

STATE OF CALIFORNIA
 AGRICULTURAL LABOR RELATIONS BOARD

D'ARRIGO BROS. OF CALIFORNIA,)	
)	
Employer,)	No. 75-RC-14-M
)	
and)	
)	3 ALRB No. 37
UNITED FARM WORKERS OF)	
AMERICA, AFL-CIO,)	
)	
Petitioner,)	DECISION ON OBJECTIONS
)	AND PARTIAL DECISION ON
and)	CHALLENGED BALLOTS
)	
WESTERN CONFERENCE OF TEAMSTERS,)	
AGRICULTURAL DIVISION-I.B.T.,)	
and AFFILIATED LOCALS,)	
)	
Intervenor.)	
)	

On September 9, 1975, an election was conducted among the agricultural employees of the employer at sites in Salinas and Brawley, California. The tally of ballots showed these results:

UFW	264
Teamsters	119
No Union	132
Void Ballots	20
Challenged Ballots	241 ^{1/}

Subsequent to the election, timely objections were filed by all parties. The objections set for hearing by order of the executive secretary dated October 11, 1975, will be set out as part of the discussion of each objection. That order, however, failed to either dismiss or set for hearing employer's objections 42-45. In the course of the hearing, the hearing

^{1/}The challenged ballots, sufficient in number to determine the outcome of the election, are treated infra.

officer, after consultation by telephone with the executive secretary, ruled that evidence would be accepted on employer objection 45. Therefore, that objection will be discussed in the opinion in the same manner as other objections set for hearing. We have reviewed employer objections 42-44 and conclude that they raise issues which are not proper subjects for objections under Labor Code Section 1156.3 (c) and Section 20365 of the Regulations, 8 Cal. Admin. Code Section 20365. Accordingly, employer objections 42-44 are hereby dismissed.^{2/}

Teamsters Locals 890 and 898 filed an objection alleging that truck drivers and other employees (stitchers, folders, hijo operators and mechanical harvesting machine operators) were improperly included in the bargaining unit. Since election petitions covering these classifications of employees of this and other agricultural employers are currently pending before the National Labor Relations Board, consistent with our holding in Interharvest, Inc., 1 ALRB No. 2 (1975), we defer determination of whether persons in these classifications are agricultural employees until decision by the NLRB.

Before discussing individual objections, we will treat the election as a whole as revealed by the record. (Harden Farms of California, Inc., 2 ALRB No. 30 (1976).)

The employer contends that various incidents of misconduct destroyed the "laboratory conditions" under which

^{2/}Objections 42-44 sought to raise various challenges to the constitutionality of the Act alleging violation of due process and improper delegation of authority to this Board. We have previously determined that such objections are not proper subjects for review under Labor Code Section 1156.3(c). Associated Produce Distributors, 2 ALRB No. 47 (1976); Gonzales Packing Company, 2 ALRB No. 48 (1976).

our elections are to be conducted and therefore the election must be set aside. In General Shoe Corp., 77 NLRB 124, 21 LRRM 1337 (1948), the NLRB first expressed its "laboratory conditions" standard as follows:

In election proceedings, it is the Board's function to provide a laboratory in which an experiment may be conducted, under conditions as nearly ideal as possible, to determine the uninhibited desires of the employees. It is our duty to establish those conditions; it is also our duty to determine whether they have been fulfilled. When in the rare extreme case, the standard drops too low, because of our fault [citations] or that of others, the requisite laboratory conditions are not present and the experiment must be conducted over again.

In the course of the multitude of decisions dealing with election conduct which the NLRB has issued in the years since it established the above standard, the NLRB has demonstrated that as applied it is not an unrealistic absolute but one which takes into account the setting in which each election is conducted, that is the relevant "laboratory", in determining whether misconduct affecting the results of the election has occurred.^{3/}

When the NLRB decides to overturn an election and conduct a rerun of the "experiment", the rerun election can usually be held as soon as the determination to set the first election aside is made and can be held among substantially the same electorate. In the agricultural labor context, rerun elections, if they are to have the same standards of employee

^{3/} Thus, in Owens-Corning Fiberglas Corp., 179 NLRB 219, 72 LRRM 1289 (1969), the NLRB said: "Although attempting to establish ideal conditions insofar as possible, we acknowledge that actual facts must be considered in light of realistic standards of human conduct, and that 'elections must be appraised realistically and practically, and should not be judged against theoretically ideal, but nevertheless artificial standards'."

participation as the initial election, generally cannot be conducted until the next peak of employment which may be the next harvest season, a year after the first election. Furthermore, the electorate will likely be substantially changed. Thus, our decision to set aside an election in the agricultural context means that employees will suffer a serious delay in realizing their statutory right to collective bargaining representation if they choose to be represented. We will impose that burden upon employees only where the circumstances of the first election were such that employees could not express a free and uncoerced choice of a collective bargaining representative.

We have determined in the case at hand that the alleged misconduct did not inhibit a free and uncoerced choice by employees of a collective bargaining representative. Taken as a whole, the election was conducted in a generally orderly fashion considering the early date in the operation of the Act, the general uncertainty of all parties as to the standard of conduct required of them and the large numbers of those actually voting. The objections to the election, considered separately and as a whole do not contain evidence sufficient to overturn the results. A discussion of the individual objections follows.

The Salinas election was held on the employer's property inside a shop building at Ranch 1, Spreckels, California. There is a parking lot adjacent to the entrance to the building. A high wire fence surrounds the shop building and parking lot. Voters reached the shop building by passing through a gate located at the edge of a public road. The employer's labor relations manager testified that the shop building was located

approximately 130 feet from the gate and that the entrance to the shop building, which faced away from the gate, was an additional 40 feet from the gate. The voters' entrance to the shop building was not directly visible from the gate entrance. The record indicates that representatives of the parties were told to stay outside the gate during the time of the election.

Board Agent Conduct

The employer asserted a number of grounds for objection which essentially focused upon alleged Board agent failure to control the election. See employer objections 1-5, 11, 13, 14, and 27. As it is our view that the totality of the conduct shown on the record is insufficient to cause us to deny certification, we need not extensively consider the individual objections going to this question. However, a brief discussion is in order.

The underlying fact to be considered as to this group of objections is that this was a large election (over 750 ballots were cast) with a large number of challenged ballots, and it was an election conducted very early in the life of the Act and this agency. The record shows that there were four, and at times five, Board agents conducting the election at the Salinas site. The evidence regarding the numbers of voters in the immediate polling area waiting to vote varies to such an extreme extent that we are unable to make a finding on the issue. However, it is clear that at times there were sizable numbers of voters waiting to enter the voting room.^{4/} Because of the large number of

^{4/}We note that the number of persons waiting outside the voting room was at times large because two or three busloads of workers were dispatched to the voting area at once. It was the employer's labor relations manager who assumed responsibility for controlling

[fn. 4 cont. on p. 6]

challenged ballots voted in this election, it appears that there were at times 10-15 people at the challenge ballot table in the voting room waiting to be processed.

The evidence is that despite the numbers of voters and challenges, the election proceeded smoothly in the voting room itself. Assuming arguendo, that, as the employer contends, the record shows that persons waiting outside in line to enter the voting room yelled pro-UFW slogans, there is no evidence that this conduct disrupted the voting. Nor, although we deplore the fact that at least one so-called "crap" game took place among those waiting outside to vote, is there evidence that this conduct interfered with the process of voting. It appears that a Board agent halted this conduct upon hearing of it, and that it lasted a fairly brief time. Some deviation from the ideal does occur in representation elections, and did in this case. However, it does not rise to the level of conduct warranting setting aside this election.

As a result of the need to deal with occurrences in the voting room and its immediate environs Board agents occasionally left the blank ballots briefly unattended. The record shows that all voters were individually handed a ballot, and most importantly, there is no allegation or evidence that there were more ballots cast than the total number of voters checked as having voted in the election. While the evidence shows that

[fn. 4 cont.]

the timing of arrival of crew buses to the voting area. Therefore, to the extent that the overlap of buses created a large crowd of waiting voters, it was the result of the conduct of the employer or its agents and may not be attributed to either the UFW or the Board agents. In any event, in light of the overall circumstances of this election we do not find that this was conduct tending to affect the result.

a Board agent did not stand next to the ballot box throughout the day, observers and Board agents were present in the room at all times. There is no evidence of any tampering with the ballot box. These objections have not been established. See Clark Shoe Co., 83 NLRB 782, 24 LRRM 1136 (1949); Sunshine - 50'Care Centers, 217 NLRB No. 14, 89 LRRM 1133 (1975); Of., California Coastal Farms, 2 ALRB No. 26, at 6-8 (1976).

Several objections go to the mechanics of the actual voting process. In substance, the claim is that the design of the voting booths created the possibility that other persons in the room could see how a voter was marking the ballot. However, there was no evidence that any person in fact did determine how another voted.

The remaining objection is directed to the fact that on various occasions during the day voters talked with one another in the vicinity of the booths prior to voting and that several times more than one voter was in a voting booth. When this conduct was brought to the attention of a Board agent it was halted. There is no evidence that this occasional "doubling up" in a voting booth can be attributed to an agent of the parties or that it caused a disruption in the voting. In the overall context of this large election we do not find that either of these two objections presents sufficient evidence of conduct warranting setting this election aside. As to the former, it is based entirely upon speculation, and the latter, while detailing less-than-ideal conduct is not of a nature to have had an adverse impact on the election as a whole.

On the basis of the above analysis, employer objections 1-5, inclusive, 11, 13, 14 and 27, are dismissed.

Board Agent Bias

The employer advanced a number of objections detailing alleged Board agent bias in favor of the UFW. See employer objections 6-10, inclusive, and 12. Again, as we have concluded that the entirety of the proven conduct does not constitute grounds for overturning the election, it is unnecessary to treat these individual objections extensively.

The evidence produced in support of the allegations of biased treatment of UFW challenged voters consists essentially of a restatement of the objection as originally submitted. It fails to indicate that any voter allegedly discouraged from voting had even a colorable claim to eligibility. Nor was any discouraged voter produced at the hearing. The evidence in support of the claim that challenged voters wearing UFW buttons were asked for two addresses and others for only one is also insufficient. The employer's witness could not state whether there were any factual differences in the bases for challenge between those in the two groups. The final allegation, that Board agents wrote information in the affidavits which was different from that given by the voter, fails for proof because no witness provided an example of such a discrepancy. Most importantly, no voter was called to testify that misinformation was recorded.

The remaining objection in this group goes to the question of alleged disparate treatment of UFW and employer observers. They allege that Board agents permitted UFW observers to take notes during the election and refused employer observers the same right, allowed UFW observers to wear campaign buttons,

allowed UFW observers to talk among themselves and refused employer observers the same right, and allowed UFW observers to talk directly to voters in violation of election rules.

As regards the wearing of campaign buttons, the only evidence is that a few of the crew observers (who changed with each crew) wore UFW buttons. Although this conduct is not desirable, we do not find that the wearing of such buttons by a few crew observers, by itself, constitutes misconduct warranting setting aside the election. Chula Vista Farms, Inc., 1 ALRB No. 23 (1975). Accord, Larkwood Farms, 178 NLRB 226, 72 LRRM 1057 (1969).

The employer's general proposition that UFW observers talked to voters was established, but the only specific testimony from an observer was that the content of the discussions had to do with the identification of voters and no more. As this was within the scope of the assigned observer duties, it is not objectionable conduct.

The remaining objection in this group claims that UFW observers were permitted to take notes and talk among themselves, while employer observers were not. The evidence is in direct conflict on this issue. However, there is no evidence tending to show that this conduct, assuming it occurred, affected the employee's free and fair choice of a collective bargaining representative, which is, of course, the focus of our inquiry herein.

Accordingly, on the basis of the above analysis, employer objections 6-10 inclusive, and 12 are dismissed.

Miscellaneous Board Agent Conduct

In a number of objections the employer claimed that various acts or omissions by Board agents affected the results

of the election. See employer objections 20, 21, 29, 33 and 37. Again, a brief treatment of each will be undertaken, as we have concluded that the election should not be overturned.

Two objections allege that there was insufficient time to notify workers of the nature of the bargaining unit and the time and place of the election, and that the Board's late provision of a sample ballot interfered with the voter's ability to vote effectively.

The record does not reflect that this was prejudicial conduct. Under our Act there is a general requirement that elections be held within seven days of the filing of the representation petition. Here, more than two full days' notice of the final details of the election was provided, more than is possible in many elections. See, e.g., Yamano Bros. Farms, Inc., 1 ALRB No. 9 (1975) (one-half day notice). Here there is no evidence that any voters were deprived of an opportunity to vote. As to eligible voters actually working on election day, since the employer bused all voting employees to the polls, lack of notice is not shown by the record.

Because Labor Code Section 1156.3(b) provides that any party with the required showing of interest may intervene up to 24 hours prior to the time of the election, ballots and sample ballots cannot be printed until the intervention period has passed. Absent evidence that significant numbers of voters were prejudiced, confused or otherwise unable to cast an intelligent vote because of lack of familiarity with the ballot format, we hold that failure to provide sample ballots in advance of the election is not a ground for setting aside that election. No such evidence is present here.

Employer objection 37 alleges that the ballot count was held on such short notice that it was impossible for the employer to have its observers and legal representatives present to verify the integrity of the ballot box. Objection 45 alleges that the UFW representative at the ballot count did not follow the Board agent's instructions.^{5/}

The ballots in this election were impounded and were counted on the evening of September 17, 1975, along with ballots from several other elections. The employer's labor relations manager, Kelly Olds, testified that he first received notice that the ballot count would occur when his wife took a phone call at 7:30 on the night of the count from a Board agent who told her that the count would begin at 7:30. Olds testified that on learning of the count he called the employer's legal department and two company officials but neither he nor anyone else attempted to reach the employer's election observers, at least three of whom lived in the immediate area. Olds arrived at the ballot count at 9:00 p.m. and was present for and watched the count of D'Arrigo ballots which occurred at about 10:00 p.m. There was absolutely no evidence casting a shadow on the accuracy or integrity of the ballot count. We conclude that the short notice of the ballot count, although undesirable, is not grounds for setting aside the election. Hiji Brothers, Inc., 3 ALRB No. 1 (1977); J. R. Norton Co., 1 ALRB No. 11 (1975).

The only evidence with respect to the allegation that the UFW representative did not follow the Board agent's

^{5/}Employer objection 33 also alleges that the employer's attorney was not permitted to be present at the closing of the ballot box at the Brawley, California election site. No evidence- was introduced in support of this objection. Accordingly, it is dismissed.

instructions during the ballot count was that, although the Board agent instructed observers not to touch any ballots, when a ballot fell from the box onto the table, Rosa Saucedo, a UFW representative, picked it up. The employer offers no evidence of any tampering with that or any other ballot. Since no conduct affecting the results of the election is alleged, this objection should have been dismissed prior to hearing. It is now dismissed.

The remaining objections relative to Board agent conduct allege that a 25-minute delay in opening the polls and the related presence of union representatives in the polling area after the scheduled opening constitute conduct warranting setting aside the election. We do not agree.

The polls were scheduled to open at 6:30 a.m. but did not open until 6:55 or 7:00 a.m. Representatives of the UFW and the Teamsters did remain in the polling area until approximately 6:55 a.m. but left before the polls actually opened. The employer's labor relations manager, who was responsible for the dispatching of buses of workers to come to the polls, summoned the first bus at about 6:45 a.m., although he knew that the polls were not yet open. The first bus arrived at about 6:52 or 6:55 a.m. and the workers on that bus stayed outside the polling room until the polls were opened moments later. There is no evidence that any workers were unable to vote because of the late opening. We therefore conclude that the late opening of the polls was not conduct affecting the results of the election and dismiss the objection. Admiral Packing Co., 1 ALRB No. 20 (1975); H & M Farms, 2 ALRB No. 19 (1976). The presence of representatives of some of the parties in the polling area prior to the opening of the

polls, although after the scheduled opening time, does not constitute interference with the election. Admiral Packing Co., supra; United Celery Growers, 2 ALRB No. 27 (1976).

On the basis of the foregoing analysis, we hereby dismiss employer objections 20, 21, 28, 29, 33 and 37. UFW Misconduct

The employer asserted a number of objections to UFW conduct affecting the results of the election.

A series of objections are concerned with UFW conduct at the gate constituting the entrance to the polling area. The Salinas election was conducted in a shop building at employer's Ranch 1. A fence surrounded the shop area, the entrance of which was about 130 feet from the shop building, and another 40 feet from the actual entrance to the shop. The shop entrance faced away from the gate. The essence of these objections is that a massed group of UFW organizers and agents stood at the gate, cheered with UFW slogans as buses of workers were driven through to vote,^{6/} "checked" all employees who came to vote by private car, and by these acts intimidated potential voters because of the UFW's alleged reputation for violence.

^{6/} The employer submitted as a late-filed exhibit a copy of a CBS sound film which he states includes two incidents filmed in the gate area during this election. The employer alleges in his letter accompanying the film that the film shows in one scene a D'Arrigo bus driving into the polling area and a group of people raising clenched fists, yelling and shouting. In another scene, the film allegedly shows Board agent Susan Schwartz talking with Teamster organizer Robert Chavez and saying "If you have any problem, you can file a challenge after the election." With respect to the first incident, we have concluded that even if partisan cheering did occur at the gate, such electioneering took place outside the polling area more than 50 yards from the entrance to the voting room and was not conduct which interfered with voter's free choice of a collective bargaining representative

[fn. 6 cont. on p. 14]

Although there is a wide range in the estimates of the numbers of those present at the gate, the bulk of the evidence is that there were as few as 4-6 and as many as 20-30 persons present there during the day. Included in this group, in addition to an unspecified number of UFW agents were Teamster representatives, and apparently many persons, especially economic strikers, who stopped to talk with UFW representatives as they entered or left the voting area. The record consistently establishes, however, that the group whatever its size, was gathered outside of the gate demarcating the polling area, where such conversation may properly occur. Herota Brothers, 1 ALRB No. 3 (1975) at p. 2, and cases cited therein.

Shortly after the election began, UFW organizers set up a table outside the gate and put up a sign which apparently said in Spanish "strikers" or "strikers register here." The record is clear that the employer took responsibility for busing to the polls all employees employed on the day of the election and the UFW took responsibility for notifying all alleged economic strikers of the election. At the striker table, the UFW representative kept a file of cards previously filled out by people who claimed to be on strike against the employer. The procedure which emerges

[fn. 6 cont.]

With respect to the second incident, the description of the exchange which took place shows only that the Board agent involved properly informed the Teamster representative at the gate of his right to file post-election objections to the conduct of the election. The alleged statement does not demonstrate that any conduct occurred which would warrant the setting aside of the election. We therefore conclude that the proposed late-filed exhibit, as described by its proponent, presents no evidence not already considered by the Board in reviewing objections to this election and presents no new evidence which would warrant the setting aside of the election. The proposed exhibit is rejected.

from the somewhat conflicting evidence in the record is that, as persons who claimed to be economic strikers came to vote, they generally parked their cars outside the gate and as they walked to the gate stopped at the strikers' table. UFW witnesses testified that at the table, striker 'cards which people carried were checked against the UFW file. In addition, some people drove their cars through the gate to a parking area inside the gate. The evidence as a whole is that a UFW representative approached some of these cars holding the card file of claimed strikers and spoke to the people inside the car. There is no evidence that any person refrained from voting after talking with the UFW representative, Because there is no evidence that any eligible voter was turned away by this procedure and in view of the fact that the union was responsible for locating, informing, and perhaps providing transportation for economic strikers, this conduct appears to be a reasonable device to keep track of those voters in the striker category. Toste Farms, Inc., 1 ALRB No. 16 (1975). We do not find that this conduct warrants setting aside this election.^{7/}

Other employer objections go to alleged UFW electioneering within the polling area; propoganda distribution to those waiting to vote, campaigning among waiting voters,

^{7/}We decline to accept the employer's suggestion that we factor into our consideration of this objection the UFW's reputation for violence. Speculation upon the alleged violent proclivities of parties appearing before this Board can contribute nothing to our mandate to perfect the statutory rights of agricultural workers.

and parking a car covered with campaign stickers inside the polling area.^{8/}

As to the propaganda distribution allegation, the record shows that Miguel Angel Martinez was a crew observer and eligible voter who went in and out of the polling area two or three times. There was some evidence that he appeared to be carrying material which he appeared to hand out to people in the polling area. Such evidence is insufficient to show prohibited electioneering. Another employer witness testified that he saw three UFW organizers go in and out of the polling area. They were carrying campaign material but did not speak or hand materials to anyone in line. They appeared to be looking for someone.^{9/} This objection has not been established by the record.

The record reveals an incident in which two persons boarded a bus carrying voters waiting to dismount and handed out

^{8/}Objection 17 also alleges that on at least five or six occasions, handwritten messages were taken inside the polling area to the Board agent in charge of the election who then went out to the ranch entrance and conversed with UFW organizers. There is no allegation that the messages were conveyed by other than eligible voters who were properly inside the polling area, nor is there any allegation that the voting was left unsupervised when the Board agent came outside to speak with the organizers, since there were several Board agents conducting the election. Parties are encouraged to raise problems they see occurring during the course of the election to the Board agent in charge so that the problems can be quickly resolved. Where representatives of the parties who are excluded from the voting area note problems which should be brought to a Board agent's attention, it is perfectly appropriate to do so by means of a written message to the Board agent conveyed by an eligible voter. The objection is dismissed.

^{9/}Similarly the employer also introduced evidence, apparently in support of this objection, that another individual, who may or may not have been a UFW organizer but who voted as an economic striker, went into the polling area but did not speak or hand any material to anyone. Here too, the evidence is insufficient to show prohibited electioneering.

UFW buttons and bumper stickers. There is no evidence that they said anything to the voters. Later, however, these two individuals were also seen talking to voters in line; but no material was passed, nor was any conversation overheard. The testimony bearing upon the relationship of these persons to the UFW is that one was earlier seen at a UFW office passing out literature, and the other was seen giving out union literature at one of the employer's labor camps some two to three weeks prior to the election. One of the two worked with the employer's witness in a D'Arrigo crew in Brawley in December 1974, and it was not clear whether or not he was still a D'Arrigo employee: there was evidence that he had been living in a D'Arrigo labor camp as late as May, 1975. It was also not clear whether the second individual was a D'Arrigo employee, and the only opportunity the witness had to observe him passing out literature was, in the witness¹ words, -for "about two seconds, maybe."

The fact that a person is an active proponent of a union is not sufficient to attribute to the union responsibility for the misconduct of the individual. See, e.g., Chula Vista Farms, Inc., 1 ALRB No. 23 (1975); accord, Intertype Corp. v. NLRB, 69 LRRM 2067 {4th Cir. 1968}, enf'g 65 LRRM 1235. On the basis of this record, we cannot conclude that the electioneering activity allegedly engaged in here may be attributed to the UFW.

Maria Preciado and Carlos Lugo Rivera were individuals who voted as economic strikers and were both seen inside the polling area handing out UFW campaign buttons. As to the former, the record shows that she had taken a leave of absence for union business in 1972, and although originally designated as a UFW

observer in the election, her name was withdrawn upon the employer's challenge that she was an organizer. Assuming an agency relationship could be established, there remains the question whether conduct of this type affected the employees' free choice of a collective bargaining representative. Harden Farms of California, Inc., 2 ALRB No. 30 (1976); K. K. Ito Farms, 2 ALRB No. 51 (1976). We think not.

The issue of union organization of the employees of this employer has been a live one for many years. The election held was heavily contested and was one in which feelings ran high on all sides. Still, there is no evidence that voters were pressured to wear buttons or were in any way threatened with harm if they did not accept the offered campaign material; nor that their free choice of a collective bargaining representative was interfered with by the offer of a campaign button to them while they were in the polling area. We find that the giving of campaign buttons to these voters while they were inside the voting area is not a ground for setting aside this election.

A further employer objection alleges that a UFW staff member entered the election area and campaigned among waiting voters. A combination of four employer and Teamster witnesses testified that a UFW legal worker, Mark Van der Hout, went into the polling area for a short period of time. Three of the four witnesses stated that he was involved in disagreements with Board agents. Only one of the four testified that Van der Hout was talking to voters waiting in line to vote. On cross-examination of that witness, however, it appeared that Van der Hout was talking to a Board agent and voters while involved in some sort

of dispute; additionally, it was too dark to see to whom he was talking in the voter line. The preponderance of the evidence does not support a finding that Van der Hout talked to, let alone campaigned, among those waiting to vote.

As we have previously held that the presence of bumper stickers in the polling area is not ground for setting aside an election [Harden Farms of California, Inc., 2 ALRB No. 30 (1976)] we dismiss the employer's remaining objection to voting area conduct.

On the basis of the above analysis, employer objections 15-19, inclusive are dismissed.

Employer objection 26, alleging improper UFW use of organizers as observers, having not been asserted to the Board agent prior to the election, was waived and is hereby dismissed. West Foods, Inc., 1 ALRB No. 12 (1975); 8 Cal. Admin. Code Section 20350 (b). So also with employer objection 45 which alleges failure of the UFW representative at the vote count to follow Board agent instructions. The conduct consisted of picking up a fallen ballot despite instructions not to touch ballots. However, no evidence of tampering has been produced. As no conduct affecting the results of the election is alleged, this objection is now dismissed.

Several objections, taken together, allege that the UFW interfered with the election by telling employees that if the UFW won there would be no supervisors in the fields and that they had to sign a union card prior to the election to be eligible to vote. No evidence having been introduced as to the latter claim, it is dismissed.

The threshold question to be addressed regarding the statement concerning supervisors is whether it may be attributed to the union. We believe that it cannot. At most, the evidence establishes that one of the alleged speakers was a vocal union adherent. The other was the crew observer for the cauliflower crew. There is no evidence to indicate either was an agent of the union acting within the scope of his official duties. DIT-MCO, Inc., 163 NLRB 1019, 64 LRRM 1476 (1967). As the statement is not attributable to a party, and we find that, in addition, the statement was not of the type tending to create an atmosphere of fear or intimidation, we do not find that conduct interfering with the election has been established.^{10/}

Teamster Objections

With the sole exception of its claim that the UFW held a captive audience speech within 24 hours of the election, the evidence as to the remaining Teamster objections has already been considered above in relation to various employer objections and found insufficient to support those objections. On this basis, then, these objections are dismissed.^{11/}

Miscellaneous UFW Misconduct

The employer contends that the UFW violated the terms

^{10/}The employer also introduced some evidence of an alleged threat made to the mustard crew that if they did not vote for the UFW they would be out of a job. The employer did not allege any such threat as part of its objections to the election; accordingly we do not consider this evidence.

^{11/}Teamster objections that mainshop mechanics at the Clark Street mainshop were excluded from the voting unit as described in the notice and direction of the election, that the Brawley election site was held open beyond the designated closing time, and that UFW nonemployee observers were present in the polling area at the Brawley election site were set for hearing but no evidence was introduced with respect to them. They are therefore dismissed.

of a pre-election agreement which provided, inter alia, that there would be no campaigning on the buses transporting the workers to the polls. Two witnesses testified that Edwardo Martinez and Raphael Tinajero handed out leaflets and buttons on the bus carrying the cauliflower crew, and that Martinez posted UFW decals on the bus before it left for the voting area.

The question presented by the objection is whether violation of the parties' agreement to restrict electioneering to preclude activity which would otherwise be permitted, may be grounds for overturning an election. In Perez Packing, Inc., 2 ALRB No. 13 (1976) we considered an alleged violation of an agreement of the parties permitting nonemployee observers. There we stated that we will carefully scrutinize any alleged violations of election agreements made by the parties in order to safeguard against prejudice to the fairness of the election. We do not see such prejudice on this record. As judged by the ultimate standard - the impact of the conduct on the free choice of the workers - the incident described is not sufficient to overturn the election. There is no evidence of coercion or intimidation, and it directly affected only a small segment of a large electorate.

The evidence in support of the allegation that the UFW held a captive audience setting within 24 hours of the election consists of testimony that a UFW organizer passed out campaign literature at the employer's labor camp an hour before the commencement of the election. Such pre-election campaigning does not constitute a "captive audience" speech and is not prohibited. California Coastal Farms, 2 ALRB No. 26 (1976). Accordingly, this objection is dismissed.

CHALLENGED BALLOTS

There were 241^{12/} challenged ballots, a number sufficient to be determinative of the outcome of the election. The challenges were made on the following six grounds: (1) not on list; (2) not on list - mustard crew; (3) economic strikers; (4) not in unit - truck drivers; (5) supervisors; and (6) name already checked off.

Not on List

The ballots of 29 voters were challenged on the ground that the voters' names did not appear on the eligibility list.

In his investigation the regional director found that names of nine of these voters ^{13/} did actually appear on the list and were simply overlooked at the time the voters came to vote. The regional director recommended that the challenges to these ballots be overruled. No party excepts to that recommendation. Accordingly, the challenges are overruled.

The regional director found that three persons ^{14/} whose names did not appear on the eligibility list were on the employer's

^{12/}The regional director's report states that there are 241 challenged ballots but his lists of challenged voters total 242 names. Among the challenged voters there appear the names "Maria Preciado" and "Maria Indra Preciado." The regional director recommends counting the ballot of one and not of the other. While it is highly unlikely that there are in fact two voters, rather than one, we cannot make that determination on the available evidence. Therefore, we do not resolve the ballot of either, and direct the regional director to clarify this discrepancy if a supplemental report is required.

^{13/}The names of the nine voters are: Mario D. Rodriguez, Maria Guadalupe Rodriguez Parra, Julio B. Mora , Trinidad Murrillo, Maria Rodriguez Simona, Evangelina Rodriguez, Jesus M. Villegas , Eugenio De La Paz, and John Angelo Pedvilla.

^{14/}The three persons are: Antonio Delgado, Jose M. Morales, and Sergio Diaz Colosio.

payroll records for the payroll period ending August 30, 1976, the eligibility period. The regional director recommended that the challenges to these ballots be overruled. No exceptions were filed to that recommendation. Accordingly, the challenges are overruled.

The regional director found that the remaining 17 voters^{15/} challenged in this category did not appear on the employer's payroll records for the appropriate payroll period. Two of these persons were employees who were ill and not receiving sick pay or disability benefits from the employer during the eligibility period.

The regional director recommended that these challenges be sustained. No party excepts to that recommendation.

Accordingly, we accept it pro forma; the challenges are sustained.^{16/}

Not on List - Mustard Crew

The ballots of an additional 26 persons,^{17/} who were members of the mustard crew, were challenged on the ground that their names did not appear on the eligibility list. The regional director found that the mustard crew as a whole was not employed during the eligibility period, but that two members of the crew,

^{15/}The 17 persons are: Carlos Rosas (Casillas), Mague Pena, Jesus Gonzales Munos, Thomas Mendez, Francisco Garate, Adrian Nello Betta, Jesus Orozco, Elias Rubalcava, Jose Avila, Santiago Celaya, James Wilson, Jose De Jesus Saucedo, Jose Samora Hurtado, Javier Silva Gonzales, Juan Patlan, Paula R. Flores, and Jose Maria de La Fuente.

^{16/}But see our decision Rod McClellan Co., 3 ALRB No. 6 (1977);.

^{17/}The 26 persons are: Juanita H. Martinez, Josefina Santana, Emilia Fabela, Margarita Rodriguez, Lorenzo Carrillo, Epifanio Favela, Anita Sanatan, Maria Elena Lopez, Francisco Castellanos, Leticia Vasquez, Luis Mejia, Angel Perez Sanchez, Carmelo Juarez, Daniel Segoviano, Roberto Alvarez Ayala, Fidel Carrillo, Rosalinda Santana, Olivia Garcia, Micaela Garcia, Irma Garcia, Amador Valdominios, Luis Mendoza, Ramon Jimenez, Anselmo Perez, Dora Sousa Quintana, and Miguel Flores Lopez.

Dora Sousa Quintana and Miguel Floras Lopez, did work during the appropriate payroll period apart from the rest of the crew. The regional director recommended that the challenges to the ballots of Dora Sousa Quintana and Miguel Flores Lopez be overruled and the challenges to the remaining ballots in this category be sustained. No party excepts to this recommendation. Accordingly, the challenges to the two named workers are overruled and the challenges to the 24 other employees in the mustard crew are sustained.

Economic Strikers

There were 148 economic striker challenges. As to 109 of these, the regional director recommended that the challenges be overruled. He found that each of these voters (1) was employed in either the payroll period immediately preceding the termination of the UFW-D'Arrigo contract on November 18, 1972 or the payroll period immediately preceding the commencement of the strike on December 6, 1972, (2) went on strike on or about December 6, 1972, (3) participated in strike-related activities, and (4) has done nothing inconsistent with his or her economic striker status.

The employer's exceptions to the regional director's recommendations consists solely of the claim that the report failed to include information of various sorts, relative to a total of 56 voters who are not named. We do not view this exception as raising a substantial, material factual issue

^{18/}The employer also objected on the ground that a hearing was required in all economic striker cases so that the employer can establish abandonment by cross-examination of economic strikers. We have previously rejected the same argument in George Lucas & Sons, 3 ALRB No. 5 (1977).

sufficient to warrant a hearing. "In the absence of specific assertions substantiated by evidence, the Board is entitled to rely on the report of the regional director." Sam Andrews' Sons, 2 ALRB No. 28 (1976). The function of the challenged ballot system is to provide a post-election framework in which contested factual questions regarding voter eligibility might be determined. It is not designed to constitute a mechanism for delay in the settling of election results. Because of the primacy of this principle of efficient resolution of election results, our regulations and case law provide that in the absence of exceptions the conclusions and recommendations of the regional director shall be accepted by the Board pro forma. We adopt that principle here, accept the regional director's recommendation and order that the ballots of the 109 strikers listed in Schedule "A" attached hereto be opened and counted.^{19/}

The regional director recommended that the challenges to the ballots of Daniel Flores Ambriz and Jose Francisco Garcia be sustained on the ground that they abandoned their economic striker status by returning to work for the employer in October of 1973. The UFW excepts to this recommendation on the ground that the social security numbers or signatures of these voters should have been checked to confirm that it is those two people who returned to work for the employer rather than two other employees by the same name. This allegation does not constitute evidence sufficient to show that there was a mistaken identity problem, and we therefore uphold the recommendation of the regional director and sustain the challenges.

^{19/}We also reject on the same grounds the employer's general exception that the strike had been abandoned prior to the election.

The ballots of Manuel Rivera Vasquez and Heriberto Perez were challenged on the ground that the two are supervisors. The regional director found that neither person possessed the indicia of supervisory status and recommended that the challenges to their ballot be overruled. No party excepts to this recommendation. Accordingly, the challenges are overruled.

Challenges were made to the ballots of truck drivers^{20/} employed by the employer on the ground that they are not agricultural employees. The regional director recommended that no determination be made with respect to the eligibility of these voters. No party excepts to this recommendation. A petition covering the truck drivers of this employer is currently pending before the National Labor Relations Board. Accordingly, we defer determination of the status of the truck drivers as agricultural employees pending the NLRB's determination. Interharvest, Inc., 1 ALRB No. 2 (1975).

The regional director shall open and count the ballots of those persons whose names appear on Schedule "A" hereafter, and shall issue an amended tally to the parties. If the outcome of the election can be determined at that time, the executive secretary shall certify the results of the election. If, after a count of those ballots and consideration of the number of challenges which have herein been sustained the outcome of the election cannot be determined, the regional director shall proceed as described in the paragraphs below.

^{20/}The regional director's report states that 30 voters were challenged as truck drivers but his attached list of names of persons challenged as truck drivers shows only 28 persons.

This Board has not yet determined whether strikers not on either payroll may yet be eligible to vote in appropriate circumstances. However, should a re-opened investigation become necessary here, we direct the regional director to conduct further investigation into the status of those persons found not to appear on either statutory payroll. Such investigation shall include determination of the last day each of these employees worked for the employer, the reason they ceased work, the employer's established practice with respect to rehiring former employees in the next season, and whether each of these employees had performed seasonal or year-round labor and, if seasonal, when during the year they are commonly employed. In addition, for each employee, the regional director shall determine and state in his supplemental report whether the employee has engaged in activities from the date of the strike to the date of the election which constitute abandonment of his or her economic striker status within the parameters enunciated in Pacific Tile and Porcelain Co. , 137 NLRB No. 169 (1962). See George Lucas & Sons, 3 ALRB No. 5 (1977). The economic striker status of each shall be measured as of the time of the election. Lawrence Vineyards Fanning Corporation, 3 ALRB No. 9 (1977). As part of the investigation the regional director shall provide the employer with an opportunity to present facts with respect to each of these employees which tend to show abandonment.

The regional director recommended that the challenges to the ballots of eight ^{21/} voters should be sustained on the

^{21/}The eight persons are: Salvador Bustamante, Abraham Saldivar Perez, Salvador Rios Medina, Victor Gonzalez, Jesus Alvarado Jimenez, Francisco Hernandez De Santiago, Pedro C. Sanchez, and Francisco Orosco.

ground they either returned to work for the employer or made applications for reinstatement with the employer. The NLRB has held that placing one's name on a rehire list does not necessarily constitute abandonment of one's economic striker status. Pacific Tile and Porcelain Co., supra. Therefore, if a supplementary report is required, the regional director shall state which of the listed employees returned to work for the employer and which only applied for reinstatement, shall state the circumstances of the application and shall determine consistent with the above-cited case, whether in each case the application for reinstatement constitutes abandonment of the employee's economic striker status.

The ballots of seven persons^{22/} were challenged on the ground that when they presented themselves to vote and their names were located on the eligibility list, it was found that their names were already checked off as having voted. The regional director made no recommendation with respect to the eligibility of these voters citing the confusion caused by similar names and ordering of surnames as preventing determination of eligibility. The regional director is hereby directed to investigate these challenges as part of his reopened investigation and determine whether there is more than one employee having each of the listed names and if so whether both names are checked off.

One name appears on the regional director's master challenge list which is not discussed in the regional director's report and with respect to whom the regional director makes no recommendation: T. K. Williams is listed as challenged as

^{22/}The persons in this category are: Jose Alonzo Villalobos, Jesus Rodriguez, Jose Garcia Aguilar, Juana Cristina De Estrada, Daniel Enrique Campos, Antonia Avila, Esther R. Torres.

Not in Unit. The regional director is directed to investigate this challenged ballot and make a recommendation as to its disposition if a supplemental challenged ballot report is required.

Dated: May 10, 1977

Gerald A. Brown, Chairman

Ronald L. Ruiz, Member

Robert B. Hutchinson, Member

SCHEDULE "A" - OPEN AND COUNT

(1) Antonia J. Pena	(30) Virginia Murrillo Gomez
(2) Abelardo Pizarro Chaidez	(31) Sinecio Marquez Galarza
(3) Delfina Zanteno	(32) Teresa Vasquez
(4) Ernesto Sanchez	(33) Roberta Luna Zuniga
(5) Melchor Ibarra	(34) Modesto Lopez
(6) Epifanio Vargas Negreta	(35) Elvira Jaime Duran
(7) Carlos Palacios	(36) Jose Ochoa Rivas
(8) Jose M. Heroz	(37) Benita Flores
(9) Enrique Cordova	(38) Maria Juana Cabrera
(10) Soledad Reya De Vasquez	(39) David Alcaez
(11) Jesus Marron	(40) Amador Ortiz Garcia
(12) Juan Franco	(41) Guadalupe Martinez
(13) Luis M. Martinez	(42) Benito M. Barcelo
(14) Hermilo Mojica	(43) Pablo Luna
(15) Jesus Martinez Rosillo	(44) Enoch Saldivar Perez
(16) Rafael Leon Lemus	(45) Elpidio Campos
(17) Rafael Colon Parrilla	(46) Hilario Aguilar
(18) Hilario Izaguirre Ramirez	(47) Maria Altagracia Isals
(19) Jose Antonia Duenas	(48) Jose Camacho Juarez
(20) Ernesto Castillo Leija	(49) Cirilo Cordova
(21) Maria Rios Masias	(50) Victoria N. Martinez
(22) Juan Vasquez Rodriguez	(51) Antonia Gestalum
(23) Rafael Antonia Rejada	(52) Joaquin Verdugo
(24) Victor M. Lopez	(53) Alfredo Gonzales
(25) Jose Asencion Nunez	(54) Francisco Perez
(26) Maria Guadalupe Jaime Dorado	(55) Marta Covarrubias Nann
(27) Jovita D. Jaime	(56) Ma. Rita Sazueta
(28) Jose Martinez Beltran	(57) Lidia Molina Collado
(29) Rafael G. Marron	(58) John F. Chavarria

SCHEDULE "A" - OPEN AND COUNT: Continued

(59)	Heladio Elias Aguirre	(87)	Manuel Elias
(60)	Simon Trujillo	(88)	Hermelinda Sanchez
(61)	Salvador Chavez Napoles	(89)	Domingo A. Puente
(62)	Francisco Ramirez Ruiz	(90)	Gabino Hernandez
(63)	Benita C. Barco	(91)	Matilde H. Sanchez
(64)	Pete Gonzales	(92)	Jose De La Pena Cisneros
(65)	Edna D. Gonzalez	(93)	Doria Perez
(66)	Ermilia Elias Perez	(94)	Luciano S. Cordova
(67)	Rosalba Martinez Aranboro	(95)	Natalia S. Leal
(68)	Antonio Perez	(96)	Hipolita C. Miranda
(69)	Juanita Elias	(97)	Antonia C. Zalasor
(70)	Jose Rodriguez Sanchez	(98")	Eliseo A. Pacheco
(71)	Carlos Lugo Rivera	(99)	Angela De La Hoz Rocha
(72)	Francisco Magallanes	(100)	Maria Mesa
(73)	Helena Calles Aguirre	(101)	Josefina Diaz
(74)	Jose N. Dzib	(102)	Juan Manuel Collardo
(75)	Efren Cruz Garcia	(103)	Adolfo Campos
(76)	Enrique Moreno Gonzalez	(104)	Felipe Serrana
(77)	Pedro Limones	(105)	Maria De Jesus Gutierrez
(78)	Maria Lenor Limones	(106)	Matilde Federico
(79)	Josefa Rodriguez Velasco	(107)	Glicerio Pereza
(80)	Maria M. Guerra	(108)	Juan Aramburo
(81)	Joaquin Alvarez (Madrid)	(109)	Mario D. Rodriguez
(82)	Jesus Magallon	(110)	Maria Guadalupe Rodriguez Parra
(83)	Leonor Izaguirre	(111)	Julio B. Mora
(84)	Esperanza Grant	(112)	Trinidad Murrillo
(85)	Maria S. Enriquez	(113)	Maria Rodriguez Simona
(86)	Eliseo De La Rosa Torres	(114)	Evangelina Rodriguez

SCHEDULE "A" - OPEN AND COUNT: Continued

- (115) Jesus M. Villegas
- (116) Eugenic De La Paz
- (117) John Angelo Pedvilla
- (118) Antonio Delgado
- (119) Jose M. Morales
- (120) Sergio Diaz Colosio
- (121) Manuel Rivera Vasquez
- (122) Heriberto Perez
- (123) Dora Sousa Quintana
- (124) Miguel Flores Lopez

SCHEDULE B - DO Not Open

- | | |
|------------------------------|----------------------------|
| (1) Carlos Rosas (Casillas) | (29) Angel Perez Sanchez |
| (2) Hague Pena | (30) Carmelo Juarez |
| (3) Jesus Gonzales Munos | (31) Daniel Segoviano |
| (4) Thomas Mendez | (32) Roberto Alvarez Ayala |
| (5) Francisco Garate | (33) Fidel Carrillo |
| (6) Adrian Nello Betta | (34) Rosalinda Santana |
| (7) Jesus Orozco | (35) Olivia Garcia |
| (8) Elias Rubalcava | (36) Micaela Garcia |
| (9) Jose Avila | (37) Irma Garcia |
| (10) Santiago Celaya | (38) Amador Valdominios |
| (11) James Wilson | (39) Luis Mendoza |
| (12) Jose De Jesus Saucedo | (40) Ramon Jimenez |
| (13) Jose Samora Hurtado | (41) Anselmo Perez |
| (14) Javier Silva Gonzales | (42) Daniel Flores Ambriz |
| (15) Juan Patlan | (43) Jose Francisco Garcia |
| (16) Paula R. Flores | |
| (17) Jose Maria De La Fuente | |
| (18) Juanita H. Martinez | |
| (19) Josefina Santana | |
| (20) Emilia Fabela | |
| (21) Margarita Rodriguez | |
| (22) Lorenzo Carrillo | |
| (23) Epifanio Favela | |
| (24) Anita Sanatan | |
| (25) Maria Elena Lopez | |
| (26) Francisco Castellanos | |
| (27) Leticia Vasquez | |
| (28) Luis Mejia | |

SCHEDULE C - Not Resolved

Economic Strikers - Neither Payroll

- | | |
|--------------------------------|---------------------------------|
| (1) Gregorio Magallan Salas | (16) Genoveva C. Morales |
| (2) Felipe Sanchez Vargas | (17) Bill Martinez |
| (3) Abraham Guerro | (18) Constancia Arellano |
| (4) Rosa Maria Zenlana Alvarez | (19) Antonio Mejia |
| (5) Joaquin Aguilar Yanez | (20) Jesus Puente |
| (6) Marciano Soriano | (21) Jose Luis Riva Aguilar |
| (7) Rafaela Alcaran De Chuca | (22) Jose P. Lopez |
| (8) Benigno Gomez Chuca | (23) J. Jesus Sandoval |
| (9) Salvador Beltran Bejihias | (24) Jesus F. Gonzalez |
| (10) Elena Perez Hernandez | (25) Maria Indra Preciado |
| (11) Rafael Pena De Medina | (26) Cristina Martinez |
| (12) Leodragnio Correa Lopez | (27) Heliodoro Valladarez Gomez |
| (13) Juan M. Floras | (28) Nellie Castro Bravo |
| (14) Esperanza V. Torres | (29) Armida Chavez |
| (15) Benigno Chuca, Jr. | (30) Maria Preciado |

Economic Strikers - Application for Reinstatement

- (1) Salvador Bustamante
- (2) Abraham Saldivar Perez
- (3) Salvador Rios Medina
- (4) Victor Gonzalez
- (5) Jesus Alvarado Jimenez
- (6) Francisco Hernandez De Santiago
- (7) Pedro C. Sanchez
- (8) Francisco Orosco

SCHEDULE C - Not Resolved: Continued

Truck Drivers

- | | |
|---------------------------------|----------------------------|
| (1) Raymond Millburn Williamson | (15) Ray Salazar |
| (2) Troy Allan Brooks | (16) Luis Martinez |
| (3) Rudolph J. Pugliese | (17) Johnny Patton Sr. |
| (4) Thomas P. Wood | (18) Morris W. Daniel |
| (5) Miguel T. Canales | (19) Garland Canfield |
| (6) Perez Salvador Mendez | (20) Felipe Celaya |
| (7) Juan R. Rodriguez | (21) Tony Garcia |
| (8) Fred R. Espinosa | (22) Raymond A. Espinosa |
| (9) Melvin W. Crisp | (23) Duane Dobbins |
| (10) Manuel Alderete | (24) Chester L. Caulfield |
| (11) Jack La Blue | (25) Stanley Curtis Patton |
| (12) Allan W. Williams | (26) John D. Patton |
| (13) Dove Williamson | (27) Danny Hughes |
| (14) George Croney | (28) Raymond A. Espinosa |

Names Already Checked Off

- | | |
|-------------------------------|----------------------|
| (1) Jose Alonzo Villalobos | (6) Antonia Avila |
| (2) Jesus Rodriguez | (7) Esther R. Torres |
| (3) Jose Garcia Aguilar | |
| (4) Juana Cristina De Estrada | |
| (5) Daniel .Enrique Campos | |

Not Discussed

- (1) T. K. Williams

MEMBER JOHNSEN, Dissenting in Part and Concurring in-Part:

I dissent with respect to the majority's resolution of challenges involving alleged economic strikers. Unlike my colleagues, I am persuaded that the UFW had itself settled the question of whether the strike against this employer had been terminated prior to the election. In response to a question on the petition for certification signed by UFW representative Marshall Ganz in which this Board inquired, "Is there now a strike at the employer's establishment(s) involved?" the answer was "no". The next succeeding question was, "If so, approximately how many employees are participating?" "Not Applicable" was the answer given.

Since termination of the strike prior to the commencement of balloting would negate the voting eligibility of economic strikers for whom replacements have been hired, all of the challenged ballots cast by persons who claimed striker status should be sustained. See my dissenting opinion in D'Arrigo Bros. of California, Reedley District No. 3, 3 ALRB No. 34 (1977).^{1/}

I concur, however, as to the validity of the election itself.

Dated: May 10, 1977

Richard Johnsen, Jr., Member

^{1/}In that case as well, the UFW replied in the negative to the same set of questions as set forth above.