STATE OP CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

VEG-PAK, INC., Employer, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Petitioner	)	No. 75-RC-11-M 2 ALRB No. 50

On September 10, 1975, a representation election was held among the employees of Veg-Pak, Inc. (employer). The direction and notice of election specified the unit as "all agricultural employees of Veg-Pak, Inc., excluding packing shed employees". The ballots in this election, along with others, were impounded pursuant to Board order pending determination of the multi-employer bargaining unit issue in Eugene Acosta et al, 1 ALRB No. 1. The ballots were counted and a tally of ballots issued on September 17, 1975. The tally showed 40 votes for the United Farm Workers ("UFW"), and 6 votes for no labor organization.

Objections to the election pursuant to Labor Code Section 1156.3(c) were timely filed by the employer and by General Teamsters, Warehousemen and Helpers Union Local 890 and Truck Drivers, Warehousemen and Helpers Local 898 ("Teamsters").

Pursuant to our authority under Labor Code 1146, the decision in this matter has been delegated to a three-member panel of the Board.

TEAMSTER OBJECTIONS

The Teamsters objected to the inclusion in the unit of truck drivers and certain other job classifications on the grounds that these employees have a history of separate collective bargaining and do not share a community of interest with other agricultural employees, and on the grounds that the employer may be within the jurisdiction of the NLRB. We have previously considered similar objections filed by the Teamsters in other cases. See Associated Produce Distributors, 2 ALRB No. 47, and cases cited therein. The factual and legal issues presented by these cases are substantially the same.[1/] Accordingly, we dismiss these objections on the grounds stated for dismissal of these same objections in Associated Produce Distributors, supra.

EMPLOYER'S OBJECTIONS

On October 27, 1975, the Board issued an order dismissing certain of the employer's objections and setting for hearing the allegations in paragraphs 2, 6(a) and 10 of the petition. The hearing was held on November 11, 1975, in Salinas, California.

1. The employer contends in paragraph 2 that this election was barred by an existing collective bargaining agreement.

[1/] As in Associated Produce the number of employees in the disputed classifications is insufficient to affect the results of the election. There are 7 truck drivers shown on the eligibility list in the Regional office file.

Since the agreement in question was executed prior to the effective date of the ALRA,[2/] we dismiss this objection. Labor Code 1156.7(a).

2. In paragraph 6(a) of its petition, the employer alleges that there was electioneering near the polls and that UFW representatives were at or near the polls during the election. More specifically, the employer contends that UFW representatives talked to employees waiting to vote both before and after the polls opened, that the buses which carried the employees to vote had pro-UFW bumper stickers on them, that some employees carried bumper stickers with them as they voted, and that people shouted "Viva Chavez" after voting. As discussed below, we find no merit to these objections.

The employer's objections concerning the activities of union representatives before and after the polls opened involve Jeffrey Lewis, a legal worker for the UFW,[3/] and one other UFW representative identified as Arturo Rodriguez. This election was conducted in the employer's machine shop, a separate building near its packing shed. Employees entered the shop by a door

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[2/] The agreement is between a multi-employer group and the Teamsters, covers the employer's truck drivers, and is effective from 1973 through July 31, 1976.

[3/] Pursuant to its decision in Interharvest, Inc., the Board on October 27, 1975, ordered the employer in this case to serve declarations in support of its objections on the UFW no later than 5 days prior to the hearing. However, it is undisputed that the employer did not do so until the day before the hearing. At this time the UFW first became aware of the precise nature of the employer's objections, and that the objections concerned Mr. Lewis. The UFW contended that it could not produce Mr. Lewis on the first day of hearing, and at the end of the day requested that the hearing be continued until the next day when he could be present. The hearing officer denied this request. Because we are able to dispose of these objections on the evidence in the record, we do not rule on the effect of the employer's failure to timely comply with the Board's order.

facing the packing shed, and left by a door on the opposite side of the shop. There were no windows in the shop so that it was only possible to observe the area around the shop from the door through which employees entered to vote. The majority *of* the employees in this election voted in two groups right after the polls opened. The first group to vote consisted of about 6 truck drivers. The second group, which voted immediately after the truck drivers, consisted of about 35 employees who arrived in the employer's buses. These employees waited for the polls to open near the loading dock of the employer's shed, about 80 feet from the shop where the polling took place. According to two of the truck drivers who testified for the employer, Mr. Lewis and Mr. Rodriguez spoke to some of these employees prior to the opening of the polls.[4/] Subsequent to the opening of the polls, the testimony at most establishes that Mr. Lewis and Mr. Rodriguez were in the vicinity of the second group of employees as they were forming lines to vote, and may have been talking to a UFW observer before the observer joined 5 other

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[4/] The employer witnesses testified that Mr. Lewis had a clipboard and appeared to be making marks on a list. UFW witnesses testified that he was explaining challenge forms provided by the UFW to the UFW's 4 designated observers. Since the employer witnesses admittedly were unable to see or hear exactly what Mr. Lewis was doing, their testimony is not inconsistent with that of the union witnesses. In any event, the employer specifically stated at the hearing that it does not contend that an improper list was kept.

employees and all 6 moved into line to vote. Both Mr. Lewis and Mr. Rodriguez left in their car when the two truck drivers left shortly after voting.

The employer contends that the rule in Michem Inc., 170 NLRB 362, (1968), would require us to set aside the election without inquiring into the content of these conversations. However, Michem only applies where prospective voters are in the polling area or waiting in line to vote. Harold W. Moore & Son, 173 NLRB No. 1258 (1969). The conversations in this case took place in the loading dock area approximately 80 feet from the entrance to the shed.[5/] Nor does the evidence establish that Mr. Lewis spoke to employees who were in line waiting to vote. The Michem rule seeks to insure that "the final minutes before an employee casts his vote should be his own." Mr. Lewis spoke with a UFW observer at the latest while employees were moving into line to vote at some distance from the shed, and in fact left the area entirely shortly after these employees began to vote. We find that these conversations were not such interference as the NLRB contemplated when it stated the Michem rule. Nor has the employer shown that there was prejudice to the

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[5/] At the pre-election conference, the board agent in charge apparently stated that there would be no electioneering within approximately 50 feet of the polls. She did not designate an area at the time of the election itself. The employer urges us to adopt a rule that where the board agent fails to designate an area, the polling area should comprise all of the employer's property. Such a rule would be highly impractical in this industry, given the size of some farms and the fact that it is often not possible to be certain which fields belong to which farm.

fairness of the election as a result of these conversations. Southwestern Portland Cement Co. v. NLRB, 70 LRRM 2536, (5th Cir. 1969), cert. den. 396 U.S. 820, (1969).

Later on, the employer's observer saw Mr. Lewis and Mr. Rodriguez in the vicinity of the polls. Again, the testimony at most establishes that after approximately 75% of the voters had voted, the two men were observed standing in a parking area so that voters returning to the buses after voting has to pass within 15-20 feet of them. The observer did not see them speak to any employees or do anything but stand there. When a Board agent approached the two men and spoke to them, they crossed the street to an area off the employer's property, and subsequently left the area entirely.

Presence of union organizers at or near the polling place, in the absence of evidence of coercion or other objectionable conduct, is insufficient to warrant setting aside an election. Harlan #4 Coal Co. v. NLRB, 85 LRRM 2313, (6th Cir. 1974). In Sam Barbie, 1 ALRB No. 25 (1975), we declined to overturn an election where an organizer was present throughout the election at a distance of about 50 feet from the polls where he did not engage in electioneering or attempt in any way to interfere with the orderly processes of the election. See also Green Valley Produce Cooperative, 1 ALRB No. 8 (1975); R.T. Englund Company, 2 ALRB No. 23 (1976).

With regard to the employer's contentions concerning bumper stickers, all parties agreed that the employer's buses

which carried most of the employees to vote had pro-UFW bumper stickers on them. These buses were driven to the polls and parked by the employer's supervisors, pursuant to an agreement reached at the pre-election conference. The bumper stickers had been placed on the buses the day before the election. Also some private vehicles parked in the area had some stickers on them. During the election these vehicles were approximately 80 feet from the machine shop. In addition, there was testimony that one or more employees may have carried bumper stickers or worn UFW buttons as they went to vote. In previous cases we have found that the presence of campaign insignia in or about the polling area is not a ground for setting aside an election in the absence of evidence that the insignia caused some disruption of the polling place. Harden Farms, 2 ALRB No. 30 (1976); R. T. Englund, 2 ALRB No. 23 (1976); Chula Vista Farms, Inc., 1 ALRB No. 23 (1975).

The evidence also showed that an unidentified employee shouted "Viva Chavez" after he had voted. Most of the employees had voted when this occurred. This conduct is not grounds for setting aside an election, since, quite apart from its timing, it is not of such character as to affect the free choice of other employees. See Harden Farms, Supra.

We finally reach the question of whether the conduct discussed above warrants overturning this election when considered in its totality. The record in this case indicates that this entire election was conducted in a calm and orderly fashion. There was no "environment of tension or coercion so related to

the election as to have had a probable effect upon the employees' actions at the polls". NLRB v. Basic Wire Products, Inc., 89 LRRM 2257 (6th Cir. 1975); NLRB v. Zelrich Co., 59 LRRM 2225 (5th Cir. 1965). Accordingly, we dismiss the objections in paragraph 6(a) of the employer's petition.

3. In paragraph 10 of its objections, the employer objected to the conduct of the ballot count in this case on the grounds that the Board agents failed to follow Section 20365 of the Rules and Regulations and the Board's Manual of Procedures in conducting the count. The sole evidence offered at the hearing in support of this objection was the testimony of the employer's observer that she was not notified in advance of the ballot count and was not present at the count. Petitioner's representative who was present after the election when the ballot box was sealed and at the tally when it was opened testified that the seals were intact. The employer does not suggest that there was any tampering with the box or any impropriety in the count, but only contends that it was entitled to have its observer present at the tally.

We have previously held that the Board is not precluded by Section 20365 of the Regulations from proceeding with an election tally in the absence of a party's representative. J. R. Norton Co., 1 ALRB No. 11, (1975). It is obviously desirable that all parties receive adequate notice of the tally of ballots and be given an opportunity to have an observer

present. J. R. Norton, supra; Salinas Marketing Cooperative, 1 ALRB No. 26, (1975). However, the fact that the employer did not have an observer present at the tally is not alone grounds for setting aside the election.

There remain before us the employer's objections in paragraphs 1 and 7(a) and (b) of its petition. In Associated Produce Distributors, 2 ALRB No. 47, (1976) we considered and dismissed objections which are substantially the same. As in that case, we here dismiss the objection in paragraph (1) that the NLRB has preempted the authority of the ALRB on the grounds that this is not a proper subject for review in a proceeding under 1156.3 (c) of the Act. Samuel S. Vener Company, 1 ALRB No. 10, (1975). We note that the NLRB has declined to assert jurisdiction over the employer's field workers on the ground that they are agricultural employees,[6/] and on this basis we dismiss the objection in paragraph 7(b) that the NLRB has preempted the authority of the ALRB in this particular case. Finally, we take notice that the NLRB found in its investigation of Case No. 20-RM-1906 that the employer is engaged in the

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[6/] In NLRB Case No. 20-RM-1906, the employer filed a petition for certification covering a unit including "mechanics, hi jos, truck drivers except long haul, shed workers and field workers". On December 2, 1975, the regional director of Region 20 of the NLRB issued her decision dismissing this petition. The dismissal was upheld by the NLRB on February 9, 1976.

business of harvesting, hauling, packing and selling broccoli and cauliflower crops, that it provides these services in the Salinas area on a contract fee basis to various growers unrelated to it, and that it owns none of the crops for which it provides these services. On these findings we dismiss the employer's objection in paragraph 7(a) that its shed workers are agricultural employees and should have been included in the unit. [7/] Associated Produce Distributors, supra, McFarland Rose Production Co., 2 ALRB No. 44; Carl Joseph Maggio, 2 ALRB No. 9.

The United Farm Workers is hereby certified as the collective bargaining representative for a unit of all agricultural employees of Veg-Pak, Inc., excluding packing shed employees.

DATED: October 1, 1976.

Gerald A. Brown, Chairman

Richard Johnsen, Jr., Member

Roger M. Mahony, Member

[7/] As in Associated Produce, the employer also objected that mechanics were excluded from the unit, and as in that case, we note that the Direction and Notice of Election did not exclude mechanics.