STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

ALBERT C. HANSEN dba HANSEN FARMS, Employer , and UNITED FARM WORKERS OF AMERICA, AFL-CIO Petitioner.	NO. 75-RC-17-M 2 ALRB No. 61

The United Farm Workers of America, AFL-CIO (hereinafter "UFW") objects to certification of a run-off election between the UFW and "no union" which was held at Hansen Farms on September 25, 1975, claiming that misconduct by the employer and this Board affected the outcome of the election. Labor Code, Section 1156.3(c). 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. From the record we have found substantial evidence that misconduct which affected the results of the election occurred and on the grounds stated herein we decline to certify the election.

On September 10, 1975 a representative election was held at the Hansen Farms in which votes were cast as follows: "no union" - 224; UFW - 221; Western Conference of Teamsters (hereinafter "Teamsters") - 36; challenged ballots - 48; and void ballots - 2. Since no party received a majority of votes,

a run-off election was held on September 25, 1975, the results of which were: "no union" - 300; UFW - 247; challenged ballots - 28; and void ballots - 5.

On October 1, 1975, the UFW filed a petition to set aside the run-off election.[1/] That petition alleges 30 instances of misconduct affecting the outcome of the election on the part of Hansen Farms and 18 instances on the part of this Board. Several of these objections were dismissed by the Board through the executive secretary in a notice of a consolidated hearing. The UFW requested review of dismissal and subsequently the Board issued an order partially granting request for review.

A noticed hearing of all UFW objections was held on November 24 and 25, 1975, and continued to December 8 and 9, 1975. Post-hearing briefs were submitted by the employer and UFW.

The Hearing Officer, J. Kenneth Tjoflat, refused to hear UFW testimony concerning conduct which occurred before the effective date of the Agricultural Labor Relations Act (hereinafter "Act").[2/] In

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[1/] On September 24, 1975, the UFW filed a petition to set aside the election of September 10 pursuant to §1156.3(c). These objections to the first election were withdrawn at the hearing.

On September 22, 1975, the Teamsters filed a petition to set aside the first election alleging conduct affecting the results of the election and improper determination of geographic scope of the bargaining unit. Several Teamster objections were dismissed by the Board in a notice of consolidated hearing. The remaining objections were dismissed by the hearing officer after the Teamsters failed to appear at the first two days of hearings.

[2/] In order to preserve their rights, the UFW made offers of proof on their first six objections: (1) that a foreman of Hansen Farms threatened to lay off a worker who was talking to his fellow workers about the UFW; (2) that Supervisor Fidel Rodriquez told a worker who was passing out UFW leaflets that he would be fired if he ever passed them out again; (3) that Rodriguez boasted he would kill Chavez for a certain amount of money; (4) that an employee was fired for UFW organizing activities; (5) that Rodriquez told workers he didn't want any supporters of Chavez around; and (6) that a UFW supporter was given a written warning for missing a day of work, contrary to usual company procedure. The employer made offers of proof rebutting these statements.

its post-hearing brief, the UFW urges the Board to remand the matter for further hearing on these objections if we should determine that the record does not establish objectionable conduct sufficient to set aside the election. We dismiss the UFW request for further hearing since we have determined that the election should be set aside on other grounds. For the same reason we will not address certain allegations on which testimony was taken at the hearing and which petitioner argues in the post-hearing brief.[3/]

Petitioner's principal contention is that the employer made promises of benefits to a majority of the workers in the voting unit if they voted "no union." These alleged promises were made in separate speeches by the employer to various crews while they were in the fields. It is the premise of petitioner that these promises illegally interfered with the election process and should be the basis for setting aside the election. Additionally, petitioner maintains that employer's agents made threats and/or promises to various workers and that these incidents in themselves are sufficient basis for setting aside the election.

[3/] These allegations include two incidents of denial of access, two statements by supervising personnel which discouraged workers from voting; incidents in which the employer bought soda pop for a crew and gave a barbeque for the workers and an allegation that a board agent would not accept certain challenges by the UFW observer at the election.

Additionally, testimony by the employer was allowed under cross examination as to a "big brawl" engaged in by himself and UFW attorney Jerry Cohen, which resulted in Mr. Cohen being hospitalized. This incident took place in 1970, well before the effective date of the Act and we therefore will not consider it in setting aside the election.

The employer contends that he acted in a fair and proper manner at all times and that he was entitled under our Act to make speeches and distribute literature. He has submitted a written letter which he gave to the workers and which he contends was similar to his speeches. Prior to circulating this letter he had it reviewed by his attorney for its appropriateness under our Act. Employer Hansen testified that he never made any promises to workers with respect to wages, better working conditions or insurance. When asked what the wages would be, Mr. Hansen maintains he always replied that he could make no promises because it was against the law.

The testimony presented by the petitioner and by the employer is in considerable conflict in many details.[4/] Considering the entire record, however, a clear picture of the conduct and its effect upon the election emerges. The testimony of different workers in different crews was generally consistent with respect to the impressions conveyed by the speeches and comments of Mr. Hansen and his supervisors.

At issue here are the conflicting interests of the employer's right of free speech and the employees' right to cast an uncoerced

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[4/] The employer asks us to recognize the language problem, in that the testimony of the workers involved triple translation. We recognize that certain problems do exist in any translations of this type, but we credit the certified translation of the testimony. We take note that the original translation between the employer and the workers was made by employer's agent and therefore the employer must take responsibility for it.

The employer also asks us to recognize that the testimony of petitioner's first witness was elicited by leading questions. The hearing officer overruled this objection at the hearing. His characterization of this witness indicates initial nervousness and a momentary misapprehension by the interpreter which was straightened out. The questioning attorney indicated he was merely refreshing the witness' memory. At most, leading questions might affect the weight of the testimony, but they are not sufficient reason to discount testimony.

vote. The "free speech" provision of our Act is contained in Labor Code, Section 1155, which provides:

> The expressing of any views/ arguments, or opinions, or the dissemination thereof . . . shall not constitute or be evidence of an unfair labor practice . . . if such expression contains no threat of reprisal or force or promise of benefit. 5/

In determining whether campaign rhetoric is sufficient to set aside an election, we look not only to the nature of the speech itself but also to whether, in the light of the total circumstances, it improperly affected the result.

As already noted, the facts of this case are in considerable dispute. After making a thorough review of the record, we find the facts substantially as follows.[6/]

Upon the filing of the certification petition by the UFW on September 2, employer Hansen began a campaign for a "no union" vote. A letter dated September 3 was issued to employees urging them to vote non-union and enumerating five "disadvantages" of a union, and extolling company policy and performance concerning wages, benefits and working conditions. This letter mentioned the ALRA and urged the workers to listen to all sides. We do not find this letter objectionable on its face.[7/]

5/ This is identical to §8(c) of the National Labor Relations Act (NLRA).

6/ Testimony on conduct which occurred before the first election was received for its effect on the second election.

7/ We do not wish to overly inhibit an employer's exercise of free speech rights. Written material prepared with advice of counsel may be very helpful, but the employer must guard against deviating from his prepared materials and should further instruct his agents to take care not to deviate from the prepared materials in their own contacts with the employees. In this case, the employer's failure to do these things resulted in what we deem, under applicable NLRB precedent, to be an illegal interference with the election.

Within a three to six day period between the filing of the petition and the election, employer Hansen and his personnel manager, Tony Vasquez, made a set of speeches before 10 to 12 crews in the fields.[8/] Mr. Hansen testified that he made substantially the same speech to each crew. The workers were called together by Mr. Vasquez. Mr. Hansen then addressed the workers in English and Mr. Vasquez translated into Spanish. Questions and answers followed each speech. Hansen and the workers testified that he asked for the support of the employees in giving him one year without the union.

Although Hansen testified that the letter dated September 3 was the basis of these speeches, testimony of workers from five different crews indicates that he deviated from the text of his carefully worded letter. He was quoted as having told the workers that if "no union" won, they would have "better wages, better benefits," "better wages or the same wages that other companies with the union would have," "best wages in the Valley," "better benefits than the union," "well, everything." Several workers testified that he said when "no union" was certified, he would negotiate a contract with representatives from each crew.[9/] Workers testified that many of these statements were prefaced with the employer's remark that he couldn't promise anything because it was against the law.

[8/] From the record it appears that each crew consisted of from 25-30 people, making the total number of workers addressed before the first election between 250 and 420. The total number of votes cast in the runoff election was 580.

[9/] According to the workers' testimony, the plan presented by Mr. Hansen was for each crew of 30 or more to elect two representatives to negotiate a contract with him. A crew of less than 30 would elect one representative to negotiate.

After the first election and before the second, Hansen and Vasquez made a second set of speeches to the workers. At each of these speeches Mr. Hansen carried a blackboard showing the tally of votes from the first election and explained that there would be a runoff election. Again, he asked for the workers' help. He was quoted as saying he "expected, insisted" on the workers' help, "so he could give better wages." Workers heard him reiterate his plan to negotiate with representatives from each crew if "no union" won.

A worker from the crew of Jesus Lopez quoted Hansen as saying that in case of a UFW victory "if it was convenient for him he would negotiate, and if not there would be a strike." If "no union" won, he would pay them "higher than the other companies, and the best benefits." A member of Crew 2 quoted Mr. Hansen as sayinc that if "no union" won he would give them "the best wages in this Valley."[10/] He said further that if Chavez won and "he [Hansen] couldn't come to an agreement with the negotiators, he wasn't going to sign...there would probably be a strike." He said he could not promise them anything in writing, but if the election came out "no union," he would give the workers a list of all that he was going to guarantee them. Another worker testified

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[10/] This particular speech was translated in the field by a worker, Raymondo Correal, who replaced Mr. Vasquez as interpreter at the request of the other workers. The record indicates that the employer objected to testimony on Correal's translation. The hearing officer overruled this objection, holding that Mr. Correal was acting as the employer's agent with his apparent consent. We agree.

that Mr. Hansen told Crew 3 "he could promise to give [them] all the benefits that any union would promise" and that "he would pay... one cent more a carton than what the union would ask." In front of Crew 4 he was heard to say that in one year he would "give the workers more than any union." In response to a request from the workers to see a contract, Hansen replied "he would pay... more than any union did and to please take his word for it, but that he could not show...the contract at the time." If the workers voted "no union" he said he would "plant some more and hire more crews." In the second set of speeches, many of the employer's comments were again prefaced with the remark that he could not promise them anything.

We turn now to the objections based on threats made by Hansen supervisors. While this testimony is also in substantial conflict, we have reviewed the record as a whole and find the facts substantially as follows.

The alleged threats were made by two of the employer's supervisors, Fidel Rodriquez and Francisco Palmeno. Each of these men supervised four crews and in this capacity they were clearly agents of the employer and known to the workers as such. There was testimony that before the first election Fidel Rodriquez addressed Crew 2 saying that if Chavez won "they would not plant any more lettuce; they would plant alfalfa...[and] barley, because they had a lot of cattle." A member of Crew 4 testified that a week to 10 days before the first election Rodriquez told them [11/]

[11/] It is not clear fror. the record whether these remarks were made to the whole crew or to several workers.

that "if no union won, Mr. Hansen would plant 800 acres more of lettuce and hire two more crews." At the same time Rodriguez was also quoted as saying that if the Chavez union was to win, Mr. Hansen "wasn't going to plant anything else anymore; that he didn't have to, he had a lot of money anyway."

In interpreting the effect these remarks had on the employees, we note that alfalfa and barley require little if any work by farmworkers. Thus, the result of planting these crops, instead of lettuce, would be to put the lettuce crews out of work.

Another worker quoted Palmeno as making similar remarks threatening the jobs of the lettuce crews. She testified that he told her Mr. Hansen owned "all those mountains that you see behind... [t]hat house that you see over there...and he used to have a landing field or airport...[h]is specialty is cattle raising...he is extremely rich, one of the richest men in the world...As you see, he had no need of selling or farming the land...If Chavez wins in this Company, they will transfer the lands to other companies."

There was also testimony as to threatened layoffs. One worker related a conversation with Rodriguez in which he was told that people in the lettuce cutting crew would be laid off "because of the Chavez movement." This conversation was overheard by a fellow worker who then relayed it to a group of 10 to 15 other workers. The worker testified further that Rodriguez made veiled offers of a promotion to a "truckdriver" if he would "get out of that movement."

For the first time this Board must consider the effect of an employer's promise of benefits to his employees made during a vigorous campaign. The National Labor Relations Board (NLRB) has characterized the issue as "the right of the employees to an untrammeled choice, and the right of the parties to wage a free and vigorous campaign with all the normal legitimate tools of electioneering."[12/]

The earliest decisions of the NLRB indicate a double standard which imposed a duty of strict neutrality on the employer[13/] while giving free rein to union campaign rhetoric.[14/]

In 1947 the "free speech" amendment, Section 8(c) of the National Labor Relations Act (NLRA),[15/] was passed in response to this policy. The Board then announced the strict laboratory conditions test of General Shoe Corp. to be applied to all parties:

> In election proceedings, it is the Board's function to provide a laboratory in which an experiment may be conducted, under conditions as nearly ideal as possible, to determine the uninhibited desire of the employees. 16/

[13/] Hollywood Ceramics Co., Inc., 140 NLRB 221, 224, 51 LRRM, 1600, 1601 (1962). IV

[13/] Eg. Rockford Mitten & Hosing Co., 16 NLRB 501, 5 LRRM 244 (1939) (holding employer interfered with the election through comments denouncing labor organizations and criticizing union leaders). 14/

[14/] Eg. Maywood Hosiery Mills, Inc., 64 NLRB 146, 17 LRRM 90 (1945) (overruling employer's objections to elections on the basis of (a) a union paper's "garbled account" of the bargaining relationship between the company and its employees and the "prediction" that those who refuse to join the union would suffer unemployment; and (b) a showing by the union to the employees of a letter containing a false statement that the employer had no petition for a wage increase pending before the War Labor Board.)

[15/] Supra., p. 5.

[16/] 77 NLRB 124, 21 LRRM 1337 (1948).

In General Shoe the conduct objected to was the employer's set of "intemperate anti-union" speeches to groups of 20 to 25 individuals in his own office and his instructions to foremen to propagandize employees in their homes. The Board also noted in this case that the free speech protection of 8(c) did not necessarily apply to pre-election statements.

In Dal-Tex Optical[17/] the Board restated its policy of not applying 8(c) to pre-election statements, but added that the first amendment must be considered in all cases. In Dal-Tex the employer had made three speeches to employees in which he listed existing benefits, asked workers whether they wanted "to gamble all of these things," stated that if required to do so he would bargain on "a cold blooded basis," and that employees "may come out with a lot less than you have now." He also implied he would not sign a contract even if required to bargain. In considering these speeches, the Board rejected a mechanical approach of applying 8(c) protection to pre-election statements. Instead, the Board looked "to the economic realities of the employer-employee relationship," stating it would "set aside an election where we find that the employer's conduct has resulted in substantial interference with the election, regardless of the form in which the statement was made." Thus the Board evaluated pre-election conduct on the basis of (1) the relationship between the speaker and the hearer and (2) the message that was actually conveyed, and set aside the election.

[17/] 137 MLRB 1782 (1962).

This "economic realities" test is especially relevant in the area of granting or promising benefits. [18] In NLRB v. Golden Age Beverage Co.,[19] the employer argued that the election should be set aside because the union promised "unusually high" wage rates. The Board found a distinction between promises made by a union and promises made by an employer. The Court approved the Board's finding that the latter is objectionable conduct while the former is not, citing an "economic realities" test:

> An employer in an unorganized plant, with his almost absolute control over employment, wages, and working conditions, occupies a totally different position in a representation contest than a union, which is merely an outsider seeking entrance to the plant.

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[18] Generally, the NLRB has treated pre-election offers and promises of benefits the same as the actual conferring of benefits, distinguishing between explicit and implied promises. An explicit offer, one which is made contingent on the outcome of the election, is the clearest example of election interference. Elections have been set aside where a laid-off employee was asked to vote "no union" and promised a job if the union lost the election [Paterson Five Brick Co., 93 NLRB 1118, 27 LRRM 1548 (1951)]; where the employer asked for "another chance" and promised "some different changes around here" [Anchor Coupling Co., Inc., 168 NLRB 218, 66 LRRM 1275 (1967); and where the employer emphasized that the union could give the employees nothing, that all benefits derived from him, and that he would be more generous in granting benefits if the union were not there [Borden Mfg. Co., 193 NLRB 1028, 78 LRRM 1498 (1971)].

Implied offers and promises, ones which would lead employees to believe that they were conditioned on the outcome of the election, have also been found to constitute election interference. Thus, an employer's statement on election day that he was considering new arrangements to provide more work [Maine Fisheries Corp., 99 NLRB 604, 30 LRRM 1101 (1952)], and an offer of financial assistance made simultaneously with a solicitation for a non-union vote [The Univis Les Co., 82 NLRB 1390, 23 LRRM 1679 (1949)] have been found to constitute election interference.

[19] 415 F 2d, 71 LRRM 2924 (5th Cir. 1959).

The U.S. Supreme Court further emphasized this distinction in NLRB v. Exchange Parts. In this case the Board had found the announcement and granting of improved benefits prior to the election to be an unfair labor practice. Sounding the theme of an "economic realities" test, the Court pointed out:

> The danger inherent in well-timed increases in benefits is the suggestion of a fist inside the velvet glove. Employees are not likely to miss the inference that the source of benefits now conferred is also the source from which the future benefits must flow and which may dry up if it is not obliged. 20/

An "economic realities" test has also been applied to threats of reprisal and shutdown. The United States Supreme Court has articulated a distinction between legitimate economic predictions and threats of retaliations in NLRB v. Gissel Packing Co.:

> [T]he prediction must be carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control...If there is any implication that an employer may or may not take action solely on his own initiative for reasons unrelated to economic necessities and known only to him, the statement is no longer a reasonable prediction based on available facts but a threat of retaliation based on misrepresentation and coercion, and as such without the protection of the First Amendment. 21/

In that case the Board was considering statements by an employer that he was in a precarious financial condition and that a union would have to strike to obtain its unreasonable demands, the probable result of which would be a plant shutdown. Here again

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20/ 375 U.S. 405, 55 LRRM 2098 (1964).

21/ NLRB v. Gissel Packing Co., 395 U.S. 575, 618, 71 LRRM 2481, 2497 (1969), (emphasis added).

the test was based on the economic realities of the employer-employee relationship and the effect of statements made in this context. The Court balanced the employer's right to free speech against the employees' right to associate freely, "[taking] into account the economic dependence of the employees on their employers, and the necessary tendency of the former, because of that relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear."

In Royal Packing Co., 2 ALRB No. 29 (1976), we considered and adopted the test stated in Gissel. In Royal, a company supervisor and a payroll clerk told employees that the company would go bankrupt if the UFW won the election.[22/]

The purpose of any regulation of campaign conduct is to promote the free choice of employees by assisting them in making a reasoned decision as to where their own best interests lie. To this end it is important for the employee to evaluate (a) to what extent a union can improve his or her working situation and (b) what disadvantages lie in unionization.[23/] Thus, the voter must be free of duress and coercion.

[22/] Although we have not considered Royal Packing in connection with the case at hand, we note that the reason given the employees in Royal for possible "bankruptcy" was that Hansen Farms, which owned the lettuce harvested by Royal, would not grow lettuce for Royal if the UFW won the Royal election.

[23/] See Bok, "The Regulation of Campaign Tactics in Representative Elections under the National Labor Relations Act," 78 Harvard Law Review 38 (1964).

Our evaluation of the employer's pre-election conduct must ask first whether the conduct was an unfair use of his economic position. If the conduct is found to be objectionable the inquiry must proceed to a determination of the effect such conduct might have had on the election. Conduct which tends to interfere with the free choice of a significant number of voters will be sufficient to set aside an election.

The objections in this case indicate a course of conduct which we have considered as a whole. See Harden Farms, 2 ALRB No. 30 (1976). We consider first the allegations concerning promises of benefits and higher wages. The employer's right to free speech would necessitate that he be allowed to recite past benefits and wage increases for which he was responsible, as well as to point out upcoming benefits and wage increases, if any, which were decided before union activity and. which are not tied to the results of the election.[24/]

We must view the statements of the employer in the light of the message actually conveyed. Although the substantive intent of the employer may well have been to stay within the letter of the law, it appears his speeches went further. We note that the impression received by the workers was a pattern of implied, if not actually expressed, promises contingent on the outcome of the election.

[24/] In United Screw and Bolt Corp. [91 NLRE 916, 26 LRRM 1596 (1950)] the NLRB indicated it would be critical of changes in benefits during an election campaign when (1) the announcement of benefits does not follow a request by employees and at the time is unexpected by then; (2) the benefits are decided earlier but not announced until just before the election; and (3) the announcement substantially differs from the customary time to grant benefits.

The record here indicates no basis for the campaign promises other than to influence the outcome of the election. The employer could not know what benefits or wages a union would ask for, nor could he unilaterally predict the outcome of negotiations. By making flat promises to do better for the workers than any union could do, the employer misrepresented the bargaining process and undercut the basis on which a union could campaign. Workers are especially susceptible to such statement in situations, as here, where they are deciding for the first time by secret ballot whether or not they want to be represented by a union.

The danger of benefits "which may dry up if not obliged," as pointed out in Exchange Parts,[25/] is certainly present here. The employer explicitly tied the promised benefits to the outcome of the election. After voting non-union, however, the employees would have no means to enforce the promises which swayed their vote.

Applying the "economic realities" test of Dal-Tex Optical, we look to (1) the economic relationship between the speaker and the listener and (2) the message that was actually conveyed. The listeners in this case were in a position of economic dependence on the speaker, Mr. Hansen. The message which was conveyed to the employees was consistently one of promises of better wages and working conditions if they voted "no union." A fair evaluation of their own best interests was thus impossible in light of the

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25/ See p. 13 supra.

coercive effect of these statements. While saying he would do better than the unions, the employer was proposing to bargain with representatives elected by the workers, thus underscoring the futility of a union vote. We find that the employer's continuous promises of benefits interfered substantially with the election, and that the election should therefore be set aside.

Additionally, we find that the alleged threats by the employer's supervisors provide another ground on which the election could be set aside. Credible and consistent testimony of employees indicated a pattern of threats of job losses if the union won the election. Whether these threats were expressed or implied is irrelevant when a clear meaning was perceived by the employees. The statements about planting alfalfa or barley instead of lettuce, the equivalent of threats of shutdowns or plant closing in the industrial setting, would be coercive conduct. Likewise, the alleged threats of layoffs in the case of a Chavez victory would have a coercive effect on the employee's vote. We are not swayed by employer's argument that no actual layoffs were made and that it was company policy to go overboard in not laying off or firing known supporters of the UFW. Coercive conduct is not limited to threats made good. In the charged atmosphere of the earliest elections under the ALRA, these threats would most certainly have an ominous effect. The threats of job losses in the case of a union victory intermingled with promises of benefits if "no union" won presented a contorted picture to employees which substantially interfered with their free choice.

For these reasons, the Board declines to certify the results of the election at Hansen Farms.

Dated; December 20, 1976

Roger M. Mahony

Robert B. Hutchinson

Ronald L. Ruiz