Healdsburg, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

GALLO VINEYARDS, INC.,	)	
	)	
Employer,	)	Case No. 07-RD-1-SAL
	)	
and	)	35 ALRB No. 6
	)	
ROBERTO PARRA,	)	(October 28, 2009)
	)	
Petitioner,	)	
	)	
and	)	
	)	
UNITED FARM WORKERS OF AMERICA,	)	
	)	
	)	
Certified Bargaining Representative.	)	
_____	)	

DECISION AND ORDER SETTING ASIDE ELECTION

Introduction

This case raises the issue of the standard for setting aside an election based on the provision of a defective employee address list as set forth in the Agricultural Labor Relations Board's (ALRB or Board) most recent precedent on the matter, *Leminor, Inc.* (1996) 22 ALRB No. 3. The Board has considered the record and the attached Investigative Hearing Examiner's (IHE) decision in light of the exceptions and briefs of the parties and has decided to affirm the findings and conclusions of the IHE to the extent consistent with the Board's reasoning as stated herein, and to adopt his recommended

order. We adopt the decision of the IHE to set aside the decertification election at issue for reasons that differ in some respect from his and clarify the holding in *Leminor* in consonance with the stringent requirement of Section 1156.3(c) of the California Agricultural Labor Relations Act (ALRA or Act)[1] that this Board certify an election unless there are sufficient grounds not to do so. We also decline to order a rerun election.

Factual and Procedural History

On June 18, 2007, Roberto Parra (Petitioner) filed a petition to decertify the United Farm Workers of America (Union) as the collective bargaining representative of agricultural employees of Gallo Vineyards, Inc. (Employer) in Sonoma County. At that time the bargaining unit consisted of direct hires of the Employer and employees of four farm labor contractors (FLC's). The Employer's eligibility list contained the names of 65 direct hires and 217 contractor employees, including additions to and deletions from the preliminary list, for a total of 282 employees.

The decertification petition was served on June 18, 2007. On June 20, the Board agent in charge of the election faxed a preliminary list of employee names and addresses to the Union. Casimiro Alvarez, who was in charge of the Union campaign against decertification, acknowledged receiving the list on that date.

A pre-election conference was held on June 21, and visits by the union to workers' homes began on or around June 22 or 23 and continued until June 24. An election was conducted on June 25. The tally of ballots was as follows:

[1] All statutory references are to the California Labor Code unless otherwise stated. The Agricultural Labor Relations Act is codified at California Labor Code section 1140 et seq.

Union 95

No Union 125

Challenged Ballots..... 12

The challenged ballots were not outcome determinative.

The Union timely filed eight election objections on July 2, 2007. The Executive Secretary dismissed all the objections except one, an objection to the adequacy of the employee voting eligibility list supplied by the Employer pursuant to section 20310, subdivision (a)(2) of the Board's regulations[2] and in accordance with *Excelsior Underwear, Inc.* (1966) 156 NLRB 1235 and *Yoder Bros.* (1976) 2 ALRB No. 4. The dismissals were affirmed on appeal by the Board in *Gallo Vineyards, Inc.* (2008) 34 ALRB No. 6. A hearing on the remaining objection was conducted before Investigative Hearing Officer Douglas Gallop on November 11-14, 2008. On March 4, 2009, the IHE issued his findings of fact, conclusions of law, and recommended decision that the Board set aside the election.

The IHE concluded that there was no dispute that there were at least 75 out-of-area addresses, post office box addresses, missing addresses or invalid addresses on the eligibility list provided by the Employer. Much of the testimony focused on the 65 addresses for which the Union contended that employees had moved or the address was incorrect. The IHE ultimately found that there were a total of 82 facially incorrect or invalid addresses as follows:

[2] The Board's regulations are codified at California Code of Regulations, title 8, section 20100 et seq.

Out-of-area addresses:	58
No addresses:	8
Post office box only:	9
Non-existent street:	4
No apartment number:	3

The IHE, taking judicial notice using maps and online search engines, found the four non-existent street addresses listed above. Applying his reading of *Leminor, Inc.* (1996) 22 ALRB No. 3, the IHE concluded that the number of incorrect addresses fell within the parameters of cases cited as examples where the election was normally set aside. He further concluded that no further inquiry was required in these instances. He concluded that, in this case, a shift of 22 votes would have changed the outcome of the election and a shift of 16 would have required resolution of the challenged ballots, with the incorrect addresses comprising more than three times the number needed to change the outcome of the election and more than four times the number needed to require a resolution of the challenged ballots.

The IHE disregarded as inapplicable National Labor Relations Board (NLRB) decisions holding that similar numbers of incorrect addresses were insufficient to overturn the election, noting that the NLRB uses a different test, focusing on the percentage of invalid addresses, instead of using an outcome-determinative rationale as does the ALRB.

The IHE rendered an alternative ruling that, even if the Board were to apply the various additional factors cited in *Leminor* to the facts of this matter, the

election should be set aside because of the Employer's gross negligence in preparing the eligibility list[3] and because the record indicates that the Union relied heavily on home visits.

Many employee witnesses offered testimony regarding mitigation, i.e., that the effect of any inaccurate addresses on the list on the election outcome was mitigated by the fact that the Union was able to contact employees with inaccurate addresses because many of them lived with employees who did have correct addresses on the eligibility list. The IHE did not find much of the testimony credible on this point. He observed that, even if he had credited the testimony of employees that fellow employees with incorrect addresses were visited at home by the Union, their same testimony also pointed out, in his view, that there were additional employees for whom the Employer had provided incorrect addresses. The IHE concluded that if factors other than the number of defective addresses are to be considered the election should still be set aside because of Employer gross negligence, non-credible evidence of mitigation, and the Union's heavy reliance on the voter list.

Petitioner timely filed its Exceptions to the Decision of the Investigative Hearing Examiner pursuant to section 20370(j) of the Board's regulations. Specifically, Petitioner excepted from:

[3] The record indicates that Mr. Collins, the Employer's representative who procured the list, knew at the time of the pre-election conference that there were post office box and out-of-area addresses on the list when the Employer submitted it, but that he thought the Employer was only obligated to provide the most current information it had.

1) The IHE's finding that "the numbers established herein fall within the parameters of cases cited in *Leminor* where the election was set aside without the need for further inquiry";

2) The IHE's determination of Employer responsibility for four addresses which the IHE found upon his independent investigation to be on non-existent streets;

3) The IHE's failure to consider additional factors set forth in *Leminor;*

4) The IHE's refusal to credit the testimony of employee witnesses as to Union visits to their homes during the election campaign while crediting the testimony of Union employees who failed to maintain their notes after the election;

5) The IHE's conclusion that the Employer's conduct in providing the eligibility list constituted gross negligence;

6) The IHE's conclusion that the Union relied heavily on the voting list in making home visits; and

7) The IHE's remedy setting aside the results of the election rather than directing a new election.

The Union timely filed its Brief in Opposition. Petitioner subsequently filed corrected exceptions and a corrected brief in support of its exceptions. The corrections cure an inconsistency in the original wording of the two documents regarding the relief sought, clarifying that Petitioner alternately seeks a decision upholding the results of the decertification election or a decision ordering a new election. Otherwise, there has been no alteration in the content of the timely filed documents. On that basis, the corrected documents are accepted.

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DISCUSSION

Excelsior Rule Requirements and Self-Organization Rights under the Act and Board Regulations

Section 1156.3(c) of the Act mandates that, unless the Board determines that there are sufficient grounds *not* to do so, it shall certify an election. This provision has been interpreted as creating a presumption in favor of certification of an election, with the burden of proof on the objecting party to demonstrate that an election should be set aside. (*Ruline Nursery Co. v. ALRB* (1985) 169 Cal. App. 3d 246, 254; *Leminor, Inc.*, *supra*, 22 ALRB No 3 at p. 6-7.) Section 1157.3 of the Act states that agricultural 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." Regulations 20310(a)(2) and 20390(e) further clarify the employer's obligation in this respect upon service of a petition for certification or decertification, requiring the employer to serve upon a regional director a complete and accurate list of employees, including farm labor contractor employees, with their full names, current street addresses, and job classifications, *accompanied by a declaration, signed under penalty of perjury* that the information is true and correct. The Board has held that this eligibility list requirement, adopted by the NLRB in *Excelsior Underwear, supra*, and by the ALRB in *Yoder Bros.¸ supra*, serves several functions, one of which is enabling communication between the union and employees eligible to vote. (*Yoder Bros., supra*, 2 ALRB No. 4 at pp. 3-4.) It is the communication function between the employees and the union that sections 20310 and 20390 seek to protect as a means of enforcing employees' Section

1152 rights of self-organization. "Implicit in these [section 1152] rights is the opportunity of workers to communicate with and receive communication from labor organizers about self-organization." (*Laflin & Laflin* (1978) 4 ALRB No. 28 at p. 4.)

In cases involving defective eligibility lists, the Board has applied an outcome-determinative standard under which an election will be set aside only if the eligibility list was so deficient that its utility was impaired and it tended to interfere with the employees' free choice to an extent that the outcome of the election could have been affected. (*Silva Harvesting, Inc.* (1985) 11 ALRB No. 12 at pp. 5-6.) It is with an eye toward this outcome-determinative test – in this case, whether the faulty list would tend to affect the outcome of the election – that we clarify *Leminor.*

Application of *Leminor, Inc.*

In *Leminor*, an employee filed a decertification petition. In response to the petition, the employer provided a list of 67 current employees and their addresses, of which 15 addresses were for post office boxes. The union in that matter was unable to make visits to the 15 post office box addresses and was advised by employees that the addresses for two or three additional employees on the list were incorrect. The union alleged that the copy of the list was less legible than the original. The employer was not aware of the requirement that current street addresses be provided. The tally of ballots showed 16 votes in favor of retaining the union, 39 against, and 2 unresolved challenged ballots. The union objected on the grounds of the incorrect eligibility list.

The *Leminor* Board noted that the essential inquiry in these cases is whether the faulty list would tend to affect the outcome of the election. It noted that the

ALRB had been more flexible than the NLRB in this respect by refusing to adopt the NLRB's presumption that a failure to provide a substantially complete list would have a prejudicial effect on an election. (*Leminor*, *supra*, at p. 6.) The *Leminor* Board further noted that it would not refuse to entertain evidence of the effect of a faulty list on the outcome of an election, precisely because section 1156.3 (c) requires certification of an election unless there are sufficient grounds to do so. (*Id.* at p. 6-7.) The Board then stated that the objecting party had to overcome the presumption in favor of certification of an election and indicated that, accordingly, the objecting party had the burden to show that the list actually impaired its ability to communicate with employees. (*Id.* at p. 7.)

The *Leminor* Board rejected the IHE's interpretation of the Board's outcome determinative standard to mean that if the number of defective addresses equaled or exceeded the number of votes that, if shifted in favor of the objecting union, would have changed the outcome of the election, the union would have carried its burden of proof. (*Leminor*, *supra*, at p. 7.) Instead, the Board reviewed ALRB and NLRB precedent and concluded that no strict numerical standard had been applied in deciding these types of cases.

The *Leminor* Board then provided a survey of prior cases, listing them in three general categories. The first category of cases listed was those where the number of inadequate addresses dwarfed the shift in the number of votes necessary to change the outcome, with the Board observing that in those cases the election normally was set

aside.[4] Relying on this portion of *Leminor*, the IHE in the present case concluded that cases falling within this category may be set aside "without further inquiry." While the portion of *Leminor* cited by the IHE is susceptible to the IHE's construction, we do not believe it can be squared with the more fundamental holdings in that case cited above.

The Board explicitly rejected any presumption based on the provision of a defective list. Further, the Board stated that it would not refuse to entertain evidence of the actual effect of the faulty list and indicated that showing such effect was the burden of the objecting party. Therefore, regardless of whether the number of inadequate addresses "dwarfs" or merely exceeds the shift in the number of votes needed to change the outcome, some inquiry into the effect of the list's deficiencies on the utility of the list is necessary before concluding that there are sufficient grounds to set aside an election. A high number of facially inadequate addresses relative to the number of votes necessary to change the outcome will normally weigh significantly in favor of inferring an outcome determinative effect on the election, but is not in and of itself conclusive.

A close look at cases relied on in *Leminor* supports this reading of the case. In *Silva Harvesting*, the Board set aside an election because the employer's list was

[4] The second category consisted of cases where the number of inadequacies was less than the number of votes necessary to change the outcome, which normally would result in the upholding of the election. The third category consisted of those cases where the number of inadequacies merely exceeded the number of votes needed to change the outcome, which would not alone be a sufficient basis to set aside the election. In *Leminor*, the Board found that the number of inadequacies in relation to the number of votes necessary to change the outcome of the election fell within the parameters of cases where the elections normally have been upheld. The Board then looked to other factors, including the actual use of the list by the Union, the efforts of the Employer to compile an accurate list, and the efforts of Board agents to facilitate the process of providing the list to the Union.

grossly inadequate, the union did not have a significant number of employee home addresses in its files, and the union's staff was forced to waste time looking for employees whose addresses were correct. (*Silva Harvesting, Inc., supra,* 11 ALRB No. 12 at pp. 8-9.)

In *Betteravia Farms,* the Board adopted the IHE's decision setting aside a decertification election based on the cumulative effect of the deficiencies in the eligibility list coupled with pre-election violence. However, the IHE held that the election should be set aside on the grounds that almost a quarter of the workforce -- 71 facially deficient addresses out of a workforce of 307 – was unreachable by the union, a shift of 17 votes would have resulted in a run-off, and the fact that the union had carried its burden of proving that the insufficient addresses impaired the list's utility. *(Betteravia Farms,* (1982) 9 ALRB No. 46 at 3, 38-46.)

In *Salinas Lettuce Farmers Cooperative* (1979) 5 ALRB No. 21, the Board upheld the IHE's recommendation to set aside the election where 81 of 236 employee addresses were out-of-area addresses, post office box addresses or not provided, the employer made no effort to obtain current street addresses, and a shift of seven votes would have placed the UFW in a runoff with a rival union. The Board also relied on the finding that home visits were crucial because of a long holiday weekend leaving only two days to campaign in the fields.

With these considerations in mind, we adopt the IHE's alternative findings of fact that there were 75 undisputed, facially incorrect addresses on the eligibility list

that "dwarfed" the shift in votes needed to change the outcome,[5] the Union relied on the deficient eligibility list, and the evidence of mitigation was unavailing. In particular, we note that on the two days just prior to the election only a handful of employees worked, vastly increasing the primacy of home visits. These factors, considered together, merit setting aside the election results.

We also take this opportunity to clarify the role an employer's gross negligence or bad faith plays in determining if a defective list warrants the setting aside of an election. In the discussion leading up to his conclusion that the election should be set aside, the IHE here made a finding that the Employer was grossly negligent in compiling the address list. It is not entirely clear to what degree the IHE relied on this finding, in conjunction with his findings regarding the deficiencies in the list and the degree to which it impaired the UFW's ability to make home visits, in reaching his ultimate conclusion. This is not surprising in light of the fact that prior Board decisions have not always been clear on the proper analytical role of employer gross negligence or bad faith.

As noted above, an employer's obligation to provide an accurate list of current addresses is a clear statutory and regulatory requirement. The failure to provide

[5] We would be remiss were we to ignore the fact that there appeared to be little, if any, effort on the part of the Board agent in charge to seek corrections of the facially inadequate addresses on the list. Although we appreciate the difficulty ALRB staff face in organizing an election in the short time frame required by statute, the ALRB bears some responsibility for enforcing compliance with eligibility list regulations, especially when non-compliance is obvious on its face and could result in substantial delay and detriment to innocent parties.

such a list creates a serious risk that the election will be set aside and, if an appropriate charge is filed, also may constitute an unfair labor practice. However, it is the deficiency in the list, whether or not the result of gross negligence or bad faith by the employer, that potentially causes interference with employee free choice. Therefore, while lack of due diligence may be relevant in determining whether a list is deficient, under an outcome determinative standard it is of no import whether the deficient list was the result of gross negligence or bad faith.[6] Accordingly, it does not provide any basis for setting aside an election where the deficiencies in the list and the consequent effect on the union's ability to communicate with employees are not themselves sufficient to warrant setting it aside.

We decline to order a rerun or new election as requested by Petitioner. Historically, the setting aside of an election under the ALRA results in the dismissal of the election petition. Consistent with the prescription of prompt elections set forth in Labor Code section 1156.3, section 20372 of the Board's regulations allows the Board to direct a rerun election only where circumstances make it physically impossible to determine the outcome of the first election. In addition, a rerun election shall be conducted, if possible, within three days of the initial election and the original eligibility list shall be used unless the Regional Director otherwise directs. The Regional Director

[6] We agree with the IHE's finding that the Employer was grossly negligent in compiling the address list and note that this would constitute an unfair labor practice. However, in this case the inquiry dictated by Board precedent is whether the misconduct had an outcome determinative effect on the election. The lack of a more effective sanction to deter similar misconduct in the future is frustrating, but to stray from an outcome determinative analysis would run the risk of setting aside an election that in fact represented the free choice of the employees.

can order a rerun election if an objection or objections to an election are filed and the Regional Director determines that it will further the purpose of the Act to nullify the first election and conduct a rerun election. Further, the Regional Director must have the consent of all the parties.

The Board has noted that it does not have the luxury of conducting rerun elections quickly because of the statutory peak requirement, which in part is why the threshold for setting aside an election is a high one. (*Anderson Vineyards* (1998) 24 ALRB No. 5 at p. 2-3; *Coastal Berry Farms LLC* (1998) 24 ALRB No. 4 at p. 12.) It is not lost on the Board that the focus should be on properly conducting an election the first time, so as not to unduly and unfairly burden parties such as Petitioner who had no hand in the election's deficiencies. (See *Coastal Berry Farms, supra*, 24 ALRB No. 4 at 12.) Nevertheless, Petitioner cites no authority for the remedy he seeks and we decline to provide it.

ORDER

It is hereby ordered that the election in this matter be, and hereby is, set aside, and that the decertification petition be dismissed.

Dated: October 28, 2009

GUADALUPE G. ALMARAZ, Chair

CATHRYN RIVERA-HERNANDEZ, Member

Member Shiroma, concurring:

I write separately to state my opinion that employer conduct, i.e., gross negligence or bad faith by an employer in providing a defective eligibility list, should be considered when determining whether to set aside election results under Labor Code section 1156.3(c) if, and only if, there has been a showing that the list's defects had some demonstrable effect on employee free choice. I believe that gross negligence or bad faith should be considered under these circumstances even if such consideration does not fit neatly within the Board's outcome-determinative analysis. I believe that a defective eligibility list, coupled with tangible, quantifiable detrimental effect on employee free choice and employer gross negligence or bad faith in compiling and providing a defective eligibility list, can meet the standard for setting aside an election under section 1156.3(c).

The California Agricultural Labor Relations Act (ALRA or Act),[7] section 1156.3(c) mandates that, unless the Board determines that there are sufficient grounds not to do so, it shall certify an election. This provision has been interpreted as creating a presumption in favor of certification of an election, with the burden of proof on the objecting party to demonstrate that an election should be set aside. (*Ruline Nursery Co. v. ALRB* (1985) 169 Cal.App.3d 247, 254; *Leminor, Inc., supra*, 22 ALRB No. 3 at p. 6-7.)

Section 1157.3 of the California Agricultural Labor Relations Act states that agricultural 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." Section 20310(a)(2) and 20390(e) of the Board's regulations further clarify the employer's obligations in this respect upon service of a petition for certification or decertification, requiring the employer to serve upon the regional director the following information accompanied by a declaration, signed under penalty of perjury, that the information is true and correct:

> (2) A complete and accurate list of the complete and full names, current street addresses, and job classifications of all agricultural employees, including employees hired through a labor contract, in the bargaining unit sought by the petitioner in the payroll period immediately preceding the filing of the petition. "Current street address" means the address where the employees reside while working for the employer.

This Board has held that this eligibility list requirement, adopted by the NLRB in *Excelsior Underwear, Inc.* (1966) 156 NLRB 1235, and by the Board in *Yoder Bros.* (1976) 2 ALRB No. 4, serves several functions: 1) It aids in determining whether the petition

[7] All statutory references are to the California Labor Code, Section 1140 et seq. unless otherwise stated.

satisfies statutory requirements with respect to seasonal peak and showing of interest; 2) It serves as a basis for determining the eligibility of workers to vote; and 3) It enables the union to communicate with eligible voters and determine which names on the employers' list they may wish to challenge. (*Yoder Bros., supra*, 2 ALRB 4 at pp. 3-4.) It is the communication function between the workers and the union that sections 20310 and 20390 seek to protect, not solely as a means of enforcing section 1157.3, but also as a means of enforcing employees' section 1152 rights of self-organization. "Implicit in these [section 1152] rights is the opportunity of workers to communicate with and receive communication from labor organizers about self-organization." (*Laflin & Laflin* (1978) 4 ALRB No. 28 at p. 4.) The importance of the timely, accurate, and complete provision of this list cannot be overemphasized. "The importance we give to the list requirement equals or exceeds that given it by the [National Labor Relations Board]." (*Jack T. Baillie Co., Inc*., (1979) 5 ALRB No. 72 at p. 6.)

There is an inherent tension between the statutory mandate under Section 1156.3(c) that the Board certify an election unless there are sufficient grounds not to do so and the degree to which defective eligibility lists can, and are allowed to, violate workers' rights to self-organization under section 1152. I am of the opinion that a violation of section 1152 occurs when open communication between unions and employees during an election is tangibly frustrated by the gross negligence or bad faith of an employer in providing a defective eligibility list. Such a violation, in my view, may place the integrity of the election process in grave doubt even if the tangible effect on the outcome of the election is minimal,

i.e., the number of defective addresses barely exceeds the shift in votes needed to affect the outcome. Although employer gross negligence or bad faith in providing an eligibility list may not, in isolation, have an effect on the outcome of an election, to ignore or give no weight to either when a defective list has had some demonstrable effect on the outcome creates, I believe, an incentive for employers to do as little as possible to provide an accurate list.

DATED: October 28, 2009

GENEVIEVE A. SHIROMA, Member

CASE SUMMARY

GALLO VINEYARDS, INC. 35 ALRB No. 6
(Roberto Parra) (UFW) Case No. 07-RD-01-SAL

Background

On June 18, 2007, Roberto Parra (Petitioner) filed a petition to decertify the United Farm Workers of America (UFW) as the collective bargaining representative of agricultural employees of Gallo Vineyards, Inc. (Employer) in Sonoma County. An election was conducted on June 25, 2007. The tally of ballots was as follows: UFW 95, No Union 125, Unresolved Challenged Ballots 12. The UFW's objection to the adequacy of the employee voting eligibility list supplied by the Employer was the subject of a investigative hearing. On March 2, 2009, the Investigative Hearing Examiner (IHE) issued his decision recommending that the Board set aside the election. The IHE found that there were a total of 82 facially incorrect or invalid addresses on the list provided to the UFW. He concluded that the number of incorrect addresses fell within the parameters of cases cited as examples where the election was normally set aside and that no further inquiry was required in these instances. The IHE rendered an alternative ruling that, if the various additional factors cited in *Leminor, Inc.* (1996) 22 ALRB No. 3 were applied to the facts of this matter, the election should be set aside because of the Employer's gross negligence in preparing the eligibility list and because the record indicates that the UFW relied heavily on home visits. The Petitioner timely filed exceptions to the IHE's decision.

Board Decision

The Board affirmed the conclusion that the decertification election must be set aside, but its analysis differed somewhat from that of the IHE. The Board clarified that under the outcome determinative standard articulated in *Leminor, Inc.* some inquiry into the effect of the list's deficiencies is necessary regardless of whether the number of inadequate addresses "dwarfs" the number of votes needed to change the outcome of the election. The Board concluded that the 75 undisputed facially incorrect addresses on the eligibility list, coupled with the evidence that the UFW relied heavily on the deficient eligibility list and the lack of convincing evidence that the deficiencies were mitigated, merited setting aside the election results. The Board also clarified that under an outcome determinative standard it is of no import whether the provision of a deficient list was the result of gross negligence or bad faith. Therefore, it does not provide any basis for setting aside an election where the deficiencies in the list and the consequent effect on the union's ability to communicate with employees are not themselves sufficient to warrant setting it aside. The Board dismissed the decertification petition, finding no authority for the Petitioner's request for a rerun election.

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STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of:	)	Case No. 07-RD-1-SAL
	)	
GALLO VINEYARDS, INC.,	)	(34 ALRB No. 6)
	)	
Employer,	)	
	)	
and	)	
	)	
ROBERTO PARRA,	)	
	)	
Petitioner,	)	
	)	
and	)	
	)	
UNITED FARM WORKERS OF AMERICA,	)	
	)	
	)	
Certified Bargaining Representative.	)	

Appearances:

Mario Martinez
Marcos Camacho, A Law Corporation
Keene, California
For the Certified Bargaining Representative

Charley M. Stoll
Camarillo, California
For the Employer

W. James Young
National Right to Work Legal Defense Fund
Springfield, Virginia
For Petitioner

DECISION OF THE INVESTIGATIVE HEARING EXAMINER

DOUGLAS GALLOP: On June 18, 2007, Roberto Parra (hereinafter Petitioner) filed a petition in the above-captioned matter to decertify United Farm Workers of America (hereinafter Union) as the collective bargaining representative of the agricultural employees of Gallo Vineyards, Inc. (hereinafter Employer). An election was conducted on June 25, 2007, with a tally of ballots of 95 votes for the Union, 125 votes for no union and 12 non-determinative challenged ballots.

The Union filed timely objections to the conduct of the election. After an investigation, the Executive Secretary of the Agricultural Labor Relations Board (ALRB or Board) set one of the objections for hearing, concerning alleged defects in the employee voting list supplied by the Employer.[1] The hearing on the objection was conducted before the undersigned on November 11 through 14, 2008, in Santa Rosa, California. The parties requested permission to file written briefs, which was granted. Said briefs have been duly considered. Upon the testimony of the witnesses, the briefs and oral arguments of counsel, and the record as a whole, the undersigned submits the following findings of fact and conclusions of law.

BACKGROUND

As noted above, the decertification petition was filed and served on June 18, 2007.[2] At that time, the bargaining unit consisted of direct hires of the Employer and employees of four farm labor contractors (FLC's). On June 20, in the late afternoon, the Board agent in charge of the election faxed a preliminary list of employee names and

[1] The Executive Secretary dismissed a number of other objections filed by the Union. On appeal, the Board sustained these dismissals. *Gallo Vineyards, Inc.* (2008) 34 ALRB No. 6.
[2] All dates hereinafter refer to 2007, unless otherwise indicated.

addresses to the Union. Casimiro Alvarez, who was in charge of the Union campaign against decertification, acknowledged he received the list on that date.

Alex Ruiz, the Employer's Human Resources Manager, testified that the addresses of the Employer's direct hires were obtained from its' computer base containing the information. This comes from employee information forms filled out by new hires, and change of address forms distributed to employees at the time of their hire, and at the beginning and end of each season. Employees may fill out the change forms at any time. Beyond this, the Employer made no effort to obtain current addresses for its' direct hires, in preparing the voting list.

The forms "require" that employees give street addresses, but in practice, the Employer takes no action against an employee who submits a post office box address. The parties stipulated that the FLC's submitted their employee address lists based on the information contained in their personnel records. The FLC lists contain many out-of-area addresses. It is evident that the Employer exercised little or no oversight in the preparation of these lists.

The preelection conference was conducted late in the day on June 21. The Employer submitted a revised voting list that, inter alia, added five names with no addresses to the three names already listing no addresses. James Canice Collins, the Employer's principal representative, Alvarez and the Board agent conducting the election all testified concerning the events therein. They agree that the parties were afforded ample opportunity to review the list. Alvarez and the Board agent testified that they did

not notice any of the post office box or out-of-town addresses on the list.[3] Collins testified he noticed the post office box and Central Valley addresses, but said nothing, because he thought the Employer and its' FLC's were only obligated to provide the addresses last known to them.[4] It is also clear that Collins was aware of the employees listed with no addresses.

Collins and the Board agent testified that Alvarez did not ask for the missing addresses, and said the list was fine. Alvarez testified that he asked when he would get the missing addresses, and the Board agent told him to file objections. The Board agent and Collins disputed this testimony. Collins and the Board agent also testified that Collins asked Alvarez if he needed any additional information, and Alvarez said he did not.

The Union brought in representatives from other parts of the state to assist in the campaign, most notably to speak with bargaining unit members in the fields and at their homes. The Union rearranged the voting list by the geographic locations of the addresses, and assigned seven representatives to make home visits. According to the

[3] The Union moved to add this failure by the Board agent as an objection to the election. It is rather startling that neither the Board agent nor Alvarez noticed these defects, and the Board agent's failure to carefully scrutinize the two lists provided by the Employer certainly did not help matters. On the other hand, it is agreed that the Union's representatives made no effort to contact the Board agent once they discovered the defects, even though provided with her cell phone number. Alvarez claimed he failed to do this because he was too busy trying to locate employees. In any event, given the number of facially invalid addresses, it is questionable whether the list could have been corrected in time to avoid prejudicing the parties' ability to make home visits. The Board, in *Leminor, Inc.*, et al. (1996) 22 ALRB No. 3, considered the conduct of a Board agent, in the context of an objection filed against the Employer, because the number of invalid addresses did not "dwarf" the number of votes needed to change the election's outcome. It would appear, therefore, that said conduct may be considered herein, if necessary. Given the conclusions reached, however, the undersigned considers the Board agent's conduct irrelevant to the disposition of the objection.

[4] Collins testified he has been one of the Employer's managers for seven years. It is noted that, prior to this election, the Employer had prepared voting lists for a certification and a decertification election. See *Gallo Vineyards, Inc.* (1995) 21 ALRB No. 3 and (2004) 30 ALRB No. 2.

Union's witnesses, this began on June 22 or 23, and continued until June 24. The only eligible voters who worked on June 23 and 24 were the four mechanics.

EVALUATION OF THE EVIDENCE AND LEGAL ANALYSIS CONCERNING THE DEFECTS IN THE VOTING LIST

The Employer's voter eligibility list contains the names of 65 direct hires, and 217 contractor employees, including additions to, and deletions from the preliminary list.[5] Casimiro Alvarez testified that, based on reports from the representatives making the home visits, and a few he made himself, he marked the Union's rearranged list to designate incorrect or incomplete addresses. In addition, he noted a number of employee addresses in the California Central Valley and elsewhere, that were obviously inadequate due to the distances involved, e.g. the employees had to be staying at a local address while working at the Employer's fields in Sonoma County. To summarize, the marked Union list contains the following alleged incorrect or inadequate addresses:

Out-of-area addresses:[6]	58
No address:[7]	8
Post Office Box only:[8]	9
Wrong or Non-existent addresses:[9]	65

[5] These are the numbers from the voting list, as modified prior to and at the conference (Union Exhibit 1), and not the preliminary list. Challenged voters are not included in the count, unless the voter's name appears on the list.
[6] These include addresses in Fresno, Patterson, Sanger, Merced, Madera, Mendota, Calipatria, Ontario, San Mateo and Santa Ana. The undersigned felt it unnecessary to investigate whether the out-of-area addresses were accurate. The Union and Petitioner cite 64 and 65 non-local addresses, respectively, and Petitioner does not include San Mateo. Again, the undersigned used the actual voting list in compiling these figures, and not the preliminary list.
[7] Three on the Employer's preliminary list, plus five added with no addresses to the official list.
[8] One out-of-area address has only a post office box listed. This is included in the out-of-area address count, and not repeated here. The undersigned does not agree with Petitioner's contention that because some of the post office box addresses are not marked on the Union's list, this automatically means the employee was contacted. Alvarez testified that he inadvertently failed to mark some of these addresses.
[9] Designated by an "x" next to the name or, in three cases, by the notation, "no viven," they do not live (there).

There is no dispute that at least facially, the 75 out-of-area, post office box and no listed addresses are invalid. Considerable testimony was directed at the 65 addresses where the Union contends the employee had moved, or the address did not exist. The Union faces a number of factual and legal issues in establishing these additional allegedly incorrect addresses. Three of the representatives making the home visits did not testify.[10] They account for 45 of the 65 employees alleged to have moved, or listed at non-existent addresses.

The representatives who did testify were, for the most part, unable to state what took place when they visited any named employee. This is not surprising, since all of them testified they took notes of this, but discarded them after the election. Similarly, Casimiro Alvarez, who coordinated the home visits, discarded his notes, and was able to relate only one instance when he was personally told the employee had moved, with no forwarding address. Thus, the Employer and Petitioner contend, not without arguable merit, that the Union's evidence on these employees rests entirely on hearsay.[11]

In addition, Salvador (Chava) Mendoza, one of the representatives making the visits, admitted he marked at least one employee as not living at the listed address, solely on the basis that, on repeated occasions, no one answered the door. Alvarez eventually acknowledged that the representatives making the home visits might have reported this to him, for some of the designated employees. The Employer and Petitioner did not have the opportunity to examine the non-appearing representatives on this issue.

[10] They are Martin Alvarez, Julio Cortazar and Roberto Garcia.
[11] Two of the representatives did testify that they observed Alvarez marking the list as they gave him the names of employees they could not locate, and that he did so accurately. Thus, those markings could be considered past

Alvarez testified that perhaps 30, or 45% of the marked names were reportedly addresses that do not exist. One apparent reason for this is that his assistant, who created the rearranged list, was not very accurate in transcribing the addresses from the Employer's list. The undersigned has identified 15 employee addresses where the assistant incorrectly transcribed street names, street numbers or apartment numbers from the Employer's list.[12]

Union witnesses insisted they brought both the Union and Employer lists with them when they were making the home visits, and the Union contends this proves they did not only follow the Union's list. Given the number of non-existent address professed by Casimiro Alvarez, the undersigned is highly skeptical of this contention. Alvarez further testified he attempted to locate problem addresses through an internet website, Yahoo Maps.

The undersigned takes judicial notice that the streets in Santa Rosa listed for three of the employees on the Employer's list cannot be found on the Automobile Association of America map for the cities of Santa Rosa and Rohnert Park, California, copyright year 2006.[13] The undersigned further takes judicial notice that by searching all of the Sonoma County street addresses marked by the Union, as they actually appear on the Employer's list, through Yahoo and Mapquest maps,[14] an additional street listed for an employee in

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recollection recorded. Even so, the reasons why these employees could not be contacted would still not be established.

[12] These include Julio Jiminez Ambriz, Santiago S. Benitez, Agustin R. Carmona, Floriberto Castillo, Miguel Gonial, Martin Guzman, Abel Z. Ortiz, Roberto S. Ortiz, Jose Luis A. Pastor, Juan C. Perez, Alonso Santana, Isaaias C. Santiago, Daniel Tirado, Alfonso F. Vigueras and Mario C. Zarate.

[13] The Union and Petitioner do not object to the taking of judicial notice, while the Employer does. Contrary to the Employer's position, these sources are highly reliable and are subject to the taking of such notice.

[14] http.//www.maps.yahoo.com and http.//www.mapquest.com/maps

Windsor does not exist.[15] Using these search engines, the remaining local addresses (again, as they actually appear on the voting list) do exist, or contain minor errors, which the Union quickly would have discovered, using that list.[16] In addition, it is apparent that the Employer's list omits apartment numbers for three employees marked on the Union's list.[17]

The Union's contention regarding incorrect street addresses is, to an extent, corroborated by James Collins. Collins testified that on June 22, Alvarez telephoned and said the Union was having difficulty locating some of the Employer's direct hires, who are mostly listed at Sonoma County addresses. Alvarez asked for a list of their telephone numbers. Collins directed the Employer's personnel office to compile such a list and fax it to Alvarez. The parties stipulated that the list, with the direct hires' telephone numbers, was sent to the Union.[18] Alvarez, in his testimony, denied making the request or receiving the fax.

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[15] These include Eduardo Morales, listed on Vichevit Ave.; Ventura Cardenas, listed on Vanarro St.; Eleno Alman, listed on Apueballe; and Alfredo Lopez Ortiz, listed on Oakpreark. All except Oakpreark, which is listed in Windsor, are supposed to exist in Santa Rosa. The Union's rearranged list changes, "Oakpreark" to "Oakbreak." The search engines are unable to list a street in Windsor for either spelling. None of these employees, or those with no apartment numbers listed, was accounted for by the employee witnesses.

[16] The search engines give information as of an unspecified date, but the undersigned considers it highly unlikely that changes in the existence of these specific streets would have occurred since the election. Meadowbrook Street auto-corrects to Meadowbrook Court (Alfonso M. Canseco), and other employees are listed on Meadowbook Court. Greenich Ave. auto-corrects to Greeneich Ave. (Leonel Cardoza and Anjelico Torres). Grandwood Street auto-corrects to Greenwood Street and other employees are listed on Greenwood Street, at the same street number (Martin H. Gonzalez and Miguel Angel H. Gonsalez). Under these circumstances, the Union reasonably could have determined these correct streets. There is no such street in Santa Rosa named, "Alyanna" (Jose L. Carrillo); however, other employees are listed at the same street number on Rhianna, and appear on the Union's rearranged list adjacent to Carrillo's name and address. One employee (Jose Luis E. Mota), is listed at 1913 Grand Avenue, a non-existent street number; however, several other employees are listed at a similar, existing address on Grand Avenue.

[17] Juan C. Castro is listed at an address on W. 9th St., with no apartment number. Several other employees appear at the same address on the list, all with apartment numbers. It cannot be presumed that Castro lived in one of those listed apartments, and employees who testified that they lived at the W. 9th St. apartments did not mention Castro. Angel L. Cortez and Albed H. Olomeda are listed at an address on Green Briar Avenue. Although this auto-corrects to Greenbriar Circle, another employee, Wilfredo H. Diaz, is listed at that address with an apartment number. It cannot be assumed that Cortez and Olomeda lived in Diaz's apartment.

[18] The fax is dated June 11, 2003, which is clearly wrong, since the first two pages are entitled, "GVI Union Address List as of 6/19/07." There is no evidence showing how current the telephone numbers were.

The notice of hearing in this matter states that the evidence should be evaluated in accordance with the Board's decision in *Leminor, Inc.,* et al. (1996) 22 ALRB No. 3. This is the most recent Board decision regarding employee lists, and it is presumed that the rationale therein represents the most compelling precedent on that subject. According to the rationale set forth in *Leminor,* the first analytical step in these cases is to determine the number of clearly incorrect or inadequate addresses. At this point, there is no requirement to show bad faith or gross negligence on the employer's part. It is sufficient that the Act and the Board's regulations require a complete and accurate list.

In *Leminor,* union representatives credibly testified that when attempting to conduct home visits for two employees, they were told they had moved. In evaluating the evidence, the Board did not find this testimony sufficient to show that the addresses were clearly wrong, and did not include them in their total of invalid addresses. This case involves many more alleged incorrect addresses than the evidence presented in *Leminor,* but for now, it will be assumed that the Union has failed to establish that any of these was clearly wrong.

Based on the foregoing discussion of the Employer's list, it is found that the following addresses appearing therein were, at least facially, incorrect or inadequate:

Out-of-area addresses:	58
No addresses:	8
Post office box only:	9

Non-existent street: 4

No apartment number: 3

Total: 82

EVALUATION OF THE EVIDENCE AND LEGAL ANALYSIS CONCERNING WHETHER THE DEFECTS IN THE VOTING LIST REASONABLY TENDED TO AFFECT THE OUTCOME OF THE ELECTION

In *Leminor*, the Board affirmed the longstanding principle that an employer and its' contractors are obligated to promptly provide an accurate list of employee names and addresses for the parties' use in contacting employees during an election campaign.[19] The failure to substantially comply with this obligation is, in itself, evidence that it reasonably tended to affect the outcome of the election, irrespective of whether the failure arose through bad faith. Where the number of invalid addresses "dwarfs" the number of votes it would be necessary to change the outcome of the election, the election is normally set aside, without considering other factors. In cases where the number of invalid addresses merely exceeds the number of votes that would have to change, other considerations apply, such as bad faith or gross negligence in compiling the list, the extent to which the complaining party actually used the list, and whether the Employer was given the opportunity to correct it.

In this case, a shift of 22 votes would change the outcome of the election, and a shift of 16 would require the resolution of challenged ballots. It has been found that 82 of the addresses on the list were facially invalid. This is almost four times the number needed to change the outcome of the election, and five times the number needed to

require a resolution of the challenged ballots. While the term, "dwarfs," is subject to various interpretations, the numbers established herein fall within the parameters of cases cited in *Leminor,* where the election was set aside without the need for further inquiry.[20]

The Employer cites decisions of the National Labor Relations Board (NLRB) to support its' position that the number of invalid addresses herein was insufficient to overturn the election. At the outset, it is noted that the parties, other than in cases where a strike is in progress, almost always have much more time to contact employees at home in NLRB elections than in those conducted by this Agency. In addition to home visits, this gives the parties sufficient time to mail election-related materials to the employees. This also means the voting list may be corrected well in advance of the election. In the cases cited by the Employer, for example, the voting lists were provided from two to more than seven weeks before the elections, and in two cases, the employers corrected the lists well in advance thereof.

In addition, the cited NLRB cases use a different test than employed by the ALRB, focusing on the percentage of invalid addresses, rather than an outcome-determinative rationale. This sometimes leads to incongruous results. Thus, in *Women in Crisis Counseling & Assistance* (1993) 312 NLRB 589 [146 LRRM 1037], a regional director recommended that the results of an election be set aside, where the union lost the election by six votes, and there were only six invalid addresses on the voting list. The regional

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[19] These are codified in section 1157.3 of the Agricultural Labor Relations Act (Act) and section 20310 of the Board's Regulations. The obligation regarding contractors is specifically addressed in section 20310(e)(4).
[20] *Betteravia Farms* (1983) 9 ALRB No. 46; *Salinas Lettuce Cooperative* (1979) 5 ALRB No. 21. The Union further requests that the undersigned take judicial notice of the settlement of a related charge concerning the voting

director based his recommendation on the calculation that the six invalid addresses constituted 40% of the names on the voting list.

In *Pacific Beach Corporation* (2005) 344 NLRB 1160 [177 LRRM 1289], the National Board upheld the results of an election where the union lost by five votes, and the evidence established 24 inaccurate addresses. The NLRB focused on the low inaccuracy rate as compared to the number of accurate addresses given, rather than the margin of the loss, arguably an incongruous result. In addition, the original voting list was given to the union more than seven weeks prior to the election. It is also significant that *Pacific Beach* involved a re-run election with the same union. See *Jack T. Baille Co. Inc.* (1983) 5 ALRB No. 72.

Similarly, in *Washington Fruit and Produce Company* (2004) 343 NLRB 1215 [176 LRRM 1362], the administrative law judge based his recommendation that the election results be overturned on the basis that 28% of the addresses were invalid.[21] Nevertheless, the ratio of invalid addresses to the margin of loss was similar to the ratio herein. The National Board certified the results of the election. In that case, the election took place almost five weeks after the voting list was provided to the union, and it had obtained the correct addresses of about 90% of the eligible voters more than two weeks before the election.

The NLRB decisions cited by the Employer, including *Washington Fruit and Produce Company,* also distinguish between cases where the employer omits names from

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list, in Case No. 07-CE-24-SAL. The undersigned will take such notice, but the settlement of an unfair labor practice charge does not constitute evidence that the alleged misconduct took place.

the voting list from those where the addresses are invalid, assigning less weight to the latter instances. This distinction is not articulated in any ALRB case, including *Leminor*. Furthermore, as this case amply demonstrates, the mere possession of employee names is not a "key piece of information" in most ALRB elections, given the brief time the parties have to locate the employees, the frequent use of two surnames, commonality of surnames and the frequent lack of a telephone listing, especially for contractor employees temporarily working in the fields. For the above reasons, it is concluded that the above cases are not controlling herein, and would not be easily applied to this Agency's expedited elections.

If, in fact, the additional factors set forth in *Leminor* should be considered in this case, the Employer presented evidence that, if credited, shows that the Union found out the correct addresses for many of the invalid entries, before the election. At the outset, it is noted that the *Leminor* decision nowhere cites after-acquired knowledge of correct addresses as a factor mitigating a defective employee list. For the most part, the evidence presented leaves open the questions of when the Union became aware of the correct addresses, and the time its' representatives spent trying to locate the voters.

The Employer's list contains several employees with an address on Grand Avenue, Santa Rosa, and Alvarez's notes indicate that Union representatives visited at least some of them, before the election. Viramontes FLC worker, Matias Flores Maya, testified that he and 12 other Viramontes and Gonzalez employees, listed with Fresno addresses, lived

[21] In *Betteravia Farms*, supra, the election results were overturned where less than 25% of the total number of addresses was invalid. In *Salinas Lettuce Cooperative*, supra, the results were overturned where about 35% of the addresses were invalid.

at that address, a single-family residence, as of the election.[22] Maya further testified that he was present on one occasion, before the election, when Mendoza spoke about the election with he and other contractor employees, at the residence.

Adolfo Rivera Navarette (Rivera) testified that at the time of the election, he and seven other Rodriguez contractor employees, listed with Patterson, California addresses, lived at an address on Debmar Lane, Cloverdale.[23] The Employer's list already contained three other employees at that address. Rivera identified, by name, five employees listed at Patterson addresses who were staying at that address as of the election (himself, Cristobal Garcia, Victor Velasques, Jorge Alran Garcia and Luis Ernesto Rivera). Rivera gave one name that does not appear on the Rodriguez list at all (Vladimir Reyes),[24] only gave the first name, "Juan," for one employee, [25] and did not identify the eighth employee.

Alondra Gonzalez contractor employee, Juan Castro Hernandez, testified he lived in an apartment on West 9th Street, Santa Rosa, as listed on the Gonzalez voting list. Alvarez's notations do not list him as an employee it could not locate, and the Union does not dispute that its' representatives were able to contact Gonzalez and other employees on the list at that address. Hernandez testified that Gonzalez employee, Sixto Gonzalez Cruz,[26] listed at a Fresno address, also lived there as of the time of the election. As noted

[22] These include Viramontes workers, Alberto Nunez, Eliel Herrera (named as Eliel Nunez), Marcos B. Nunez (named as Marco Antonio Nunez), Escribiano Mauricio, Bertin Reyes, Fernin Salguero, and Rafael H. Reyes; and Gonzalez workers, Sixto Gonzalez Cruz, Juvenicio Guzman, Pedro G. Alamilla, Navor Martinez and Bertin Reyes.
[23] Mispronounced as, "Dermar."
[24] The Rodriguez list contains the name, "Rafael Reyes." Reyes is a common surname, and the undersigned cannot assume that Rivera merely used the wrong first name.
[25] The Rodriguez list does contain the name of employee, Juan Soto, but Juan is a very common first name.
[26] Incorrectly transcribed as, "Sixter Gonzalez groups."

above, Maya testified that Cruz lived with him on Grand Avenue at the time of the election.

The voting list contains several employees listed at another apartment on West 9th Street, and Alvarez's notations indicate that its' representative(s) visited at least some of those employees. Hernandez testified that Gonzalez contractor employees Raul Blancas Maya and Anselmo C. Ventura,[27] listed at Fresno addresses, also lived in this apartment at the time of the election.

Alondra Gonzalez contractor employee, Rodolfo Maldonado Cabrera, is listed on the voting list at one of the West 9th Street apartments, and Alvarez's notations indicate the representative attempting to contact Cabrera told him Cabrera had moved. Cabrera testified he did, in fact, live at that address, and Salvador Mendoza visited he, and other employees twice to discuss the election.[28] Among those other employees, in addition to Maya and Ventura, was Benito Castro Andrade, also listed at a Fresno address. Cabrera further testified that other employees, listed at local addresses, who the Union contends could not be contacted at home, lived in this apartment at the time of the election, and were present when home visits took place.

The Alondra Gonzalez voting list contains an employee, Moises M. Garcia, listed at an address on Camino del Prado, Santa Rosa, and Alvarez did not designate him as an employee the Union could not contact at his residence. It follows that Union representatives at least attempted to visit Garcia at that address. Gonzalez FLC employee, Delvino Colihua Zoquiteca, listed at a Fresno address, testified that he was

[27] Mispronounced as, "Anselmo Alventuro."
[28] Cabrera was anything but consistent as to when these visits took place, or visits to his crew in the fields.

staying at the Camino del Prado address at the time of the election. Zoquiteca named six other employees listed at Fresno addresses,[29] and two employees with no addresses listed,[30] as having lived at that address at the time of the election.[31]

The voting list for Alondra Gonzalez's employees lists an employee, Samuel M. Rivas, as living at an address on Peterson Lane, Santa Rosa, and Alvarez's notations indicate that the Union was able to contact him at this address. Sergio Velasquez employee, Paolino Andrade Hernandez (Andrade), testified that employees of both contractors lived at that address at the time of the election. He listed three Velasquez employees listed at Fresno addresses who lived there when the election was conducted.[32] In addition, Andrade testified that Gonzalez employee, Agustine Carmona, who is listed at a different address on the voting list, also lived there. Andrade testified that Union representatives, including Mendoza, visited the home twice before the election, and spoke with the Velasquez employees living there.[33]

Salvador Mendoza denied successfully contracting any employee listed with an address outside Sonoma County during the election campaign. Mendoza denied ever being at the Grand Avenue residence, and the Union's list designates one of the Union representatives who did not testify as the one responsible for visiting employees listed there. Mendoza testified that he did make home visits at the Debmar address, but never

[29] Hisidro Tehuitle, Pedro G. Alamilla (identified as Pedro Ramirez Alamira), Navor Martinez, Baldomero G. Panzo (transcribed as Valdomero Panzo), Andres Ceplihua Zoquiteca and Luis Antonio G. Dias.
[30] Nicolas Quiahua and Maurillo M. Quiahua (identified as Marillo Quiahua).
[31] At the hearing, the undersigned stated that he considered Zoquiteca to have established virtually nothing in his testimony. This pertained to his hearsay testimony regarding home visits to the residence. A reviewing authority may consider it relevant that the Union was given this as an employee's address, if other employees, listed at invalid addresses, also lived there. Given the similar testimony of other employee witnesses, the undersigned does not believe that this comment prejudiced the Union.
[32] These included himself, Oscar Andrade and Lucas Bernardino.

met with any large groups of employees there, or any other residence. Mendoza could not recall if he visited employees at the 9th Street apartments, but Juan Manuel Moran, the representative assigned to visit those employees, testified he believes he saw Mendoza and another representative there while Moran was making his home visits.

The Union cites other reasons, in addition to Mendoza's testimony, not to credit the employee witnesses. Since *Leminor* requires clear evidence that addresses on a voting list are invalid, it follow that, to the extent it is relevant, evidence that the Union was actually able to contact employees listed at invalid addresses should also be clear. While the undersigned does not believe Mendoza was unable to contact any of the Central Valley employees, the testimony of the employee witnesses did present significant credibility issues, at least as to the number of such employees contacted. As is partially described above, the employee witnesses had considerable difficulty independently identifying other employees, and in some cases, they were virtually incapable of stating their own addresses at the time of the election. If these witnesses had not been permitted to use the voting list, the undersigned doubts they would have been able to clearly identify more than a few employees. Even using the list, there remains doubt as to the accuracy of their testimony. This is particularly true with respect to Maya and Rivera.

In addition to the 13 employees (including Maya) with Fresno addresses that Maya contended were living on Grand Avenue, Maya named an additional 10 employees, listed

[33] Hernandez testified that a total of about 13 people lived in the house, the remaining employees from Gonzalez's crews. Hernandez was not asked to identify the Gonzalez employees.

at different local addresses, as living at this residence.[34] This makes 23 employees living there. The Employer's list also contains the names of 15 employees at the Grand Avenue address, only two of whom were identified by Maya as living there at the time of the election. If 13 more employees lived at that address, this would mean that 36 workers were living in this one home. Alternatively, either the Employer's list was inaccurate as to the addresses of 23 employees, or Maya's testimony was seriously flawed.

Similarly, in addition to naming Rodriguez employees with Central Valley addresses as staying at Debmar Lane as of the date of the election, Rivera named three employees as living at two addresses on Debmar who appear on the list at different addresses, and failed to name two others who do appear on the list at those addresses.[35] Therefore, if accurate and complete, Rivera's testimony establishes another five employees listed at incorrect addresses. In all, these witness gave testimony specifically showing that the local addresses of 15 employees were incorrect, and if their testimony was accurate and complete, another 22 employees were listed at these addresses, but did not live there at the time of the election.

To summarize, the above employees identified 34 employees with facially invalid addresses as living at addresses given for other employees on the voting list, but this may well be countered by an equal number of additional inaccurate addresses established by their testimony.[36] Thus, there is a strong correlation between the credibility of these

[34] These include Viramontes employees, Hugo Garcia, Moises C. Hernandez, Santos G. Cortes and Teofilio Gonzales; and Alondra Gonzalez contractor employees Samuel M. Rivas, Fernando M. Trejo, Francisco Zaragoza, Pedro F. Gutierrez, Bonifilio V. Cruz and Victor E. Ramirez.

[35] These are, respectively, Daniel Mondragon, Gonzalo Soto and Jesus Leon; and Leonardo Soto and Roberto Mondragon.

[36] Alvarez's notations indicate that the Union was able to contact most of these employees, at the designated addresses, thus upholding the validity of those addresses, and placing the credibility of the witnesses in further

witnesses, and the total number of erroneous Sonoma County addresses. If these witnesses are credible, the number of invalid addresses rises considerably above 82. In addition, since the Union contends that more than 30 *other* employees were listed at incorrect addresses, testimony that many additional employees were incorrectly listed circumstantially corroborates the Union's position.[37]

Two direct hire employees listed with post office box addresses testified that the Union was already well aware of their street addresses and the street address of a wife, before the election, a contention the Union disputes.[38] Alex Ruiz testified that the day after the prehearing conference, the Employer faxed a corrected employee list to the Union. The list gave the street addresses of the two direct hire employees added to the list with no addresses. Alvarez denied receiving the corrected list. Assuming the testimony of the Employer's witnesses is credited, and Alvarez did receive the list, Board precedent indicates that at least three, and possibly all five of these facially invalid addresses would be mitigated.[39]

As noted above, Collins testified that Alvarez told him the Union representatives were having difficulty locating the direct hire employees, and he had a list sent with their telephone numbers. Collins also testified Alvarez told him the representatives were

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doubt. If those addresses were incorrect, the Union would have doubtless wasted considerable time going to the invalid addresses looking for the employees, before finding them at the correct addresses.

[37] There are a few instances where both the employees' testimony and the Union's list show the same incorrect addresses. These have not been added to the number of invalid addresses, because the undersigned does not consider the employee witnesses sufficiently reliable to find that those specific addresses were clearly wrong.

[38] These are Eustacio and Evangelina Maza Campos, and Jose Carmen Solas Maza.

[39] In *Point Sal Growers and Packers* (1978) 4 ALRB No. 105, the number of invalid addresses was mitigated, because the employer had substantially corrected the list prior to the preelection conference. In *Patterson Farms* (1982) 8 ALRB No. 57, the effect of a tainted voting list was mitigated, because a union representative admitted independently knowing the street address of most of the employees listed with post office box addresses. Therefore, if credited, the invalid addresses of the three employees whose addresses were already known to the Union would be

having trouble locating the contractor employees listed at out-of-area addresses, and that he gave Alvarez the Grand Avenue and Debmar Lane addresses. Alvarez denied ever asking for assistance from the Employer in locating employees, because it was "very involved" in the campaign, allegedly permitting the Petitioner to campaign during work time.[40] Alvarez further testified that the only issues discussed when he met with Collins were access for the Union's representatives, and complaints by him of excess access taken by Petitioner. Alex Ruiz testified he attended one of these meetings, and the only issue discussed was access. Collins did not mention Ruiz's presence at any of the meetings.

In its' brief, the Employer contends Alvarez asked Collins to locate the contractor employees on the morning of June 21, and Collins provided the two addresses that afternoon. Even if Collins did provide the addresses, it appears highly unlikely that he did so as early as that date. Since the unrebutted testimony establishes that the earliest date home visits began was the evening of June 22, it is very unlikely that the representatives would have reported this difficulty prior thereto. Collins was also far less than clear as to when these conversations took place. He initially testified that he provided the information as part of a meeting with Alvarez on June 20. (TR 565-567). Later, Collins testified that Alvarez made the request by telephone on the morning of June 21, the date of the preelection conference, and he provided the information later that day, but before the conference. (TR 580-581). Shortly after this, Collins testified that

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mitigated. Arguably, by providing street addresses for two employees the day after the preelection conference, the Employer also acted with sufficient promptness to mitigate those invalid addresses.

[40] This was alleged in one of the Union's objections. Since it was concluded there was insufficient evidence to conduct a hearing on this allegation, the undersigned is obligated not to consider that any access violation occurred.

Alvarez, inter alia, raised the issue of not being able to contact FLC employees at home on June 22. (TR 583-585).

On cross-examination, Collins reverted to claiming the conversations took place on June 20. (TR 596). As noted above, Alvarez did not receive the preliminary list until the late afternoon on June 20. Thus, it is almost impossible that he would have made the request that morning. Ruiz testified that the meeting he attended with Collins and Alvarez took place *after* the preelection conference, further casting doubt on Collins' testimony. (TR 537). Based on the foregoing, it is found that if, in fact, Alvarez made such a request, it most likely would have occurred on the morning of June 23.

The Employer presented evidence of other instances of "self-help" by the Union, that allegedly resulted in its' representatives obtaining additional employee addresses. Paulino Andrade, whose testimony is partially discussed above, testified that Union representatives visited his crew of 18 workers twice in the fields before the election. On one occasion, Salvador Mendoza had Agustin Carmona, who Andrade identified as the Union's "secretary" on the crew, obtain addresses for all the crew members.

Velasquez contractor employee, Felipe Gonzalez Felix is listed at an address in Sanger, California, far from the Sonoma County fields. Felix testified that about one week before the election, Mendoza visited his crew of 18 employees in the fields.[41] Felix

[41] The Union contends that Felix, and other employees who testified regarding when their contacts with Mendoza took place, should be discredited, because the Union probably would not have even been served with the decertification petition when they say the alleged meetings took place. The undersigned does not consider an inaccurate estimate of when the visits occurred, in itself, to be a valid reason to totally discredit the testimony. If, in fact, Mendoza visited the crews to discuss the election, it is, in itself, of little importance that the witnesses erred as to the exact date. These apparent inaccuracies, however, underscore the uncertainty as to when the Union learned the correct addresses, and constitute an addition to the other credibility issues raised by the employees' testimony.

testified that Mendoza asked the crew members to write down their addresses, which they did.

Felix gave his local address at the time of the election. In contrast to the first group of employee witnesses discussed above, the Employer did not list that address for any employee. Felix identified four other Velasquez employees listed at Sanger addresses as living at the local address at the time of the election.[42] He stated no Union representative visited his home prior to the election. Felix further testified that he visited the Union's office, and asked Mendoza why no visit had been made. Mendoza replied that he did not have the time to do this.

Mendoza denied obtaining any employee's address while taking access in the fields, or directing anyone to do this for him. Mendoza claimed that in each instance he asked for a local address, the person he asked denied knowing where the employee lived. He further denied knowing Carmona, that the Union had a "secretary" on any crew, or that it had any employee representative on the contractor crews at the time of the election. Mendoza denied telling Felix he had not visited his residence, because he had no time to do so.

It is well established that it is not the obligation of a union to remedy defects in a voting list. The duty to compile and correct the list lies solely on the employer. *Betteravia Farms* (1983) 9 ALRB No. 46; *Silva Harvesting, Inc.* (1985) 11 ALRB No. 12. This was specifically reaffirmed by the Board in *Leminor*. While the purpose of examining the accuracy of voting lists in representation cases is not, in itself punitive, excusing the distribution of highly inaccurate lists in all but the clearest of cases will only

serve to encourage employers to promulgate such lists. It will also require the evaluation, as is the case here, of extensive, conflicting evidence proffered by less than reliable witnesses.

In the context of this Agency's expedited elections, it is critical that the parties receive accurate addresses at the earliest possible time. Thus, the fact that a party may be informed, or otherwise discover the correct addresses for some of the employees, at some point during the election campaign, does little to show that it was not prejudiced in making home visits to the employees, particularly if one considers the time its' representatives had to expend in discovering the correct information. Collins' testimony, that Alvarez told him the representatives were having difficulty locating both direct hires and FLC employees, if credited, shows that time was spent looking for the employees.

As noted above, in *Leminor,* the Board did not even cite the subsequent acquisition of correct addresses by a party as a factor to consider, whether or not the number of invalid addresses "dwarfs" the number of votes needed to affect the outcome of the election.[43] As noted above, two cases have found that where the voting list was corrected before the preelection conference, or where the union already knew the correct addresses of most of the invalid entries when it received the list, those invalid addresses

[42] These are Hector Gonzalez, Raul G. Ramirez, Victor Andrade and Esteban Sierra Ramos.

[43] The Board did state that in close cases, the *failure to seek corrections in the list* constitutes evidence that the union did not rely on home visits to get its' message across to employees. The undersigned is satisfied that the Union herein heavily relied on the home visits. It recruited a number of representatives from other parts of the State, a major function being to make the home visits. Only a few of the employees worked on the two days preceding the election, so there was no other way to contact them on those critical dates. See *Salinas Lettuce Cooperative,* supra.

would be mitigated. *Point Sal Growers and Packers* (1978) 4 ALRB No. 105; *Patterson Farms* (1982) 8 ALRB No. 57.[44]

In *Jack T. Baille Co., Inc.* (1983) 5 ALRB No. 72 a Board majority upheld an election, noting that the union's representatives had discovered some of the correct employee addresses, and had been informed of others. This is the only Board case even mentioning information received after the preelection conference. The majority, however, in its' final analysis, cited the "unique" circumstances of that case as the reason for overruling the objection. These included an election campaign between the same parties within the prior year, intense campaigning and high voter turnout.[45] Here, the last election for this bargaining unit was on March 13, 2003, more than four years earlier. The majority of the eligible voters worked for labor contractors, and did not reside locally on a permanent basis. No evidence was presented regarding employee turnover, but over a four-year period, this could be expected to be substantial. Although the turnout in this election was comparable to the turnout in *Jack T.Baille,* the record does not disclose how intense the campaigning was herein. Thus, to the extent that this case remains valid precedent, two of the three "unique circumstances" cited therein are not established.

Furthermore, the Employer and Petitioner are, in effect, asking the Board to penalize a party for attempting to remedy the effects of an employer's defective voting list. The undersigned believes that, to the contrary, parties should be encouraged to resolve difficulties arising in Board elections amongst themselves, without facing

[44] The Employer's reliance on this case is, therefore, misplaced. A union organizer admitted she already knew the street addresses of 33 of the 41 employees listed with post office box addresses.

[45] In the absence of these "unique circumstances," that decision would run directly counter to Board and National Labor Relations Board decisions finding that the availability of alternative means of communication should not be

sanctions. This is clearly preferable to a party doing nothing, and then seeking to have the election overturned if it loses. By continuing to permit self-help actions without penalizing parties, there will doubtless still be objections filed based on defective voting lists, but it is more likely that the parties will be satisfied with the process.

The record shows that the Employer otherwise cooperated with the Union in providing the location of crews and their work schedules. There is no dispute that the Union was accorded statutory access rights to campaign in the fields. The Employer further contends that on several occasions, the Union's representatives arrived late to take access, and it permitted them to compensate for this by staying into work time, which was paid by the Employer. The Employer and Petitioner contend that this "extra" access should be considered in determining whether, under the circumstances, the Union was able to communicate with the eligible voters. The Board, however, has held that in-field access and home visits are separate concepts, and the availability of one is irrelevant to defects in the other. *Yoder Brothers, Inc.*, supra; *Betteravia Farms*, supra, at IHE Decision, page 35.

Collins testified that on the day of the election, Alvarez told him that many of the employees (with invalid addresses) had been contacted, and had been convinced to "vote no." It is assumed Collins meant to vote against decertification, which would actually require a "yes" vote. In any event, Alvarez denied making any such comment. Even if Collins is credited on this point, this does not mean that the Union was thereby precluded

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considered in determining whether an election should be set aside due to a defective voting list. *Yoder Brothers, Inc.* (1976) 2 ALRB No. 4, at page 7, fn. 4.

from objecting to the list if, upon further consideration of what had taken place, it decided that the defects in the voting list did affect the election result.

Finally, the parties stipulated that Petitioner received the same voting list as the Union, and did not receive any additional information. The Employer's witnesses further testified that the Employer was neutral in the election, and did not campaign for or against the Union. The Employer and Petitioner contend that this shows the Union and Petitioner operated on an equal footing and, therefore, the defects did not reasonably tend to affect the outcome of the election.

The undersigned has substantial sympathy for the position of Petitioner, who has not been alleged to have in any way contributed to the defects in the list. *Leminor* and *Betteravia Farms,* supra, are the only Board decisions on this topic involving decertification petitions, and this issue was not raised therein. There have been several rival union elections, where objections were raised as to defects in the voting list. Only one case mentioned this issue. In *Silva Harvesting, Inc.* (1985) 11 ALRB No. 12, the Board concluded that when two parties to an election are provided with defective voting lists, the issue is not whether one side was more prejudiced than the other. Rather, the issue is whether the defective list tended to affect the outcome of the election. While not expressly stating this, it appears the Board was referring to the right of bargaining unit members to be apprised of the issues by the parties. Inasmuch as the evidence herein shows the defective list placed a substantial roadblock on the parties' ability to contact eligible voters, this right was substantially interfered with.

To repeat, the undersigned believes that the voting list herein was so defective as to require that the election be set aside, without evaluating the Employer's evidence. While the Board cases find a "presumption in favor of certification," this should not translate into a "rush to certification" under any theory possible, particularly where the employer has flagrantly disregarded its' statutory obligations. If the additional factors set forth in *Leminor* do apply to this case, it is noted that the Employer states, in its' brief:

> The NLRB has found that gross negligence will be found where the Employer was aware that many of the addresses were incorrect when it furnished the list, or when it was made aware of the mistakes and did little or nothing to correct them in a timely manner. (Citing *Laidlaw Medical Transportation, Inc.* (1998) 326 NLRB 925 [160 LRRM 1107])

The undersigned believes it is equally egregious to provide a list with numerous out-of-area addresses, in addition to post office box addresses, and no addresses at all. It has been found that the Employer's chief representative knew that the voting list contained 75 obviously invalid addresses, and did nothing to remedy this prior to the preelection conference. It has also been found that the Employer had previously submitted two voting lists for prior elections. Thus, if the Employer's legal position is correct, its' conduct constituted gross negligence.

As discussed above, the Union, in fact, did rely heavily on the voting list in making home visits. As also noted above, the Board agent in charge of the election failed to adequately scrutinize the list, resulting in a failure to ensure statutory compliance.[46] Finally, even if the testimony of the primary employee witnesses is relevant and credible,

said testimony establishes many additional defects in the voting list, beyond those found based on the Union's evidence. In light of this, the undersigned issues the following recommended order.

ORDER

It is hereby ordered that the Union's objection to conduct of the election in Case No. 07-RD-1-SAL be sustained and that the results be set aside.

Dated: March 4, 2009

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Douglas Gallop
Investigative Hearing Examiner, ALRB

[46] In *Leminor*, the Board found fault with similar conduct by the Board agent conducting that election, but still upheld the election results. The ratio of invalid addresses to the margin of loss was far lower in *Leminor* than is the case here.