated, "We were moving very

fast that day." The list was taken back to a motel room, the staple was removed, and five or six people worked on the list, transposing the names and addresses to cards and dividing up the cards into groups so that four teams of organizers could contact the workers. Thus, there is no direct evidence that the list when received was missing the final page, and there is evidence of enough confusion among the organizers themselves so that the final page could have simply been lost. On the basis of this record, we cannot find that it has been demonstrated that the final page was in fact missing when the list was turned over to the UFW.

Since we find that the allegation that the Board failed to supply the final page of the list is unsupported by the evidence, we must consider only the two names which were omitted by clerical error. Although a substantial clerical error by the Board in supplying an eligibility list may be grounds for setting aside an election, see Coca-Cola Co. Foods Division, 202 NLRB No. 123 (1973), we do not believe that the omission of two names, in itself warrants overturning this election.

We reaffirm that it is the employer's obligation to supply an accurate, up-dated list of names and addresses of workers in accordance with the applicable statutory provisions and regulations. The burden of explaining defects or discrepancies in the list is consequently upon the employer. Where it appears that the employer has failed to exercise due diligence in obtaining and supplying the necessary information, and the defects or discrepancies are such as to substantially impair the utility of the list in its informational function, the employer's conduct will be considered

as grounds for setting the election aside. Where the list is deficient due to the gross negligence or bad faith of the employer, an election may be set aside upon a lesser showing of actual prejudice by a union. Under the total circumstances of this case, we find that the Employer did substantially comply with the requirements of Regulation 20310(d)(2), and that the deficiencies in the list are not sufficient grounds for setting aside the election. We therefore certify the Teamsters as the bargaining representative of these employees.

Certification issued of the following unit: All agricultural employees of the Employer, excluding supervisors as defined in the Act.[11]/

Dated: January 7, 1976

Roger M. Mahony, Chairman

LeRoy Chatfield, Member

Richard Johnsen, Member

Joseph Grodin, Member

[11]/We make no determination as to the status of the employees claimed to be guards since the record is insufficient for the determination of the issue. The lack of determination does not preclude either party from seeking clarification or modification of the certification at a later date.

Member, ORTEGA, J., dissenting:

I respectfully dissent from the majority opinion on the grounds (1) that the standards set forth in the majority opinion as to what would be considered compliance with 8 Admin. Code §20310(d)(2) (providing an accurate list of names and addresses of employees, "Excelsior list") are vague and subjective, and make compliance with that Section easy to avoid, (2) that because of the nature of agricultural employment patterns and the speeded up process required by the Agricultural Labor Relations Act the need for a complete and accurate employee list is greater than that necessary under the NLRB and therefore strict compliance with §20310(d)(2) should be required, and (3) that

the inaccuracies, wrongful omissions and additions in the list supplied by the employer in this case had a cumulative effect that requires setting this election aside.

The majority adopts the standards that have been established by the NLRB. However, they excuse departure from those standards by indicating that under the ALRA an employer may have "greater difficulty" than an industrial employer in obtaining the necessary information and may have "good faith doubt" as to which employees to include in the list. I submit that the NLRB standards are vague, highly subjective and capable of different interpretations and therefore should not be our standards. The causes of the difficulty and doubts of the employer in compiling an accurate list and the brevity of time in which to campaign argue for more strict standards rather than excuse departure from already lax standards of the NLRB.

The majority test is that the employer's conduct will be considered grounds for setting aside an election when the employer has failed to exercise "due diligence" in obtaining and supplying the necessary information and the defects or discrepancies are such as to "substantially" impair the utility of the list. Where the list is deficient due to "gross negligence" or "bad faith" an election may be set aside upon a "lesser" showing of actual prejudice. First, all these tests are primarily based on a subjective evaluation of the employer's behavior. Did he exercise due diligence? Was he grossly negligent or merely negligent? Did he act in "bad faith"? But what is due diligence? Is supplying a Christmas list of employees due

diligence? Yes. (Teltonic Instruments, 173 NLRB No. 87 (1968). Is supplying a list of the employees covered by the pre-existing contract due diligence? And what is "bad faith"?

Granting that any test, unless it is purely a numerical formula, will, in the final analysis, require some subjective evaluation, I would rather the test be based solely on the prejudicial effect of a defective list on the union's ability to communicate with prospective voters. I would base this on the need for the list of names and addresses as expressed in Excelsior Underwear[1] and made more compelling in the agricultural industry. Such a test would be functionally related to the goals of the requirement imposed by 8 Cal. Admin. Code §20310(d)(2), would tend to be less subjective than one based on employer intent, and would encourage full and complete compliance.

Although the NLRB cases cited by the majority use the terms due diligence, gross negligence and bad faith, a reading of those cases suggest that, in fact, all of them turn on the extent and nature of the inadequacy of the list. We therefore should drop the employers intent language and adopt a test that is related to the purpose of the requirement for a list. Employers should know that an election will be set aside when they fail to provide complete and accurate lists of their employees, They should know that the statute requires them to maintain accurate and current payroll lists containing the names and addresses of

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[1]156 NLRB No. 111 (1966) which states in part, ". . .we regard it as the Board's function to conduct elections in which employees have the opportunity to cast their ballots for or against representation under circumstances that are free not only

(fn. cont'd on p. 4)

all their employees (Labor Code §1157.3), and that this Board will not lightly excuse them from that requirement. It imposes on them an affirmative duty to compile the data so that they may be able to supply complete and accurate employee lists. Employers should not be led to believe that they can rely on Christmas lists, current bargaining unit lists or labor contractor neglect as a rationale for any insufficiencies in the list. If a list submitted by an employer has such inaccuracies or omissions that it impeded communication to some workers and therefore impeded a free and reasonable choice among employees then that list should be considered inadequate and the election set aside. The purpose of the requirement of the list (aside from the other purposes discussed by the majority) is to enhance communication with the workers and if such communication is impeded then the purpose of

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(fn. 1 cont'd)

from interference, restraint, or coercion violative of the Act, but also from other elements that prevent or impede a free and reasoned choice. Among the factors that undoubtedly tend to impede such a choice is a lack of information with respect to one of the choices available. In other words, an employee who has had an effective opportunity to hear the arguments concerning representation is in a better position to make a more fully informed and reasoned choice. Accordingly, we think that it is appropriate for us to remove the impediment to communication to which our new rule is directed. . . . "

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This is not, of course, to deny the existence of various means by which a party might be able to communicate with a substantial portion of the electorate even without possessing their names and addresses. It is rather to say what seems to us obvious—that the access of all employees to such communications can be insured only if all parties have the names and addresses of all the voters. . . ." (Emphasis in original.)

the requirement of the list is defeated.[2]

What is troublesome in the majority's test is that it implies that *if* the employer supplies a list he need not be concerned about its accuracy if he can say that that is .the best he can do. In this case the employer allegedly updated his employee address list twice a year. Is this sufficient due diligence? I think not. Under the majority opinion, an employer could claim that he updates his list once a year. Would that be due diligence? Again, I would emphasize that because of the nature of agricultural employment patterns the employer has a duty under our statute to keep a current and correct list of all employees and that he must supply that list to the ALRB. Accepting a twice a year updating as sufficient defeats the purpose of the statute (§1157.3) and its underlying assumption about the nature of agricultural employment patterns.

I might note at this juncture that I also disagree with the majority's view, cited at footnote 2 of their opinion, that the presumptions of 8 Cal. Admin. Code §20310(e) are not a penalty. I would find that they are a discretionary penalty and that they may be applied as necessary to effectuate the purpose of the ALRA including applying them as means to encourage full compliance by others. The Section states: "Failure to effect timely compliance with these requirements may give rise to <u>any</u> <u>or</u> <u>all</u> of the. . .presumptions" (Emphasis added).

[2]I agree with the majority that access to the worker at the work site is no defense to failure to supply a complete and accurate list for the reasons they stated. See also footnote 1, in this opinion.

Turning to the specific facts of this case we find that the employer had had a contract with the Teamsters for 15 years. The Teamsters filed the petition for election. The employer gave the Board a list that encompassed those employees that were covered under the Teamsters contract. Nine employees were omitted; six because the employer used the wrong payroll period and three because they were high school students and not covered under the Teamsters contract. In addition two workers who were fired were included. Seventeen workers on leave— without pay and therefore presumably ineligible, and two security guards were also included. The total I arrive at is 30 names that were wrongfully included or excluded. In considering the effect of inaccuracies in an employee list we must consider the total inaccuracies, for it is the total number that determines whether the union could use the list as an effective means of communication. Whether those not on the list nevertheless voted does not minimize the effect of errors, for it means that they may have voted without the benefit of the union presentation of its views. As to those ineligible who were on the list, the fact that they might not have voted similiarly does not lessen the effect on the union's attempt to communicate with those workers who were eligible.

The union in this case found that at least six of the addresses given did not exist. They also found an unspecified number of workers who had moved. (We note that this employer

operates a nursery which allegedly has more stable and year round employment than other agricultural employers.)

The cumulative effect of 30 errors on the list, and at least six wrong addresses, in an election in which there were 160 eligible voters, and in which the difference in the results between the Teamsters and the UFW was only 35 votes I find is substantial.

For all the reasons stated above, I would set this election aside and therefore dissent from the majority opinion.

Dated: January 7, 1976

JOE C. ORTEGA

Member