STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

LU-ETTE FARMS, Employer, and WESTERN CONFERENCE OF TEAMSTERS, I.B.T., LOCAL 898, Petitioner, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Intervenor.	No. 75-RC-41-R 2 ALRB No. 49

In an election conducted October 30, 1975, a majority of votes were cast for the United Farm Workers of America, AFL-CIO ("UFW").[1/] The employer filed timely objections which were considered initially at a preliminary hearing conducted by then Board Member Grodin in El Centro on December 2, 1975. As a result of that preliminary hearing, arrangements were made for supplemental investigation of certain specified facts. Reports of the preliminary hearing and of the supplemental investigation were served on the parties, and they had opportunity to respond. Based

[1/] The Tally of Ballots showed that of approximately 114 eligible voters, 56 votes were cast as follows: UFW - 39; Teamsters - 11; No Labor organization - 5; Void Ballots - 1.

on the report of the preliminary hearing, the reports of the supplemental investigation, and the responses of the parties, we conclude that there exist no factual disputes requiring an evidentiary hearing, and that the results of the election should be certified.[2/]

The employer's first objection is that the Board agent in charge of the election improperly invoked the presumptions provided for in 8 Cal. Admin. Code Section 20310(e). The presumptions were invoked because of the failure of the employer to provide any employee addresses within the 48-hour period as required by Section 20310(e) and its further failure even to provide addresses for a substantial number of employees.[3/] The employer argues that invocation of the presumptions was improper because (a) the Board agent who invoked them did so on the erroneous assumption that they were to be invoked automatically rather than on a discretionary basis; (b) the list supplied by the employer was substantially complete; and (c) the regional office failed to comply with a directive from the General Counsel dated October 24, 1975 to the

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[2/]An employer objection based on the alleged inadequacy of the union's showing of interest was dismissed by the regional director on the ground that such matters are not reviewable in a post-election objections proceeding. 8 Cal. Admin. Code Section 20315(c). The employer's request for review of that dismissal is denied.

The regional director also dismissed objections filed by the Western Conference of Teamsters, Agricultural Division, International Brotherhood of Teamsters and various of its affiliated local unions, on the ground that the declaration and other evidence submitted in support of the petition were legally insufficient. The Teamsters' request for review of that dismissal is also denied.

[3/]The election petition was filed on October 23, 1975. The original eligibility list which the employer submitted on October 25, 1975 contained no addresses. A supplementary list submitted on October 27, 1975 contained addresses for approximately 45 out of approximately 114 employees.

effect that determination as to whether to not an employee list is substantially complete or accurate is to be made by the regional director, and that if a regional director determines that it is not substantially complete or accurate he or she "shall state the reason for this determination in writing and serve a copy on all parties." The regional director made no written determination here.

The employer does not claim that invocation of the presumptions adversely affected its interests in the election except insofar as it was presumed that the union had obtained the necessary showing of interest. Since matters relating to showing of interest are not litigable in a post-election proceeding under Labor Code Section 1156.3 (c), 8 Cal. Admin. Code Section 20315 (c), the objection is dismissed. John V. Borchard Farms, 2 ALRB No. 16 (1976), Jack or Marion Radovich, 2 ALRB No. 12 (1976).

The employer's other objection is that there was insufficient notice of the election which resulted in a nonrepresentative vote. Of approximately 112 eligible voters,[4/] 56 voted in the election at 2:00 p.m. on Thursday, October 30, 1975. The employer asserts in its objection petition that the official Notice of Election was not posted or handed out until the day of the election; and that over 50% of the people who were eligible to vote were not at work on that day, and therefore presumably received no notice. At the preliminary hearing on December 2, the employer further contended that although Board agents promised

[4/] The supplemental investigation done by the Executive Secretary and served upon all the parties showed that 2 of the 114 names of eligible voters on the list supplied by the employer were actually duplications.

at the pre-election conference on October 29 to distribute notices to workers in the fields the following morning, they did not in fact appear until 11:30 a.m. The UFW contended in response that any delay in notice to the workers in the fields was of no consequence since nearly all of those employed on the day of the election voted, and those who did not vote were working elsewhere and would not have received notice in any event.

At the preliminary conference it was agreed that further investigation of the notice issue should proceed along two lines: (a) statements should be obtained from the Board agents involved with respect to the nature of the notice provided; and (b) the employer's payroll records should be analyzed to determine when eligible voters who did not vote last worked for the employer. This supplemental investigation was conducted and the results served upon all parties.

We first note that this election was carried by less than a majority of potentially eligible voters, since only 50% of all eligible voters participated in the election. However, these numbers alone do not indicate that the vote was not representative. The N.L.R.B. has certified elections in which a minority of eligible voters participated, in the absence of evidence that any voter or voters were denied the opportunity to vote. NLRB v. Central Dispensary and Emergency Hospital, 15 LRRM 643 (D.C. Cir. 1944); cert, den, 324 U. S. 847 (1945) Valencia Service Co., 99 NLRB 343, 30 LRRM 1074 (1952) See also Trusio v. Pennsylvania Labor Relations Board, 87 LRRM 2832 (Pa. Ct. Com Pis 1974). The bare fact that a minority of eligible

voters participate in an election is not in itself grounds for setting aside the election. The question before us here is whether or not employees were denied the opportunity to vote as a result of the notice procedures in this election. We find they were not.

We are committed to the principle that every effort should be made to notify eligible employees of an election and give them an opportunity to vote. However, we note that the requirement of the ALRA that an election be held within 7 days of the filing of a petition combines with rapid turnover in the workforce characteristic of much of California agriculture to create peculiar difficulties in providing such notice. The burden of confronting these difficulties falls in the first instance on the Regional Director and Board agents in charge of the case, but particularly in view of the time constraints involved, the parties themselves are expected to participate in efforts to notify employees.

In this case, the employer points to two alleged defects in the notice given. With respect to the employer's contention that notice should have been given to workers earlier on election day, it appears that two Board agents went to the employer's premises at 8:30 a.m. on that day, and exercised due diligence in providing written and oral notice to workers in both English and Spanish. Prom comparison of the employer's payroll records with the regional office voting records it appears that only 7 of the 53 eligible workers who were at work on the day of the election failed to vote. These uncontradicted facts lead us to conclude that this contention is without merit.

The employer also contends that notice should have been given to employees prior to election day. Comparison of the employer's payroll records with the eligibility list indicates that 40 out of the 56 voters who did not vote last worked for the employer prior to October 23. Thus, even had notice been disseminated at the work place the day of the filing of the petition, these employees might not have received it. The employer's late and only partial compliance with the requirement that it furnish a list with addresses of its employees (see footnote 3, supra) made any other means of notifying them by either the Board agents or the unions largely a matter of guesswork.[5/] Nor did the Board agents have any way of knowing that a number of the employees on the list submitted to it were no longer working for the employer and might not be reached by the notice procedures they selected. The employer does not assert that it made any efforts to reach these employees

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[5/] One means of notifying eligible voters who are no longer at work is to attempt to contact them individually at their addresses. We decline to make individual notification by the Board agent mandatory, however, since even if a complete list is timely furnished, the burden of supplying individual notice within the 7-day period may simply be too great. Rohr Aircraft Corp., 136 NLRB No. 122 (1962). We note that knowledge of the addresses of eligible voters would be helpful in devising other means of notice as well, such as posting of notices in labor camps or community stores or the use of radio announcements in appropriate areas, and would make possible notification of potential voters by the union or unions involved. We reaffirm the discretion of the Regional Director and Board agents to devise means of notice which are appropriate under the circumstances. See Regulations Section 20350(a); Rohr Aircraft Corp., supra.

itself.[6/] Under these circumstances, we find that the notice procedures employed here were adequate and that the election was representative.[7/]

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

Certification issued.

Dated: September 29, 1976

Gerald A. Brown
Roger M. Mahony
Robert B. Hutchinson
Ronald L. Ruiz

[6/] Indeed, we note that the employer is attempting to rely on its own misconduct as a ground for setting aside the election to the extent that its failure to comply with Board Regulations requiring the furnishing of a complete and accurate list of the names and addresses of all employees may have prevented notification by the union or by board agents of employees no longer working for the employer on the day of the election. Such reliance is prohibited by Section 20365(b) of the Regulations. Furthermore, the N.L.R.B. has taken the position that an employer who fails to post notices of election or to supply lists of eligible voters is estopped from raising the argument of an unrepresentative vote, as ground for setting aside the election. National Mineral Co., 39 NLRB 344, 10 LRRM 13 (1943).

[7/] We note that the supplemental investigation referred to above discloses that at least 2 employees who last worked prior to October 23 heard of the election and voted, and that of 15 employees who worked during the week prior to the distribution of notice on the morning of the election, but did not work on election day itself, 8 voted. The record does not disclose how these people received notice of the election or whether other employees who were not working for the employer on the day of the election and who did not vote also received notice of the election. In any case, the employer's argument that no employees not working for the employer on the day of the election received notice of the election is clearly erroneous.

MEMBER JOHNSEN, dissenting:

I respectfully dissent from the majority opinion on the grounds that the Board's failure to provide adequate notice of an election caused the disenfranchisement of a substantial number of voters. For those at whom it was directed, the notice provided was adequate. The problem with this election arises from the fact that notice was directed only at a certain segment of the eligible voters -- namely, those who happened to be working at the employer's farm on the day of the election.[1/] A full 50 percent of the eligible voters were either not working or working elsewhere at the time notice was being given. That group of potential voters was thus effectively disenfranchised.

One of the basic tenets of the Act is that, with regard to representation elections, the Board should strive for maximum participation of the employees eligible to vote.

[1/] The Act does not limit voting eligibility to that particular category of workers:

> "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 . . . ." Labor Code Section 1157.

(See Labor Code Section 1156.4; 8 California Administrative Code Section 20350.) Toward that end, the Act provides that the Board can hold *a* representation election only "upon due notice to all interested parties." Labor Code Section 1156.3(a). The concept of due notice is reflected in the Board's regulations at 8 California Administrative Code Section 20310(g):

> "Upon the filing and service of a petition, the Board or its agent will seek the cooperation of all parties in the dissemination to potential voters, of official Board notices of the filing of the petition and official Board notices of the direction of an election, where appropriate."

This section clearly calls for a prompt effort to notify eligible voters of a pending election. It is true, as the majority states, that the parties themselves are expected to participate in efforts to notify employees, but the initiative must come from the Board and its agents. Here the Board agent did not begin to enlist the cooperation of the parties until late in the day preceding the election. No notices of the filing of the petition had been reproduced and posted, nor had any announcements of a pending election been made to the media. The last minute onsite election notification used here fell far short of the notification effort that is contemplated by Section 20310(g).

A more timely notification effort would have given the eligible workers who were not present on the election day some opportunity to be apprised of the election.[2/] The list provided by the employer did not contain addresses for all the eligible workers, but the principal means of notification would,

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[2/] While the severe time restraints imposed by statute will not always permit much advance notice of an election, at least there should be some opportunity for workers to be notified of the exact time and place of an election. Carl Joseph Maggio, Inc., 2 ALRB No. 9 (1976).

in any event, have been by word of mouth or by some form of mass communication, such as radio and local newspapers. It is to be presumed that all workers on the list of eligible voters have a vested interest in the election. The tally shows that the absent workers could have participated in sufficient numbers to affect the outcome of the election had they received some form of advance notice.

However, it is not necessary to indulge in speculation as to what the absent but eligible workers would have done had they received notice of the election. The integrity of the election process requires that at least some effort be made to give all eligible voters an opportunity to receive the basic information concerning time and place of the election. Here, a significant portion of the "electorate" was not given that opportunity. They were in effect disenfranchised. This is a considerably different situation from that wherein the notice given is deficient but not discriminatory in its application.

Under the circumstances presented in this case, granting certification amounts to condoning improper notification procedures and condoning the disenfranchisement of eligible voter employees who do not happen to be on the employer's premises on the day of the election. The election should be set aside so that, upon the filing of a new petition, proper notification procedures can be employed and a more representative vote obtained.

Dated: September 29, 1976

Richard Johnsen, Jr., Member