STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of:	
TMY FARMS,	No. 75-RC-13-R
Employer,	2 ALRB No. 58
and	
UNITED FARM WORKERS OF AMERICA, AFL-CIO,	
Petitioner.	

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

A petition for certification was filed by the United Farm Workers of America, AFL-CIO, on September 15, and an election was held on September 24, 1975, among all the agricultural employees on the farm operated by employer TMY Farms. The tally of ballots showed that of 213 eligible voters, 172 votes were cast as follows: UFW - 100; No Union - 25; Challenged Ballots - 47. The employer filed a timely objections petition, pursuant to Section 1156.3(c), raising 13 issues. Eleven of these were set for an evidentiary hearing.[1/]

[1/]Paragraphs 5 and 11 were dismissed by the Board through its executive secretary and paragraph 12 was permitted to go to hearing only insofar as it alleged conduct not in conformity with the access rule (8 California Administrative Code Section 20900). At the hearing, the employer moved for inclusion of the dismissed allegations. The motion was denied. On December 17 the employer filed with the Board a petition for reconsideration, asking that the partial dismissal be revoked. On December 22, 1975, the Board issued an order denying the petition for reconsideration.

An amendment to the objections petition was sought by the employer on October 22, 1975, for the purpose of including an allegation that leaflets distributed to employees prior to the election had falsely stated that there were no initiation fees for workers applying for membership with the petitioner. The regional director declined to accept the amendment on the ground that it was not timely filed. A request for Board review of that decision was filed by the employer, who contends that it did not learn of the alleged misrepresentation until October 16, 1975, and therefore was unable to make an objection within five days after the election pursuant to 8 California Administrative Code Section 20365. In Skyline Farms, 2 ALRB No. 40 (1976), the Board was urged to accept an identical amendment based on the same newly discovered evidence. It declined to do so, stating that, "Absent unusual circumstances, the Board will not permit amendments to objections petitions after expiration of the five day period set forth in Labor Code Section 1156.3(c)." Accordingly, the regional director's rejection of the employer's amendment to its objections petition is sustained.

The employer introduced no evidence on three of the issues set for hearing. Eight issues are left for decision by this Board.

Appropriateness of the Bargaining Unit

The employer objected to the election on the grounds that the unit sought by petitioner was inappropriate since it combined direct employees of TMY Farms with employees of a labor contractor not actually engaged by TMY Farms. At the election itself, the labor contractor's employees all voted under

challenge by the employer pursuant to Section 20350(b)(2), which provides that a voter may be challenged on the ground that he/she "was not employed in the appropriate unit during the applicable payroll period". 8 California Administrative Code Section 20350(b)(2).

In this particular case, the 47 challenged ballots could not affect the results of the election. Accordingly, we do not resolve them, and this objection is dismissed. See 8 California Administrative Code Section 20363(c); Interharvest, Inc., 1 ALRB No. 2 (1975). However, the status of these employees was fully litigated in the objections hearing, and since we recognize the value to the parties of knowing their status for purposes of bargaining, we will treat the employer's objection as a request for clarification of the bargaining unit. See Hemet Wholesale, 2 ALRB No. 24 (1976).

The employer argues that the bargaining unit sought by the union was inappropriate since it combined employer's employees with workers of a labor contractor who had not actually been engaged by the employer. TMY is a general partnership consisting of three corporate partners, one of which hired the labor contractor in question to work at TMY Farms. Employer relies on language from Section 1140.4(c) of the Act which excludes from the definition of agricultural employer "any person supplying workers to an employer, any farm contractor ... and any person functioning in the capacity of a labor contractor", and which further provides that the "employer engaging such labor contractor ... shall be deemed the employer for all purposes under this part".

Labor Code Section 1140.4 (c) provides that "The term 'agricultural employer' shall be liberally construed to include any person acting directly or indirectly in the interest of an employer in relation to an agricultural employee . . . " . We find that the corporate partner engaged the labor contractor in the course of carrying out the ordinary business of the partnership, and that the employer of the contractor's employees is the partnership itself. The employer introduced no evidence that the contractor's employees did anything for the corporate partner, other than harvest crops owned by the partnership and grown on partnership land. We do not view the fact that the contractor was nominally engaged by the partner as necessarily "fixing" that partner as the employer. See State Compensation Insurance Fund v. Industrial Accident Commission, 28 C.A. 2d 474, 479 (1938).

The employer next argues that the labor contractor's employees were improperly in the unit because they do not share a community of interest with its direct employees. In support of this argument, it offered evidence that the labor contractor's employees are supervised in the field by the contractor's own foremen, while TMY's direct employees are supervised by TMY foremen, and that the labor contractor's employees are paid on a different basis, work different hours, and harvest a different variety of tomato than TMY's direct employees. We note that it is not uncommon for one employer to hire both direct employees and employees through a labor contractor, and that in such a case we are clearly required by Labor Code Sections 1140.4(c)

and 1156.2[2/] to place the labor contractor and direct employees in the same bargaining unit, unless they work in noncontiguous geographical areas, which is not the case here.

We find that, for the purposes of Labor Code Section 1140.4(c), employees hired by a general partner in order to carry out the partnership's business are employed by the partnership itself. Such employees are properly included in the unit which we certify in this decision.

Requirement of Majority Vote

Employer's next argument is that the union did not obtain a majority vote of the agricultural employees in the bargaining unit, as required by Section 1156 of the Act:

> "Representatives designated or selected by a secret ballot for the purposes of collective bargaining by the majority of the agricultural employees in the bargaining unit shall be the exclusive representatives of all the agricultural employees in such unit for the purpose of collective bargaining with respect to rates of pay, wages, hours of employment, or other conditions of employment. . . . "

Employer reads this provision as requiring that the union be chosen by a majority vote of all employees in the unit and not simply by a majority of those voting. We note that the majority vote provision of the National Labor Relations Act also speaks in terms of "a majority of the employees in a unit." 29 U.S.C.A. Section 159. In N.L.R.B. v. Deutsch, 43 LRRM 2852 (1959), 265

[2/] Labor Code Section 1156,2 provides that:

> "The bargaining unit shall be all the agricultural employees of an employer. If the agricultural employees of the employer are employed in two or more noncontiguous geographical areas, the board shall determine the appropriate unit or units of agricultural employees in which a secret ballot election shall be conducted."

F. 2d 473, cert. den. 361 U.S. 473 (1960), the Ninth Circuit Court of Appeals specifically held that a majority of those voting is sufficient to elect a representative for a bargaining unit. There the court stated, "It has repeatedly been held under well recognized rules attending elections that those not participating in the election must be presumed to assent to the expressed will of the majority of those voting, so that such majority determines the choice." See also N.L.R.B. v. Central Dispensary & Emergency Hospital, 15 LRRM 643 (D.C. Cir. 1944), cert. den. 324 U.S. 847 (1945); Lu-Ette Farms, 2 ALRB No. 49 (1976). The employer's majority vote objection is dismissed.

Election Not Held Within Seven Days

Section 1156.3(a) of the Act requires that the representation election be held within seven days of the filing of the petition. Here the period between petition and election was nine days. It is the employer's position that the election is therefore invalid.

This Board has held that an election taking place on the ninth day following the filing of a petition for certification, though in violation of Labor Code Section 1156.3(a), need not be invalidated unless it was shown that any party or persons were prejudiced thereby. Jake J. Cesare & Sons, 2 ALRB No. 6 (1976). See also Klein Ranch, 1 ALRB No. 18 (1975), Employer does not claim that its interests or those of the workers were in any way prejudiced as a result of the election having been held after the statutory seven-day period. In the absence of such a showing, we are not bound to overturn a late election and we decline to do so here.

Solicitation of Authorization Cards

Two issues raised by the employer concern solicitation of authorization cards. These issues may be stated as follows: (1) whether the election should be overturned on the grounds that the California Employment Development Department (E.D.D.) referred applicants for special unemployment assistance to the United Farm Workers Service Center for help in filling out forms, and that the union used this opportunity to solicit workers' signatures on the authorization cards; (2) whether false and misleading statements were used by the union to solicit the workers' signatures on the authorization cards.

We have already considered the evidence before us in this case regarding the E.D.D. referrals in Jerry Gonzales Farms and Takeo Azuma, 2 ALRB No. 33 (1976).[3/] As in those cases, no evidence has here been presented demonstrating that the workers referred by E.D.D. were either employed by the employer or voted in the challenged election. Because there was no showing that the conduct complained of affected the election, we overrule the objection.

It is claimed by employer that false and misleading statements were used by the union in soliciting authorization cards. Particular reference is made to a statement which appeared at the bottom of a leaflet found on the employer's property two days before the election. It read: "Sign a UFW authorization card to win the right to vote for the only real union on the ballot." Employer construes this statement as indicating that one must sign an

[3/] In Gonzales and Azuma, supra, the Board ordered the parties to show cause why this same issue should not be considered on the basis of testimony and documentary evidence submitted in TMY Farms, 75-RC-13-R, the case now before us. There being no response to the order, those cases were consolidated and decided on the basis of the evidence before us in this case.

authorization card and become a member of the UFW before he can vote in an ALRB election. Employer regards it as a per se violation of the election process and also contends that it affected the outcome of the election by inducing workers to sign authorization cards and thereby become unduly biased in favor of the union.

The leaflet was dated September 8, and the petition for certification was filed on September 15. Since the leaflet was apparently used to obtain authorization cards which would serve as the requisite showing of support, the statement in question was not actually false. Authorization cards would have to be signed by a sufficient number of workers in order for there to be a showing of support which would trigger an election.

Under the circumstances we cannot say that misrepresentations were made which would warrant overturning the election.

Bumper Sticker Visible from Polling Place

Employer contends that the election should be overturned because a UFW bumper sticker could be seen from the polling place on a car 150 feet away. In Samuel S. Vener, 1 ALRB No. 10 (1975), we held that four bumper stickers, visible from the polling place and bearing UFW slogans, were not prejudicial to the fair conduct of the election. The vehicles bearing those bumper stickers were situated 30, 50, 75 and 100 feet respectively from the polls. Here there was only one vehicle bearing a bumper sticker and it was parked some 150 feet from the polling place. We do not find that this was prejudicial to the fair conduct of the election.

Inducing Employees to Leave Polling Area Without Voting

Employer charges that union agents improperly induced the labor contractor's workers to leave the polling area before they had voted. Two incidents, one at the polling site itself

and one on the road leading to the polling site, form the basis of this charge.

A.

Testimony adduced at the hearing suggests that anywhere from 15 to 40 or so of the workers provided by the labor contractor did not vote because they were told by an unidentified man, whose affiliation is not clear, that their votes would not count and that they should leave the polling area. Two persons testified as to this incident, but their accounts lack consistency as to the numbers and identity of employees who failed to vote. Doubts are further raised by the fact that, according to one witness, the statement in question was heard by Board agents who, although seeing people leave the voting line, did nothing to correct the situation.

The burden of proof is on the party seeking to overturn an election to come forward with specific evidence showing that unlawful acts occurred and that these acts interfered with the employees' free choice to such an extent that they affected the results of the election. NLRB v. Golden Age Beverage Co., 415 F. 2d 26, 71 LRRM 2924 (5th Cir., 1969); see also NLRB v. Mattison Machine Works, 365 U.S. 123, 47 LRRM 2437 (1961). Despite the serious nature of the conduct alleged here, we are unable to find in this record evidence sufficient to support a conclusion that any eligible voters were turned away from the polls. We base this conclusion on our reading of this record as a whole, including the failure of the witnesses to establish clearly the times at which the incident or incidents occurred, which employees were involved and the identity or affiliation of the person who voiced the offending statements.

B.

A third witness testified for the employer that he witnessed an incident in which a UFW organizer known as "El Minuto" halted one of the labor contractor's buses as it was carrying about 35 employees to vote and informed the driver that "these people could not go into vote because those people didn't work there."[4/] The witness at the time was riding on the outside of a truck which was halted behind the bus. Following this incident, the bus pulled to the side, and the truck proceeded into the polling area. The witness testified that he passed this bus still waiting in the same spot about 45 minutes later as he was leaving the polling area. He did not know whether or not the bus eventually went into the polling area after he left.

A UFW organizer who was present throughout the election period in the vicinity where this incident allegedly occurred testified that one of the labor contractor's buses was halted on its way to the polling area by an unidentified man arriving from the polling area. The organizer subsequently learned from the bus driver that this man had told the driver that the buses would go in to vote one at a time. This same witness identified "El Minuto" as a UFW organizer who had been with him throughout the election period, although he was unable to say with certainty that "El Minuto" never approached or talked with the driver of a bus on its way in to vote. We note particularly that the

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[4/]The UFW objected to all testimony concerning this incident on the grounds that there was no reference to it in the declarations submitted by the employer in support of its objections petition. We find on the merits that the employer's testimony on this point is not grounds for setting aside the election.

employer's witness had no knowledge as to whether or not the bus which he observed eventually proceeded to the polling area. Because of such conflicting evidence, we find that the employer has failed to establish that any voters were prevented from voting in this bus incident. See NLRB v. Golden Age, supra; NLRB v. Mattison Machine Works, supra.

We find no grounds which would justify the setting aside of the election here challenged. The United Farm Workers of America, AFL-CIO, is, therefore, certified as the collective bargaining representative of all the agricultural employees of TMY Farms.

Dated: November 29, 1976

Gerald A. Brown, Chairman

Richard Johnsen, Jr., Member

Robert B. Hutchinson, Member