STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

SUPERIOR FARMING COMPANY, Employer, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Petitioner.	No. 75-RC-2-F 3 ALRB No. 35

On September 11, 1975, an election was held at Superior Farming Company. The tally of ballots showed the following results:

UFW	391
No Union	295
Void	9
Challenged Ballots	282

The Board, on March 25, 1977, ordered that the regional director open and count the 82 challenged ballots which were overruled without exception by the regional director in his report on challenged ballots. On April 5, 1977, the amended tally of ballots was issued which showed the following results:

UFW	440
No Union	328
Void	9
Challenged Ballots	200

Exceptions were filed to the regional director's recommendations concerning between 83 and 88 challenged ballots. No exceptions were filed to the regional director's recommendation

that between 112 and 117 challenged ballots[1/] be sustained. We order that these latter challenges, sustained by the regional director and not excepted to by any party, not be opened and counted. As the remaining challenged ballots, to which exceptions were filed, are too few in number to affect the outcome of the election, it is unnecessary to resolve them.

The employer filed timely objections, and a hearing was held. The hearing officer issued a report, served on all parties, which summarized the testimony and commented on credibility, but which made no recommendations. Based on an independent survey of the record, we dismiss the objections and certify the results of the election.

The employer contends that given the manner in which the election was conducted some 326 eligible voters were disenfranchised, thereby affecting the results of the election; and that union organizers electioneered in the polling area in direct violation of the Milchem rule, Milchem Inc., 170 NLRB No. 46 (1968).[2/] The election at Superior Farming was one of the largest elections conducted by the Fresno Regional Office during the early days of our Act. Numerous problems were encountered resulting in confusion and some degree of chaos during the course of

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[1/]The discrepancy in number of challenged ballots stems from inconsistencies in the lists in the regional director's report on challenged ballots. As our results hers would be the same using either extreme, we do not resolve the question of the exact number of ballots involved.

[2/]The employer's objections petition raised several other objections. The employer's brief essentially dealt only with those issues treated in the body of this opinion. As to the employer's other objections, we dismiss those objections as they are either improper subjects for review, or there is no evidence introduced to support them or no prejudice resulted from the conduct.

the election. Many of the problems might have been averted had the Board agents and parties been more experienced in conducting elections of this type, which require among other things logistical considerations far different than those typically found in industrial settings.

The parties spent much time and effort at the hearing and in their briefs detailing the alleged misconduct. Were we willing to adopt per se rules we would be compelled to set this election aside. But this election is a prime example of why some per se rules may not be workable in ALRA elections. To be sure, the Board agents made mistakes, some of which were in the form of assenting to procedures urged upon them by the objecting party. But, on the whole, they are to be commended for maintaining sufficient control to insure a chance to vote to all those desiring to participate in the election.

Our act seeks to protect the rights of farm workers to *a* free election which produces a representative result. Obviously the critical examination in each objections case is whether, in the final analysis, those rights were protected. Because we find that they were, we certify the results of this election.

I. DISENFRANCHISEMENT AND CONDUCT SURROUNDING THE ELECTION

The record reflects that a pre-election conference was held at Superior's Poso Ranch on the evening before the election. It was agreed that the election would be conducted at two sites, Polling Place "A.", which was located at the Poso Ranch headquarters, and Polling Place "B", which was located at the employer's

Dehydrator Commodity Center. The bulk of the ballots were to be cast at Polling Place "A"; site "B" would handle the approximately 100 employees who worked at the dehydrator, plus the alleged economic strikers. There was some disagreement over the voting hours. The employer requested a 1 p.m. to 5 p.m. voting time at site "A", while the UFW sought a 7 a.m. starting time to accommodate the large number of voters. Board agent in charge, Elias Munoz felt that the 1 p.m. to 5 p.m. hours would be enough time to vote the anticipated numbers and set those hours for site "A"; 4:30 p.m. to 7:30 p.m. were set as the voting hours for site "B".

There was also disagreement over the use of buses to bring crews in from the field to vote. The employer proposed the idea. The UFW opposed it, claiming it had had bad experiences with busing at elections held at other ranches earlier that week; that it created a problem in picking up crews and leaving their cars behind; and that it would tend to decrease voter turnout rather than increase it. Munoz ruled in favor of the use of the company busing plan but did allow the UFW to have one of its organizers ride on each bus. Some of these buses traveled for distances of up to 10 miles in picking up voters.

Three Board agents conducted the election at site "A". The polls at site "A" opened some 15 minutes late at approximately 1:15 p.m. Some 75 persons were waiting to vote. One bus had already unloaded and another drove up as the polls opened; other voters were arriving in separate vehicles. Only 10 persons were initially allowed in the actual voting area which was located

inside a building; the rest of the prospective voters had to line up outside in a grassy area immediately outside the building, a so-called "clear area." From the outset there were problems with the eligibility list: it was not in alphabetical order, pages were upside down, it was not complete. It was hot outside, the line of prospective voters grew, people became impatient and began yelling to "Hurry up." In an attempt to speed up the process, the voting line was alphabetically split into two lines. These lines were reorganized once thereafter and then again. The result was confusion, voters not knowing which line they belonged in. People outside became even more restless, tired and noisy. Munoz, the only Spanish-speaking agent present, tried to quiet the crowd, which, according to the employer, was 98 percent Spanish-speaking. His efforts were initially unsuccessful, however, and one of the employer's observers was asked to assist in interpreting.

Sometime after 5 p.m. there was a surge of some 75 frustrated voters into the building. Munoz ordered the polls closed and announced they would be reopened once order was restored. They remained closed 20 to 30 minutes. When they reopened, they remained open until 7 or 7:30 p.m. The estimates of the number of people waiting to vote when the polls closed and those waiting to vote when the polls reopened varies from witness to witness. It is clear, however, that there was a smaller number, perhaps 50 to 100 less. There does not appear to have been any further disruption once the polls reopened. Some persons waited four to five hours to vote,

The balloting at site "B" was not without its confusion either. Apparently two Board agents conducted that portion of the election; at times only one of the two was present. The polls opened more than one-half hour late at approximately 5:10 p.m., but remained open until 9:30 or 10 p.m. Part of the eligibility list was misplaced. As a result many of the dehydrator employees had to vote a challenged ballot and one of the employer's choices for an observer was not permitted to act as such. The election was briefly halted at least once. Children of economic strikers played in the polling area and some economic strikers remained in the polling area after voting, contrary to the Board agent's requests, until threatened with the closing of the polls. Yet, there is no direct evidence that such conduct prevented anyone from voting. The only evidence elicited that any voters were disenfranchised because of the manner in which the election was conducted came during the direct examination of UFW organizer Ray Olivas when he testified that a little over 300 economic strikers appeared to vote but many of them left because it was. taking so long. On cross-examination, in an attempt to explain why only 175 economic strikers voted, Mr. Olivas testified that some of the persons at site "B" might not have been economic strikers; that the 300 persons he had previously mentioned were the number of economic strikers they expected; that many of those who left might have been family members or relatives who were not eligible economic strikers.

The employer points out that of the 1,097 employees on the eligible payroll list, 768,[3/] or 70 percent, cast ballots; that approximately 326 eligible employees did not vote and that these 326 voters could have affected the results of the election. We note in passing that the fact that even a minority of eligible voters participate in an election is not in itself grounds for setting aside an election. Lu-Ette Farms, 2 ALRB No. 29 (1976) [where 50 percent of the eligible voters participated in the election]. The employer contends that the most plausible and reasonable explanation for less than 100 percent voter turnout was the delay, disruption, chaos and confusion that surrounded the conduct of the election. He cites Hatanaka & Ota Co., 1 ALRB No. 7 (1975) in support of his position. In Hatanaka the tally of ballots showed a total of 310 votes out of a possible 392 as follows: No Union - 70; UFW - 60; 1 Void Ballot and 130 Challenged Ballots. We set that election aside based in part on the fact that of the 82 eligible voters who failed to vote, some had been disenfranchised by the Board agent's failure to open the polls until approximately one hour after the designated time. There all parties agreed that the Board agent's conduct disenfranchised some voters; here that is the central question of dispute. There, because of mishandling it became impossible to resolve the challenged ballots which were outcome determinative; here there is no such problem. Additionally, here both polling sites remained open at least two hours past their scheduled

[3/]This figure represents votes cast for UFW, No Union and the noneconomic challenged ballots overruled by the regional director

closing time and there was no indication that anyone was deprived of an opportunity to vote had he or she chosen to remain and do so. Jake J. Cesare & Sons, 2 ALRB No. 6 (1976).[4/]

In Hatanaka we held that in order to set aside an election in circumstances such as these, there must be affirmative evidence on the record that some eligible voters were disenfranchised. There is no such evidence here. At most the employer has shown at site "A" that there were a smaller number of prospective voters in line when the polls reopened; at site "B" that some persons who may or may not have been economic strikers left because it was taking too long. It is not clear whether any returned to vote. There was hearsay testimony indicating that people were leaving to tend to their families or seek their cars; but there was also hearsay testimony that they planned to return. Such evidence alone cannot support a finding.[5/] Patterson Farms, Inc., 2 ALRB No. 59 (1976). In each instance there was no indication that had these persons chosen to remain and vote or to return before the polls closed, they would have been deprived of an opportunity to do so.

[4/]The dissent asserts that it is our position that "since the polls remained opened beyond the posted closing, all interested voters should have had an opportunity to vote." Our position, quite simply, is that the record in this case contains no evidence whatsoever that any voter was disenfranchised as a consequence of the elections having started late.

[5/]The dissent would establish as an independent ground for setting aside the election the possibility that voters were "either dissuaded, inconvenienced or actually prevented" from voting as the result of the temporary closure. This we reject. Any act or event in which human beings participate is necessarily burdened with an infinite number of possibilities. To begin overturning elections on possibilities would certainly be a complete abdication of that obligation charged to us by statute to assure farm workers secret ballot elections.

Significantly, the employer chose not to call as a witness a single voter who had been disenfranchised. That he had ample opportunity to do so is evident. For two weeks following the election, two employees canvassed the employer's crews in search of disenfranchised voters. They were able to obtain 23 declarations. The employer sought to introduce them in evidence. They were form declarations setting forth one of two generalized reasons for not voting. One of the reasons was premised on a basic inaccuracy which was that the polls had been permanently rather than temporarily closed. The hearing officer correctly sustained the UFW's objection to their admission finding that they had little or no probative value. The hearing did not conclude until some six days after the hearing officer's ruling on the declarations. If weaker and less satisfactory evidence is offered when it is within the power of the party to produce stronger and more satisfactory evidence, the evidence offered should be viewed with distrust. Evidence Code Section 412. We dismiss the objection.

II. VIOLATION OF THE MILCHEM RULE

Before the balloting began Board agent Munoz established a so-called "clean area" at site "A" which included the grassy area immediately outside the building where the voting would take place, bounded on the east by a hedgerow. Prospective voters were to form a line inside the "clean area" and union organizers were not to enter and conduct any organizational activity within that area. The "clean area" was to be restricted to prospective voters; as it turned out many persons who had already voted

gathered there awaiting friends or transportation.

The employer presented several witnesses in support of his contention that UFW organizers were electioneering within the "clean area" during the balloting. It is clear that three UFW organizers were within the "clean area." It is also clear that they were within that area not only when the polls were temporarily closed but also at other times when the balloting was being held. What is not clear is whether the organizers were talking to prospective voters or persons who had already voted. A careful examination of the record indicates that in most instances it is more likely that the organizers were talking to persons who had already voted; in the remaining instances, with one exception, it is at least as likely that the organizers were talking to persons who had already voted as to persons who were waiting to vote. The exception involves the testimony of Maria Antrevino who testified that while waiting in line to vote she saw union organizer Ramon Galvan approach persons 12 to 14 feet from her with a notebook in hand and ask what crew they were with and heard a lady answer. He was there for "a couple of minutes" and that was apparently the extent of the communication.

The employer contends that UFW organizers' actions at site "A" violated the Milchem rule. He also contends that the presence of UFW organizers who also claimed status as economic strikers in the polling line at site "3" and the inevitable conversations that had to take place with other economic strikers over a two hour plus waiting period is also a violation of the Milchem rule.

In 1968 the NLRB held that sustained conversations in the polling area between parties to the election and employees waiting to vote would invalidate an election regardless of the substance of the conversation. In establishing this "per se" rule the National Board reversed its earlier case by case approach under which it examined the facts of each case to determine whether or not the parties' actions had affected the results of the election. Section 1148 of our Act requires us to follow applicable NLRB precedent. The question here is whether the Milchem rule is applicable to this election held during this agency's first week of conducting elections. We think not. It is difficult to perceive how a "per se" rule devised after three decades of conducting elections in an industrial context could be arbitrarily applied to an election of this size held in an agricultural context under the unique circumstances of the first days of our Act.

This election was not held in the closed confines of a small plant in which 63 eligible voters worked, such as they did at Milchem, Inc. Rather it was held on a 20,000 acre ranch. Workers did not leave their machines and walk a short distance to a polling place; rather they were brought by bus from the fields, miles from their cars which in turn were miles from their homes. They waited outside in the heat, both those who had voted and those waiting to vote. The only available shade was in the grassy "clean area." Those who had voted chose to wait there for their bus. Understandably, people grew restless, tired and loud after a while; understandably the sole Board agent

who spoke their language tried to placate the several hundred persons that were there; understandably, too, there would have had to have been some communication, some coordination with those in the grassy clean area in order to transport them back to the fields.[6/] We find that the Milchem "per se" rule is not applicable to a setting such as this. And absent a showing that any conversations that union organizers might have had with prospective voters affected the outcome of this election, we are reluctant to set aside the election. We have found no evidence of objectionable electioneering in this case. This objection is dismissed.

CONCLUSION

Taken collectively and cumulatively, we do not find that conduct of the Board agents or of the UFW seriously undermined the integrity of the election. What this record does reflect are inevitable periods of delay and confusion resulting from the attempts of an undermanned, overworked and inexperienced staff to carry out an enormous task. Given this agency's sudden emergence onto the volatile scene of agriculture labor relations

[6/]The dissent's extraordinary claim that this Board "has in effect exceeded" the application of the Milchem rule to encompass the conduct of observers rests on a misinterpretation of Perez Packing, Inc., 2 ALRB-No. 13 (1976). There we found that where an observer ignored the request of the Board agent and repeatedly engaged prospective voters in conversation, it was a "serious violation of the Board agent's instructions" which when considered collectively with other conduct warranted the Board's refusal to certify the results of the election. There is no evidence that any participants in this case engaged in conduct similar to that complained of in Perez.

nothing less could be expected. We are not convinced that these factors deprived these farm workers of a free election with representative results. Given the strong statutory presumption in favor of certification we uphold this election.

We certify the United Farm Workers of America, AFL-CIO, as the bargaining representative for all agricultural employees of Superior Farming Company.

Dated: April 26, 1977

GERALD A. BROWN, Chairman

ROBERT B. HUTCHINSON, Member

RONALD L. RUIZ, Member

MEMBER JOHNSEN, Dissenting:

In contrast to my colleagues, I do not view as acceptable an election so chaotic that Board agents had no recourse but to terminate balloting in order to restore order.

Labor Code Section 1156.3 (c) specifically empowers the Board to set aside improperly conducted elections.[1/] I would invoke this authority and deny certification on the basis of the following violations of election procedures:

1. Delays in the scheduled opening of the polls at both election sites. It is the majority position that since

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[1/]This section provides, in pertinent part, that, pursuant to a hearing on objections to an election, if the Board finds that

> ... any of the assertions made in the petition ... are correct, or that the election was not conducted properly, or misconduct affecting the results of the election occurred, the board may refuse to certify the election. [Emphasis added.]

The majority argues that when an objection to an election is made under Labor Coda Section 1156.3(c) on grounds that the election was not conducted properly, the objection must allege and prove "misconduct affecting the result of the election". A reasonable reading of the statute would permit the Board to set aside elections which it determines were not properly conducted regardless of whether the misconduct actually affected enough votes to alter the outcome of the balloting.

the polls remained open beyond the posted closing, all interested voters should have had an opportunity to vote. However, a voter so precluded from voting would have no knowledge of the extension of the time for balloting unless he or she was present at the time that the polls would have normally closed. See, e.g., G.H.R. Foundry Division, The Dayton Malleable Iron Company, 123 NLRB 1707 (1959) [additional voting time provided on the day of the election does not in and of itself generally remedy the uncertainty caused by starting late].

2. Balloting at one polling site was temporarily interrupted while. Board agents attempted a more efficient organization of a disorderly voting process. Additionally, there was the complete shutdown of another polling facility by a Board agent, without a time certain for reopening, after repeated warnings to employees waiting to vote that he would do so unless order was restored. Although balloting did eventually resume, a number of the waiting employees did not remain for the polls to reopen.[2/] One UFW witness testified that he overheard several employees declare their intention to return to vote after attending to other commitments. The record does not reveal whether any of these employees later cast ballots. Whereas the absence of a full turnout of eligible employees does not alone constitute disenfranchisement, it is a different matter when employees who make an effort to vote are prevented from doing

[2/]Even though a substantial number of voters participated in the election, at least 297 of the 1,097 eligible employees did not. This number is sufficient to affect the results of the election since it more than equals the total number of voters challenged at the election. [None of the 177 economic strikers should have appeared on the employer's payroll list and are therefore in addition to the 1,097 figure.]

so because of the manner in which Board agents either scheduled or conducted the election. The possibility that eligible employees were either dissuaded, inconvenienced, or actually prevented from voting as the result of the closure establishes an independent ground upon which to set aside the election.[3/]

3. A third ground which supports invalidation of the election is based on the following evidence.

An organizer for the union entered and remained in the "quarantined" polling area[4/] adjacent to one of the voting facilities and spoke with prospective voters even though, by his own admission, he knew that both acts were prohibited.

It is this evidence which prompts the employer to urge us to follow the rule set forth by the National Labor Relations Board which stands for the proposition that any prolonged conversations in the polling area between parties to the election and' employees waiting to vote, regardless of the substance of the conversation, will invalidate an election. Milchem, Inc., 170 NLRB No. 46 (1968). My colleagues reject the so-called Milchem rule; finding that this particular per se rule is inapplicable in the agricultural setting.

[3/]The majority dismisses the charge of disenfranchisement because of the employer's failure to produce witnesses who could in fact demonstrate that they were disenfranchised due to the cessation of balloting. However, the National Labor Relations Board views election misconduct with such rectitude that it has held that where the regional director's investigation of timely filed objections uncovers matters relating to the conduct of a Board agent or the functioning of Board processes sufficient to cause the election to be set aside, the Board will consider such matters even if not within the scone of those objections. Gail W. Glass d/b/a Richard A. Glass Company, 120 NLRB 914 (1958).

[4/]Designation of what is the polling area is left to the discretion of Board agents, Klein Ranch, 1 ALRB No. 18 (1975).

This Board has considered the Milchem decision in at least 18 separate cases but not until now has it been presented with a factual setting similar to that which underlies Milchem. There/ the NLRB set aside an election because a union agent stood for several minutes near a line of voters waiting to vote and engaged them in conversation which he testified "concerned the weather and like topics". Milchem is limited to conversations by parties in the polling area and is a preventative device to "assure that parties will painstakingly avoid casual conversation which could otherwise develop into undesirable electioneering or coercion". As stated by the Board:

> ... the potential for distraction, last minute electioneering or pressure, and-unfair advantage from prolonged conversations between representatives of any party to the election and voters waiting to cast ballots is of sufficient concern to warrant a strict rule against such conduct, without inquiry "into the nature of the conversations ... [as] ... the' final minutes before an employee casts his vote should be his own, .as free from-interference as possible. 170 NLRB No. 46 at p. 362.

Continuing, the Board stated:

> The difficulties of recapturing with any precision the nature of the remarks made in the charged atmosphere of a polling place are self-evident, and to require an examination into the substance and effect of the conversations seems unduly burdensome ... a blanket prohibition against such conversations is easily understood and simply applied. 170 NLRB No. 46 at p. 362.

Under our regulations, parties are never permitted in the voting area during the course of balloting but may be represented by observers who must be drawn from the ranks of nonsupervisory employees of the employer, 8 Cal. Admin. Code Section 20350(b). When the NLRB is presented with evidence that an observer conversed with prospective voters, it will set aside elections only after inquiry into the substance of the comments and upon finding them prejudicial

rather than, as when parties are concerned, regardless of the nature of the comments, Century City Hospital, 219 NLRB No. 6 (1975).

Prior cases in which this Board has weighed application of the Milehem principle fall generally into two categories — parties conversing with voters outside the polling area[5]/ and

[5]/Herota Brothers, 1 ALRB No. 3 (1975) [alleged conversation between union representatives and election observers occurred outside polling area]; Green Valley Produce Cooperative, 1 ALRB No. 8 (1975) [union representative was not in the designated voting area during the course of balloting] ; Yamano Bros. Farms, Inc. , 1 ALRB No. 9 (1975) [organizers conversed with workers 150 yards from the polling area before polls opened and left immediately upon request of Board agent] ; Yamada Bros. , 1 ALRB No. 13 (1975) [union representatives approached prospective voters on public highway two and one-half to three miles from the polling area]; Toste Farms, Inc., 1 ALRB No. 16 (1975) [once polls have opened, employees should be permitted to cast their vote in an atmosphere free of interference by the parties, but organizer's conversations with employees occurred on public road 1,500 feet from the polling place]; Klein Ranch, 1 ALRB No. 18 (1975) [union agents positioned themselves at entrance to ranch, quarter of a mile from the polling area and well beyond that quarantined area designated by the Board agent]; William Pal Porto & Sons, Inc., 1 ALRB No. 19 (1975) (even if evidence of electioneering had been established, it would have taken place beyond the polling area]; Admiral Packing Co., 1 ALRB No. 20 (1975) [union organizer spoke to employees outside the polling area prior to the start of balloting]; Sam Barbic, 1 ALRB No. 25 (1975) [even though Board agent had not designated a restricted polling area, it was clear that organizer was not stationed within immediate voting area; moreover, he did not engage in electioneering nor attempt in any way to interfere with the orderly process of voting]; Salinas Marketing Cooperative, 1 ALRB No. 26 (1975) [organizer did not enter the designated voting area after balloting commenced; comments to prospective voters occurred outside the polling area]; R. T. Englund Company, 2 ALRB No. 23 (1976) [mere presence of union organizers in parked automobile about 25 yards from the polling booths for up to 20 minutes did not constitute electioneering in the voting area] ; Harden Farms of California, Inc., 2 ALRB No. 30 (1976) [organizer engaged in momentary exchange with employees after they had voted and away from immediate polling area]; Konda Brothers, 2 ALR3 Mo. 34 (1976) [no evidence that members of employer's family spoke with prospective voters or that they were within polling area since they had positioned themselves up to 150 feet away from polls and no specific polling area boundaries had been designated]; Veg-Pak, Inc., 2 ALRB No. 50 (1976) [no evidence organizers spoke to employees who were in line waiting to vote] ; Missakian, Vineyards,. 3 ALRB No. 3 (1977) [electioneering by union agents outside the polling area prior to the commencement of voting is not conduct sufficient to set aside an election].

nonparty observers speaking to prospective voters in the polling area.[6/] Since Milchem is inapplicable to conversations by anyone outside the polling area or to conversations by nonparties within the polling area, we did not need to reach Milchem in any of these cases.

On the other hand, in Perez Packing, Inc., 2 ALRB No. 13 (1976), this Board set aside an election partly on grounds that an observer carried on conversations with prospective voters in the polling area despite warnings by Board agents, without examining the nature of the comments made by the observer, the Board considered .such conduct to be "a serious violation of the Board agent's instructions regarding the conduct of the election". This violation, taken together with objections to the selection of a union observer and the supervision of the polling area, constituted

> ... objectionable conduct [which] undermines the integrity of this election to such an extent that it would be inappropriate for the Board to affix its imprimatur to the outcome. 2 ALRB No. 13 at p. 8.

Thus, this Board has in effect exceeded the Milchem rule as well as the holding in subsequent NLRB cases that, in the case of comments by observers in the voting "area, elections will be set aside only when an examination of the comments reveals

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[6/] Chula Vista Farms, Inc., 1 ALRB No. 23 (1975) [individual who conversed with voters in the polling area was an eligible voter, therefore neither an official of the union nor a representative of the employer and thus not a party to the election, within the meaning of Milchem]; Perez Packing, Inc., 2 ALRB No. 13 (1975) [observer's conversations with employees waiting to vote, without examination as to content, is conduct exceeding permissible bounds, particularly when conduct continues despite Board agent's admonishments]; Gonzales Packing Company, 2 ALR3 No. 48 (1976) [no evidence of electioneering since observer may have just given routine instructions to prospective voters].

that they were prejudicial, Century City Hospital, supra. Organizers, as agents of a party, should be held to a higher standard of conduct. Therefore, the reasoning which led us to the holding in Perez concerning conduct by an observer leads me to the same conclusion regarding the conduct of organizers as in the case at hand.[7/]

The majority asserts that the election was held under conditions which invited misconduct by the parties. This should not excuse the misconduct. If Board agents held an election under such conditions as to encourage or make inevitable election misconduct, then clearly the results should not be certified merely because such conduct was predictable.

I would set aside the election without prejudice to the right of any labor organization to file a new petition which meets the statutory requirements and I would support a means whereby the eligibility of the affected economic strikers could be preserved so that they could vote in another election on this farm if held within one year.

Dated: April 26, 1977

Richard Johnsen, Jr., Member

[7/] The NLRB viewed as "a serious breach" of its rule against electioneering at or near the polls conduct in which an individual who was acting on behalf of the union engaged in electioneering activities in close proximity to the polls during *a* substantial part of the voting period, notwithstanding the Board agent's instructions, on three separate occasions, that he leave the area, Star Expansion Industries Corporation, 170 NLRB 364 (1968). Contra": Sewanee Coal Operator's Association, Inc., 146 NLRB 1145 (1964) [there was no specification by the Board agent of a designated or "no electioneering" voting area]. Here, the organizer admitted that he knew before the election that his presence in the voting area was prohibited.