STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

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| HIJI BROS., INC., Employer, and UNITED FARM WORKERS OF AMERICA AFL-CIO, Petitioner, and WESTERN CONFERENCE OF TEAMSTERS, Intervenor. | ) | No. 75-RC-3-M<br>3 ALRB No. 1 |

On September 2, 1975, the United Farm Workers of America, AFL-CIO (UFW) filed a Petition for Certification pursuant to §1156.3(a) of the Labor Code requesting a representation election among all the agricultural employees of the employer, Hiji Bros., in the County of Ventura, California. A timely petition of intervention was filed by the Western Conference of Teamsters (WCT).

On September 9, 1975, an election was conducted. The ballots in that election, along with others, were impounded by order of the Agricultural Labor Relations Board (Board), pending determination of the multi-employer bargaining unit issued in Eugene Acosta, et al., 1 ALRB No. 1 (1975),

On September 17, 1975, the Board issued its determination that single employer units were appropriate and ordered an immediate count of the impounded ballots. Eugene Acosta, supra.

The ballots from the Hiji Bros. election were counted on September 18, 1975, at 8:00 a.m., in the Board offices of the Ventura Sub-Region. The results of the tally were as follows:

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| Votes cast for UFW | 85 |
| Votes cast for WCT | 17 |
| Votes cast for no labor organization | 39 |
| Challenged ballots | 19 |

The employer filed a timely petition to set aside the election under §1156.3(c) of the California Agricultural Labor Relations Act (Act) on the grounds that:

1. Inadequate notice of the counting of the ballots precluded the employer from having representatives or observers present at the tally.
2. UFW organizers violated state law by trespassing on the employer's property.

I

The employer alleged a violation of the ALRB regulation §20365(a) in the counting procedure. [1/] The employer contends that §20365 casts an obligatory duty upon the Board to provide an opportunity for all parties to have an observer present at the count and that the election must be set aside if such an opportunity is not provided.

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[1/] Section 20365(a) of the 1975 Regulations provided in part: "Upon completion of the election, a Board agent shall furnish to the parties. a tally of the ballots. Each party shall have a representative present at the time ballots are counted who is authorized to receive such tally."

Robert McMillan, the employer's attorney, testified that on September 17 at about 7:45 p.m. he received a phone call in his Oxnard Office from Kenneth Keith, who was then Director of the Sub-Regional Office of the ALRB in Ventura. According to McMillan, Keith informed him that the ballots from the Hiji Bros. election would be opened "immediately", but did not specify a time or place for the opening. When McMillan demanded 24 hours notice of the count, Keith responded that he would see what he could do. McMillan's secretary, Margaret Buban, testified that the next communication between the ALRB and Hiji Bros, was a telegram telephoned to McMillan's office at 9:05 a.m. September 18 announcing the ballot opening at 8:00 a.m. that same morning. On the telegram, which was subsequently received in the mail, were instructions to Western Union to begin telephoning at 6:00 a.m. on the 18th.

Because of a former Board Regulation which prohibited Board agents from testifying, [2/] Mr. Keith was not questioned. Accepting the facts alleged by the employer, the notice to Mr. McMillan in effect was not substantially different from the notice received by the employer in J. R. Norton Co., 1 ALRB No. 11 (1975). In the hearing in that case, the attorney testified that he was telephoned in his Newport Beach office at 5:30 p.m. and advised of the count scheduled to begin at 7:30 that evening in Salinas.

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[2/] §20600.2(a) read in part, "No...officer or employee of the Board shall...testify in behalf of any party to any cause pending in any court or before the Board..."

While more adequate notice is desirable, we have previously held that the Board is not precluded by §20365 from proceeding with an election tally in the absence of *a* party's representative. Veg-Pak, Inc., 2 ALRB No. 50 (1976), and cases cited therein; J. R. Norton Co., supra. As outlined in Norton p. 5, the intent of §20365 (a) is to

> "impose under normal circumstances an affirmative duty upon the parties to have a person present at the tally, who is authorized to accept 'the tally upon completion of the election so that the period for filing of objections to the election begins to run at that time. To accept the interpretation advanced by the employer would subvert the purpose of this Section and create a tool through which a party could conceivably delay the tally of the ballots indefinitely."

Section 20365 was changed to §20360 in the 1976 regulations, and provides for the unusual situation of the counting of impounded ballots when the parties are not at the voting site. Section 20360(a) reads in part:

> "If the ballots are not to be counted immediately after the conclusion of the election, the Board agent shall give advance notice to representatives of all parties of the time and place at which the ballots will be counted. It is the obligation of ail parties who are notified of the time and place of the ballot count to have a representative present at the time ballots are counted who is authorized to receive a copy of the tally. The time for filing objections under Labor Code §1156.3(c) shall begin to run as soon as the count is completed and the tally prepared, regardless of whether or not all parties are; present to receive a copy of the tally." (Emphasis added).

It is obviously desirable that all parties receive adequate notice of the tally of ballots and be given an opportunity

to have an observer present. However, the fact that the employer did not have an observer at the tally is not alone grounds for setting aside an election. Veg-Pak, supra. J. R. Norton Co., supra.

The employer contends that the Board is mandated by the Legislature to follow National Labor Relations Board (NLRB) precedent in applicable situations. It cites Tideland Marine Services, 116 NLRB 1222 (1956)[3/] for the proposition that there is no need to show impropriety if the Board's regulation is not followed in detail. Subsequent NLRB cases held to the contrary when the procedural errors in handling ballots were less grievous. Polymers, Inc., v. NLRB, 414 F2d 999 (1969).[4/] NLRB v. Capitan Drilling Co., 408 F2d 676 (1969).[5/]

In Polymers, Inc., the court stated:

> "Although the Board recognized that the conduct of the election did not comply with optimal safeguards of accuracy and security, and it acknowledged that the sealing of the ballot box could have been improved upon, it concluded that desirable election standards were met and that no reasonable possibility of irregularity inhered in the conduct of this election ... Thus the Board declined to apply a standard which could disregard the remoteness of the possibility of irregularity." Supra at p. 1002.

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3/ The election examiner failed to seal the ballot box and retained it in his possession from one day to the next while away from the polling place.

4/ The ballot boxes were sealed with easily removed masking tape and locked in a station wagon,

5/ One strip of masking tape was missing from the ballot box. The NLRB refused to set aside the election noting that there were no allegations that the Board agent acted improperly or that interested persons actually removed or inserted ballots into the box.

In the case at hand, the employer's observers were present at the election and observed and participated in the signing and sealing of the ballot boxes. Ubaldo Ortega, an election observer for the UFW, was present both at the election when the boxes were sealed and signed and at the counting of the ballots on September 18. He testified that at the opening, the ballot boxes appeared as they had when sealed on September 9 and that the Board officials properly opened and tallied the ballots.

Three ALRB agents were also present at the count. Along with the UFW observers, they signed affidavits attesting to the fact that they had observed the count and that the resulting tally was accurate.

When there is any semblance of impropriety in the ballot count, or any substantial possibility of the occurrence of impropriety, failure to give notice may well require setting the election aside. J. R. Norton, Co., supra. In this case, there is no evidence or reason to believe that there was any impropriety in the counting of the ballots. Without further evidence to impugn the count, we hereby dismiss the employer's objections.

II

The employer alleges trespass violations prior to the effective date of the Board's access rule, August 29, 1975, as well as violations of the access rule thereafter. The question presented is whether any such incidents of excess access affected the outcome of the election.

The employer's objection stated that organizers came onto its property in violation of §602 of the California Penal Code and contrary to accepted practice under the National Labor Relations Act as reflected in NLRB v. Babcock and Wilcox Co., 351 U.S. 105 (1956). The ALRB has determined to regulate organizer access to employer property by its access rule, 8 Cal. Admin. Code §20900, and this determination has been approved by the California Supreme Court in ALRB v. The Superior Court of Tulare County, 128 Cal. Rptr. 183 (1976). Therefore, we will consider the events in this case taking place after August 28, 1975 in light of the limitations in the Board's access rule.

Access Prior to August 29.

Eight of the twelve incidents of UFW trespass alleged by the employer occurred prior to the effective date of the Board's access rule.[6/]

As we stated in K.K. Ito, 2 ALRB No. 51 (1976), the issue of whether the entry of organizers onto the employer's property prior to August 29 constitutes trespass is not a proper question for review by this Board. However, it is appropriate for the Board to review such incidents of alleged access to determine whether the conduct warrants the setting aside of the election because it involved coercion or intimidation of workers which interfered with their free choice of a collective bargaining representative.

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[6/]Two incidents occurred sometime before the election, but the employer witness was uncertain as to the dates. On both occasions, the organizers' access did not result in work stoppage or in other disruption that affected the outcome of the election.

Employer witnesses, Frank Hiji, George Fujimoto and Shogo Kanamori testified that the eight pre-access rule visits by the UFW organizers to the employer's property took place between August 21 and August 28, 1975. On four of the occasions prior to August 29, the organizers spoke to workers or handed out leaflets at times before work or during lunch. On the other four occasions and on the dates uncertain, the organizers were on the property for brief time periods when the workers were working. At one of those times, the organizers spoke to workers as they walked back across the field at the completion of each row of celery planting.

There was no testimony that organizers prevented workers from working and no other activity besides conversation was alleged. There is no evidence that the organizers conducted themselves in anything but a peaceful and non-disruptive manner.

We conclude that the record does not support a finding that the incidents of pre-regulation access were in any way coercive or intimidating so as to interfere with the employees' exercise of free choice. Samuel S. Vener Co., 1 ALRB No. 10 (1975). Therefore, we dismiss the objection.

Access After August 28, 1975.

The employer presented evidence regarding two incidents of organizer access after August 28, 1975:

A. September 1, 1975 - Mr. Shogo Kanamori testified that one UFW organizer, a Mr. John Gardner, arrived at a field

location where a crew of 30 employees was at work at 9:15 a.m. and stayed until 9:30.[7/] Mr. Kanamori testified that Gardner "spoke to the people" but did not specify whether the employees interrupted work while the organizer was speaking to them.

B. September 5, 1975 - According to the testimony of the employer, Frank Hiji, three UFW organizers, including John Gardner, entered a field where 13 employees were working. The organizers were present when Mr. Hiji arrived at 3:30 p.m., and they remained one hour. Mr. Hiji did not know whether or not the crew foreman ever asked the organizers to leave, and it appears from the record that he never actually approached them himself.

An employee testified that the organizers stayed on the edge of the field and did not actually speak to anyone. However, Mr. Hiji alleged that the organizers engaged in conversation with one employee, an irrigator working some distance away from the others. Mr. Hiji did not seem certain as to whether the irrigator stopped work to speak to the organizers, but asserted that one cannot work and talk.

Thus, we conclude that the access rule was violated on the two occasions above, in that on both September 1 and September 5 the organizers were on the property during work periods, and on

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[7/] Prior to K.K. Ito, supra, it would have been reasonable for unions to interpret the access rule clause allowing organizer access for one hour during the working day to mean any one hour if a crew did not have an established lunch break.

September 5, the number of organizers exceeded access rule limitations. While we cannot condone these infractions, [8/] we cannot conclude on these facts that they affected the outcome of the election. K.K. Ito, supra. Therefore, we dismiss this objection.

Accordingly, we certify the United Farm Workers of America, AFL-CIO, as the collective bargaining representative of all agricultural employees of Hiji Bros., in Ventura County.

Dated: January 5, 1977

Gerald A. Brown, Chairman

Richard Johnsen, Jr., Member

Ronald L. Ruiz, Member

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[8/] Present Section 20900 (5) (A) provides that any organizer who violates the access rule and any labor organization whose organizers repeatedly violate the access rule may be barred from exercising the right of access for an appropriate time period after due notice and hearing.