STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

MAPES PRODUCE COMPANY, Employer, and WESTERN CONFERENCE OF TEAMSTERS LOCAL 890, Petitioner, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Intervenor.	)	No. 75-RC-23-M 2 ALRB No. 54

The Western Conference of Teamsters, Local 890 ("Teamsters") received the majority of the votes cast at an election held on September 12, 1975, among the employer's agricultural employees at Brentwood, Edison, and Blythe.[1/] The United Farm Workers of America, AFL-CIO ("UFW") objected to the election on various grounds including (1) that the eligibility list supplied to the UFW was defective and not supplied by the Board in time for its effective use, and (2) that the election

[1/]The results of the election were as follows: Teamsters - 72; UFW - 50; No Union - 2; unresolved challenges - 25. The regional director issued his Report on Challenges on February 6, 1976, in which he recommended that 12 challenges be overruled and 13 be sustained. The UFW filed exceptions in which it urged that all the challenges be sustained because of irregularities in procedure, If we were to do so, the Teamsters would still receive the majority of votes. Since there is no exception to the regional director's recommendation that 13 challenges be sustained, we so rule. The remaining challenges are not sufficient in number to affect the outcome of the election.

was not scheduled during the seven days following the filing of the Petition for Certification.[2/]

1. Eligibility list. The Teamsters had filed a Petition for Certification on September 3, 1975. The UFW intervened on Monday, September 8, 1975. On that same day the UFWs representative requested of the Board agent a copy of the eligibility list and was told by the agent that he did not have it, but that it would be made available the following day. On Tuesday, September 9, 1975, the Board agent could not be located and finally at 6:00 p.m. on Wednesday, September 10, the UFW's representative was informed that the list would be made available to her the next day, September 11, at the preelection conference. Although there were no eligible voters in Salinas, for some unexplained reason the pre-election conference was held in Salinas. At that conference, identical lists were provided to the Teamsters and the UFW by the Board agent. The Teamsters, however, had been given names and addresses of Mapes employees as early as August 26, 1975, by reason of their collective bargaining agreement with the employer.[3/] The UFW representative returned to the Stockton area from Salinas about 2:00 p.m. on September 11, with the list and began organizing with the aid of the list in the Brentwood area about 4:00 p.m.,

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[2/]Because we conclude that the election should be set aside based upon these defects, we do not reach the other objections.

[3/]The employer's payroll period in question was from August 27 through September 2, 1975.

and continued until about 8:00 or 9:00 p.m. that evening. Because of the workers' schedule and the election the following day, that proved to be the UPW's sole opportunity to reach the workers with the aid of the list. The evidence also indicates that on August 25 and 26, the Teamsters were in the Mapes fields with the workers obtaining signatures for membership and authorization cards, advising them of a wage increase that they had negotiated for them which was to take effect on August 28, 1975, and also advising them of the upcoming election.

The UFW's copy of the eligibility list (with the last page missing) was introduced into evidence. An examination of that list reveals the following facts. Three hundred fifty-four numbered names appear on the list.[4/] One hundred twenty-one names were accompanied only by post office boxes instead of addresses; nine of these post office boxes were located in Somerton, Arizona; others were located in such places as Poston, Arizona; Brawley, Heber, Oakley, and Knightson, California, to name a few. There were 64 post office box addresses for Brentwood workers, exactly twice the number of workers that have a given street address in Brentwood. There were 48 names without any address whatsoever. There were seven names with addresses that were illegible. There were 60 names bearing addresses in the El Centro area although Mr. Jackson, the company's general manager, had testified that the company had moved its operation out of and ceased employing workers in that area on August 1, 1975, and that

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[4/]Actually 355 names appear on the list, no number having been assigned to one, Brent Spitzer.

if any employees continued to live in El Centro, they would have a daily commute of some 600 miles to their work in Arvin. There were 14 names with addresses in the Coachella area; that also would have been a commute at least comparable to that from El Centro. Two addresses were "Calle Union, Apt. #1, Bakersfield." There were two addresses in Los Angeles and one in Ontario. One worker, Luis Duarte, had been working in Brentwood since May 1975, still showed an El Centro address on the eligibility list. In short, of the 355 names that appear on the list supplied the UFW, 255 were unreachable in the few hours the UFW had to approach the workers before the election. The remaining 100 names with street addresses break down as follows: 16 in the Blythe area; 39 in the Arvin-Edison area; 45 in the greater Brentwood area.

Mr. Jackson also testified that it was the company's policy to obtain the workers' addresses on time sheets when they first came to work each year and that new or different addresses were obtained during that year only if the workers came in and volunteered them. There is no evidence that the employer made any effort between August 28, 1975, the date the Act went into effect, and September 3, 1975, the date the Teamster's Petition for Certification was filed, to comply with the Act's provision that employers maintain accurate and current payroll lists containing the names and addresses of all their employees. Labor Code Section 1157.3.[5/] Furthermore, Mr. Jackson testified that

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[5/]Section 1157.3 provides: "Employers shall maintain accurate and current payroll lists containing the names and addresses of all their employees, and shall make such lists available to the board upon request."

he made no effort to contact any of his foremen to have them ascertain the current addresses of his workers once he received the Petition for Certification.

Mr. Jackson also testified that the company's payroll period ended on Tuesdays and in an effort to compile the eligibility list on Wednesday, apparently September 3, he had used the data from time sheets and time cards instead of using the regular payroll list which would not have been completed until Friday, September 5. As it turned out, Mr. Jackson completed the eligibility list on the evening of September 4; however, he did not turn it over to the Board agent until September 11. On September 12, Mr. Jackson appeared at the election with the payroll list; on that list were four to six names of eligible voters that had not appeared on the eligibility list. That payroll list, as well as the eligibility list, had been in his possession since Friday, September 5. For some reason, Mr. Jackson chose not to provide the Board agent and the parties with the regular payroll list, or at least an eligibility list based on it, but rather chose on September 11 to give them the more hastily prepared, apparently less accurate list he had prepared on September 4. Mr. Jackson testified that though he had both lists in his possession, he never compared them and that there could have been other names on the payroll list that were not on the eligibility list.

We have previously overturned an election where a union did not receive the eligibility list until the day before the election and the list did not contain addresses for any of the employees. Valley Farms, Maple Farms, & Rose J. Farms,

2 ALRB No. 42 (1976). We have also held that 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. Yoder Brothers, 2 ALRB No. 4 (1976). In this case, the Board agent's failure to give the UFW the eligibility list until the day before the election was prejudicial. Whether that failure by itself was sufficiently prejudicial to overturn the election, we need not decide. Suffice it to say that it is a factor in overturning this election. What is more central are the defects in the list itself. When, as here, some 255 persons from an eligibility list of 355 are virtually unreachable because no current and accurate addresses are given for them, the utility of that list is substantially impaired. Lists such as this are equivalent to no lists at all. To permit an employer to submit such lists is to completely disregard the obligation the law places on him to maintain accurate and current payroll lists containing the names and addresses of all his employees. Finally, not only does the record clearly show that the employer here exercised no diligence whatsoever in obtaining and supplying current and accurate addresses, but he also compounded that error by submitting the apparently less accurate of two available lists to the Board agent and the parties.

The concurring opinion interprets the statutory requirement that employers maintain accurate and current

payroll lists of their employees' names and addresses to serve three purposes: (1) to determine peak harvest, (2) to help determine a union's required showing of interest, (3) as a means of facilitating voter identification at the polls. The concurring opinion also indicates that the majority's reasoning is premised on the false assumption that the employer's payroll list is designed to facilitate unions in contacting employees at their homes prior to the election. While the concurring opinion cites our Yoder (supra) decision, it ignores Yoder's language: "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 . . ." Yoder, supra, at page 4. It also chooses to ignore the National Labor Relations Board's "Excelsior Rule" which is the foundation for the Yoder rule regarding lists. In Excelsior Underwear, Inc., 156 NLRB 1236 (1966) the Board held that not only was an employer, shortly before an election, required to make available for inspection by the parties and the regional director a list of employees eligible to vote, but also that the list had to contain addresses in addition to names. In explaining why it was now requiring that employer lists additionally contain employees' addresses, the Board said,

> "In discharging that trust [to conduct elections fairly], 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 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 reasonable choice. Accordingly, we think that it is appropriate for us to remove the impediment to communication to which our new rule is directed." Excelsior Underwear, Inc., supra, at page 1240.

In concluding the Board said:

> "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. In other words, by providing all parties with employees' names and addresses, we maximize the likelihood that all the voters will be exposed to the arguments for, as well as against, union representation." Excelsior Underwear, Inc., supra, at page 1241.

We conclude that the UFW was substantially prejudiced by being deprived of a timely and accurate list of names and addresses of employees. Furthermore, the employer's disregard of the law had a disproportionately prejudicial effect on the UFW because the Teamsters had much earlier access under their collective bargaining contract with the employer to a more accurate list of employees' names and addresses. We therefore conclude that the employer's misconduct affected the results of the election.

2. Election held more than seven days after Petition for Certification filed. Labor Code Section 1156.3(a), requires elections to be held within seven days of the filing of a Petition for Certification. The Board scheduled the election in this case for September 12, 1975, nine days after the

Teamsters filed their Petition for Certification. There is no evidence in the record explaining why the election was not scheduled earlier. Of approximately 380 voters, 149 cast valid ballots.[6/] The eligible voters in Blythe were some 15 to 25 permanent employees. The bulk of the eligible voters in Arvin were apparently seasonal workers. During the 1975 tomato harvest, as many as seven tomato harvesting machines, each involving a crew of 17 persons, had been used in the Mapes' Edison-Arvin fields. By September 6, 1975, the harvesting had been completed. Workers began leaving Arvin after the machines stopped, but before the election was held. There was testimony that at least some of the workers were still in the Edison-Arvin area on September 10, 1975, the seventh day after the filing of the Petition for Certification. A family of 15 left for Mexicali on the 10th or 11th of September. Two crews left the Edison-Arvin area for Brentwood, one on September 11, the other on September 12, neither crew receiving notice of the election. Another worker left the area to seek other employment on September 10. Had the election been held within seven days, the evidence indicates that a significant number of additional workers might have cast their ballots at the Edison-Arvin site.

In Ace Tomato, 2 ALRB No. 20 (1976), we set aside an election held after the seventh day because work had stopped for the season and workers were leaving the area. We concluded in that case that the delay in holding the election probably

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[6/]here were three void ballots.

contributed to the unusually low voter turnout. This case is similar. Accordingly, the failure to hold the election within seven days from the filing of the petition is grounds for setting aside the election. Therefore, because of the employer's misconduct which affected the results of the election, and because of the failure to hold the election within the statutory period, we set aside the election.

Dated: October 20, 1976

Gerald A. Brown, Chairman

Roger M. Mahony, Member

Robert B. Hutchinson, Member

Ronald L. Ruiz, Member

MEMBER JOHNSEN, concurring:

I concur in the result reached by the majority of my colleagues but believe the holding of this election two days beyond the statutory limitation with demonstrated prejudice to employees who were precluded from voting therein is alone sufficient cause for denying certification and would therefore not find the issue of the employer's payroll list necessary to this determination. [1/]

[1/]Two additional grounds for the setting aside of this election arise from the manner in which this matter was handled by the regional office. First, the Teamster petition for certification, as filed on September 3 with the Salinas Regional Office, listed the employer's address at 1444 Hiway 4, Brentwood (San Joaquin County) and described the employer's vegetable operations as located at Firebaugh, Bakersfield, Blythe, El Centro and Brentwood areas. The first two locations are within the jurisdiction of the Fresno Regional Office, the next two are within the area served by the Riverside office, and Brentwood would fall within the authority of the Sacramento region. It is not clear why the Salinas regional director assumed that the petition was properly filed in that office since Regulation Section 20300 provides that a petition for investigation of a question concerning representation under Labor Code Section 1156.3 "shall be filed in a regional office or sub-regional office having jurisdiction over a county wherein employees in the bargaining unit are employed". Secondly, since employer operations are clearly in noncontiguous geographical areas in accordance with Labor Code Section 1157, the regional director should have directed and preserved a separate tally of ballots at each location where employees were working pending Board evaluation and determination of the appropriate unit or units. See Egger & Ghio Company, Inc., 1 ALRB No. 17 (1975); Bruce Church, Inc., 2 ALRB No. 38 (1976).

This Board has held that an election conducted beyond the seven-day statutory period will not invalidate an election in the absence of a showing that any party or persons were prejudiced thereby, Klein Ranch, 1 ALRB No. 18 (1975). In Ace Tomato Co., Inc., 2 ALRB No. 20 (1976), the election was held eight days following the filing of the petition for certification, at a time when the peak harvest season was nearing an end, resulting in an unusually low turnout of eligible voters. That election was set aside. However, we upheld another election which was held on the eighth day because there the delay in fact maximized voter participation by enfranchising recalled employees who did not work on or prior to the seventh day, J. J. Crosetti Co., Inc., 2 ALRB No. 1 (1976). In the matter herein, only 149 employees participated in the election although the employer's payroll list for the applicable payroll period numbered 354. As harvest was winding down, each day's delay corresponded with a decreasing number of employees still employed. Proper evaluation of this employer's operations should have prompted the regional office to set the election within rather than without the seven-day period; failure to do so is alone sufficient cause to set aside the election.[2/]

[2/] The thrust of Labor Code Sections 1140, et seq., is designed to maximize participation by seasonal agricultural laborers in Board conducted elections. Section 1156.3(a)(1) provides that elections will be held only during that period when the employer's payroll reflects 50 percent of the peak agricultural employment for the current calendar year. Section 1156.3(a)(4) requires this Board to direct elections within a maximum of seven days of the filing of a valid petition (an intervening union may qualify for ballot status up to 24 hours prior to the scheduled election). Read together, these sections charge a regional director with scheduling an election as soon as possible after a petition is filed. The record is silent as to the reason the election was not held within the required time period.

My objection to the majority's reliance on the scope and purpose of the employer's payroll list is premised on the contention that the finding goes beyond a fair reading of the statutory and regulatory requirements in regard thereto and implies that an employer is now charged with a duty to independently assure the Board that each employee's address does in fact identify the quarters in which he/she actually is living, at any given moment, in order to avoid grounds which would set aside an election, and overlooks the fact that the employer has no control over the filing of a petition for an election and therefore has no advance means of knowing when a payroll list may become due. Served with a petition just seven days following the effective date of the Act, Mapes Produce Co. submitted addresses supplied by the employees themselves. However, many of the addresses consisted only of postal boxes, a common practice in rural California and one customarily relied upon by this employer. To set aside an election on the basis of a practice employers had been accustomed to using and had every cause to believe was sufficient is a harsh result at this juncture and requires employers to depart from established custom without notice.[3/]

[3/]We have considered the employer list issue on two prior occasions. In Yoder Brothers, Inc., 2 ALRB No. 4 (1976), we ruled that employers will be expected to exercise due diligence in obtaining and supplying names and addresses of workers as required and that failure to do so in a manner which substantially impairs the utility of the list may be grounds for setting an election aside, but Yoder did not distinguish between home and mailing addresses. We set aside the election in another matter in which the employer supplied no addresses whatsoever for any of his employees, an omission we found to have substantially impaired the utility of the list to the union, Valley Farms/ Maple Farms, & Rose J. Farms, 2 ALRB No. 42 (1976).

Labor Code Section 1157 provides that 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 1157.3 requires that "Employers shall maintain accurate and current payroll lists containing the names and addresses of all their employees and shall make such lists available to the board upon request". In pertinent part, Regulation Section 20310(d)(2) requires the employer, upon service of a petition pursuant to Section 1156.3(a), to provide the board "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 . . . ." (Emphasis added.) "Whose names appear on the payroll," "accurate and current payroll lists," "complete and accurate list limited to the complete and full names and addresses" -- nowhere is the employer required to submit a "current home address" at which the employee was residing on the day the roster was prepared for the applicable payroll period, the reading the majority would have us deduce from the foregoing provisions. Such a result is premised on the assumption that the employer's payroll list is designed to facilitate unions in contacting employees at their homes prior to the election. It also assumes that employees will not move from the addresses given the employer at the commencement of the pertinent payroll period. Were that the intended import of these provisions, then I believe the statute would require employers to relinquish payroll lists directly to the unions rather than to the Board before the petition drive commenced, a step which would obviate the underlying

rationale upon which this Board adopted an access rule to permit organizers to meet with seasonal employees during specified nonwork periods on employer's properties. Moreover, the employer's list is conveyed directly to the Board (Labor Code Section 1157.3), a copy of which is then transmitted to the parties after the regional director has determined that a showing of interest has been made by the petitioner (Regulation Section 20310(d)(2)). The statute did not contemplate that the employer's list would be utilized primarily for the purpose of pre-election campaigning nor would that be a practical approach under our Act which provides that an election may occur within 48 hours following the filing of the petition and an intervening union may qualify for ballot status up to 24 hours prior to the election. In the matter herein, for example, the UFW did not intervene until the fifth day following the filing of the Teamster petition, thus permitting itself only one full day's use of the employer list had the election been held within the statutory time frame.

Since our regulations provide penalties for employers who fail to submit lists in a timely fashion or who submit lists which are deemed inadequate -- or who fail to file any lists whatsoever -- I submit that recourse to regulatory procedures prior to the election and not the setting aside of a completed election is the proper remedy.[4/] In most cases, the invalidation

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[4/]Upon an employer's failure to timely comply with requirements as to the list, Regulation Section 20310(e) enables the regional director to impose any or all of the following presumptions:

(1) That there is adequate employee support for the petition;

(2) That the petition is timely filed with respect to the employer's peak of season;

(fn. cont. on p. 6)

of an election will delay for another year the selection of a bargaining representative by agricultural employees.

I interpret the statutory requirement as to the employer's payroll list to serve three purposes. First, it serves to test whether the employer's operations are at peak harvest pursuant to Labor Code Section 1156.4. Secondly, it enables the regional director to determine the number of employees employed in the applicable payroll period in order to evaluate whether the petitioning union has secured the required showing of interest to warrant the setting of an election. Lastly, the list establishes an eligibility roster for use by the parties during the course of the election, to which end the inclusion of addresses serves as a further means of facilitating voter identification at the polls.

The statutory use of the term "current" merely imposes upon the employer a duty to maintain an accurate and current payroll list containing the names and addresses of employees for use by this Board to facilitate the conduct of orderly elections. To require more makes it incumbent upon the Board to clearly enunciate such a rule before faulting a party for adhering to a reasonable reading of statutory and regulatory requirements.[5/]

Dated: October 20, 1976.

Richard Johnsen, Jr., Member

(fn. 4 cont.)

> (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.

[5/]The majority opinion relies in part on the "names and addresses" rule of Excelsior Underwear, Inc., 156 NLRB No. 1236 (1966),

(fn. cont. on p. 7)

(fn. 5 cont.)

as authority for setting aside elections in which the employer failed to submit current residential addresses for employees eligible to vote in a representation election. However, Excelsior is concerned with whether employers must release to petitioning unions the employees' home mailing addresses in the absence of access to employer premises by union organizers. By contrast, ALRB regulations grant a limited right of access to union organizers.

A review of the facts in the Excelsior case is instructive. During campaigns preceding two elections conducted by the National Labor Relations Board, employers mailed letters containing anti-union material as well as alleged misrepresentations to employees at their home addresses. Thereafter, the union requested from the employer a list of employee addresses in order to mail letters of rebuttal. The union lost in the ensuing election and filed objections, one of which alleged employer interference with the election based on the mailing list refusal. The Board held that after an election has been directed, the employer must file with the regional director an eligibility list containing the names and addresses of all eligible voters which the Board's agent shall make available to all parties. Failure to comply with the requirement became grounds for setting aside the election.

Nevertheless, the Board declined to make the rule applicable to the parties in the representation proceeding at hand. Instead, it announced that it was establishing a requirement that would be applied in all election cases commencing 30 days following the effective date of the ruling in order " . . . to insure that all parties to forthcoming representation elections are fully aware of their rights and obligations as here stated", 156 NLRB No. 1236, p. 1240 (1966).

The rule is the Board's attempt to afford unions an opportunity to contact each employee and thus "maximize the likelihood that all voters will be exposed to the arguments for, as well as against union representation" and was promulgated in order to permit unions an alternative means of communication in the absence of access to employer's property. As the Board stated:

> " . . . without a list of employee names and addresses, a labor organization, whose organizers normally have no right of access to plant premises, has no method by which it can be certain of reaching all employees with its arguments in favor of representation, and, as a result, employees are often completely unaware of that point of view." (Emphasis added.)

Although Excelsior's "names and addresses rule" refers to home addresses, the thrust of the opinion is to allow communication with employees in a neutral setting outside of the employment locale. In my opinion the decision was primarily responsive to the union's need for addresses to which it might mail a letter of rebuttal.