STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

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| C. MONDAVI & SONS, d/b/a CHARLES KRUG WINERY,<br><br>Employer,<br><br>and<br><br>UNITED FARM WORKERS OF AMERICA, AFL-CIO ,<br><br>Petitioner. | ) | No. 75-RC-44-S<br><br>3 ALRB No. 65 |

This decision has been delegated to a three-member panel. Labor Code Section 1146.

On October 17, 1975, an election was held at C. Mondavi & Sons, d/b/a Charles Krug Winery. The tally of ballots showed the following results:

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| UFW | 77 |
| No Union | 35 |
| Void | 2 |
| Challenged Ballots | 6 |

The employer filed timely objections, of which the executive secretary dismissed 24. A hearing was held on the remaining nine objections, and the hearing officer issued a report recommending that the election be upheld. Both parties filed timely exceptions to the report,[1/] as well as arguments in support of pre-trial motions.

We affirm the hearing officer's denial of pre-trial motions. It is within the hearing officer's discretion to grant motions to sequester witnesses, and we will uphold the denial of such motions where, as here, no prejudicial effect has been shown.

[1/] The employer filed 318 exceptions for this simple, four-issue case.

We accept the hearing officer's recommendation and uphold the election.

I. Notice of Election

The employer contends that the notice of the election was inadequate for the employees to hear of the election in time to vote and for the employer to conduct a no union campaign.

The high voter turnout, coupled with no evidence of voters disenfranchised due to lack of notice, establishes that employees had adequate notice of the election.

The employer's contention that it received inadequate notice is similarly without merit. The evidence establishes that the employer had actual notice a full seven days before the election, having been served with a petition for certification on October 10, 1975. This alone constitutes sufficient notice under the Act. Kawano Farms, 3 ALRB No. 25 (1977).

The employer claims that it was prejudiced by the statements of Board agents between October 10 and 14, 1975. These statements may have created a doubt as to whether a petition had, in fact, been filed. However, this evidence was introduced at the hearing in the form of uncorroborated hearsay, which is insufficient to support a finding. Patterson Farms, 2 ALRB No. 59 (1976). While an election must be conducted within seven days after the filing of a petition, this does not guarantee that the parties will have seven days in which to campaign. Furthermore, we note that the employer had been campaigning at least two months prior to the election. In addition, the employer secured a temporary restraining order against the holding of the election, apparently believing

that this would ensure that the election would not be held as scheduled. The Board held the election at 4:00 on October 17, 1975, one hour after the temporary restraining order was lifted. Any detriment to the employer's last-minute campaign was caused by its error in judgment, rather than lack of notice from the Board.

II. Portuguese Ballots

The employer asserts that the election should be overturned because the Board did not furnish Portuguese ballots. We dismiss the objections to the Board's failure to provide ballots printed in Portuguese because there was no evidence that this omission caused the disenfranchisement of voters.

III. Union Threats and Intimidations

The employer alleges that the pre-election conduct of Pedro Tellez was threatening and intimidatory toward other employees. The grounds for this contention are (1) Tellez's statements that workers would be "chingada" if they did not support the union and (2) Tellez's two pre-election encounters with Emilio Ibarra, a representative of the employer-sponsored California Winegrowers Association. We support the investigative hearing officer's finding that there were no threats regar*dless of Tellez's agency status.*

Further, although the hearing officer did not find it necessary to determine Tellez's status as a union agent, we find that he was not a union agent. A union organizer told Krug employees to speak to Tellez if they wanted to contact the union. This does not support a theory of agency, nor does the fact that. Tellez appeared at the fields at least once with a known union organizer. Tellez did not support the union earlier than six

weeks prior to the election. Tellez did not support the union any place other than at Krug. Tellez did not work for the union, either with or without pay. Tellez's appointment as an election observer and his election to the ranch committee two weeks after the election have no bearing on his status as a union agent. Conduct of a non-party is to be accorded less weight than that of a party. Takara International, Inc., 3 ALRB No. 24 (1977).

This objection is dismissed.

IV. Onion Electioneering and Campaigning at the Polls

The employer contends that the conduct of the union at the polls warrants overturning the election. The investigative hearing officer has found that these objections are without merit. We agree. Our finding that Tellez was not a union agent further bolsters this conclusion.

We affirm the hearing officer's finding that when the election at Krug is viewed in its entirety, there was an atmosphere conducive to free choice and full participation. Both of the employer's objections relating to union campaigning and electioneering at the polls are dismissed.

Conclusion

Having found no conduct which warrants our setting aside this election, we uphold the decision of the hearing officer. The United Farm Workers of America, AFL-CIO, is certified as the bargaining representative for all agricultural employees of C. Mondavi & Sons, d/b/a Charles Krug Winery.

Dated: August 9, 1977

RONALD L. RUIZ, Member

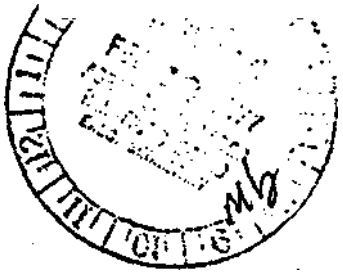
ROBERT B. HUTCHINSON, Member

MEMBER JOHNSEN, Concurring:

The majority opinion accepts the hearing officer's conclusion that regardless of Pedro Tellez[1] agency status there were no unlawful threats which affected the election. In light of that conclusion, I find it unnecessary to address the issue of Tellez' agency relationship with the union.

Dated: August 9, 1977

RICHARD JOHNSEN, JR., Member



In the matter of:

C. MONDAVI & SONS, d/b/a CHARLES KRUG WINERY,

Employer,

and

UNITED FARM WORKERS OF AMERICA, AFL-CIO,

Petitioner.

NO. 75-RC-44-S

INITIAL DECISION

On October 17, 1975, a representation election was conducted pursuant to Labor Code Section 1156.3(a) among all of the agricultural employees of C. MONDAVI & SONS, d/b/a/ CHARLES KRUG WINERY (hereinafter referred to as employer). The election, held at the East End of Trubody Lane, Yountville, resulted in the following tally: UFW 77; No Labor Organization 35; Void 2; and. Unresolved Challenged Ballots 6. There were determined to be 138 eligible voters. (ALRB Exh. No. 6.) [1/]

The employer timely filed an objections petition on October 21, 1975 pursuant to Labor Code Section 1156.3(c) and 8 Cal Admin. Code Section 20365.[2/] The Petition Setting Forth Objections To The Election set forth Thirty Three (33) objections.

[1/] A complete list of exhibits is attached Exhibit A. Note that ALRB Exh. No. 6 was also introduced as UFW Exh. No. 10.

[2/] At the time the original objections were filed, regulations issued by the Board on August 28, 1975, were in effect. Subsequently, the Board adopted new regulations effective October 13, 1976. The latter are hereinafter referred to as the "old" regulations, and the former the "new" regulations.

(ALRB Exh. No. 7.} Said objections were reviewed by the Executive Secretary pursuant to 8 Cal Admin. Code 20365 and various objections were dismissed while others were set for evidentiary hearing on December 8, 1975 in St. Helena, California.[3/] For various reasons, the hearing did not commence until November 15, 1976 in Napa, California.[4/]

The hearing regarding employer's objections was held on November 15, 16, 17, 18 and December 8 and 9, 1976 pursuant to Section 20370 of the New Regulations. Pursuant to 20370(d) of the New Regulations the entire hearing was transcribed by tape recording.[5/] The scope of the hearing, pursuant to Section 20365(g) of the New Regulations, was limited to those issues not dismissed by the Executive Secretary in her review of the Case. (ALRB Exh. No. 8) Those objections set for hearing were the following:

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[3/] Only those objections heard or relevant to the hearing had herein are discussed. For a complete list of all employer objections, see ALRB Exh. No. 7.

[4/] The reasons need not be stated herein. Obviously, the demise of the Board itself and its later refunding caused most of the delay.

[5/] This was the first representation hearing held pursuant to the new regulations. The regulations provide for the tape recording of the proceedings. After the first day of the hearing, I discovered that there had been a malfunction in the taping system and that portions of the first days proceedings were unintelligible on the tapes. Those portions totally or partially lost included: pretrial motions by the employer, the testimony of employer's first witness, Rennick J. Harris, and, the voir dire of the Portuguese interpreter by the employer.

On the second day of the hearing, the parties were informed of the malfunction and the following procedure was followed. —>

5. The Board illegally, improperly and erroneously failed to give adequate notice of the election to the eligible employees.

6. The Board illegally, improperly and erroneously failed to give adequate notice of the election to the Parties.

22. The Board illegally, improperly and erroneously failed to inform the Employer that a petition had been filed in this matter until October 14, 1975, four days after filing, despite repeated calls by the Employer's representative in order to ascertain whether the petition had been filed, thus substantially and materially affecting the results of the election and depriving the Employer of Due Process of the law.

29. The Board did not decide on the unit and time and place of the election in enough time to properly inform the voters as to the details of the election.

15. The petitioning Union intimidated and threatened eligible employees, coercing some of them into voting for the Union and/or not voting against the Union.

16. The petitioning Union engaged in electioneering in the immediate vicinity of the polls while eligible employees were lining up to vote, thereby disrupting the laboratory conditions required for a free election and depriving said employees of a fair and uncoerced secret ballot election.

19. Union adherents engaged in campaigning activity in the immediate vicinity of the polls while eligible

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First, Rennick J. Harris testified again and the voir dire of the Portuguese interpreter was conducted again. In regard to the pre-trial employer motions, the hearing officer informed attorneys for the employer that his ruling as to those motions remained, but to insure a complete record, employer could file full briefs outlining all arguments they had advanced in support of all pre-trial motions. Such a brief was filed by employer on January 21, 1977. The UFW declined to file a response. (See Exhibits B and C. respectively.)

At this time, the record appears complete in all respects. All tapes have been preserved including those that are unintelligible in certain areas. There were 19 ninety-minute tapes used throughout the hearing.

employees were lining up to vote, thereby depriving said employees of a fair and uncoerced secret ballot election.

20. The Board illegally, improperly and erroneously failed to have the Notice of Election in this matter printed in Portuguese despite a request by the Employer to do so and an assurance by the Agent that it could be done, thus substantially and materially affecting the results of the election.

21. The Board illegally, improperly and erroneously failed to have the ballots in the election in this matter printed in Portguguese despite a request by the Employer to do so, thus substantially and materially affecting the results of the Election.

In essence, objections heard at the hearing revolved around four areas of employer complaint. First, there was inadequate notice to the employer and employees that the election was going to be held (Employer Objections 5, 6, 22, and 29). Second, the election was preceeded by union threats and intimidation that made a free, uncoerced choice at the polls an impossibility (Employer Objection 15). Third, the union electioneered and campaigned in the area of the polls (Employer Objections 16 and 19). Fourth, Portuguese employees were denied their statutory rights by the failure of the Board to print either the Notice of Election or ballots in Portuguese. (Employer Objections 20 and 21.)[6/] For the reasons set forth

[6/] It should be noted that each side filed post hearing briefs summarizing the facts and law applicable to the present situation. The briefs were filed January 7, 1977. Employer's post hearing brief contains reference to certain issues which were beyond the scope of this hearing. Those issues , just as they were irrelevant to the hearing, will not be decided in this opinion. In this regard, see Footnote 14, infra. (The briefs are made a part of this opinion as Exhibits D and E.)

below, I find that the objections are without merit.

I. THE ADEQUACY OF THE NOTICE OF THE ELECTION

Of the myriad of issues presented in six days of testimony, the facts relating to the question of notice of election -- both to employer and employees -- are relatively free from dispute, They reveal the following.

A Petition for Certification (in English and Spanish, ALRB Exh. No. 4} was filed with the Board on Friday, October 10, 1975, at approximately 3:45 PM. The UFW was the organization seeking to represent the employees and the petition was signed by Felix Gonzales, the designated agent of the UFW. Prior to the filing of the petition with the Board, Betty Hopperstad served the petition on the employer.[7/]

On the same day, Rennick J. Harris, Chairman of the Board of the California Winegrowers Foundation and employed by Charles Krug to provide labor relations services to the company, received word that the Petition for Certification had been served on the employer. Harris, who conducts labor campaigns

[7/] The parties stipulated that "if called to testify," Betty Hopperstad would testify that on 10/10/75 she served a copy of the Petition for Certification, UFW Exh. No. 11, on Peter Mondavi. Whether Peter Mondavi was, in fact, the person on whom it was served is open to debate. The testimony of Rennick J. Harris indicated that Peter Mondavi may not have been in town during that period. I find the conflict to be irrelevant. There is no doubt that a Petition for Certification was received by Employer -- even if not by Peter Mondavi. Employer testimony indicates that from the 10th of October on they were furiously attempting to determine if the Petition for Certification received by the Company had, in fact, been filed with the Board.

for the employer by explaining and comparing company benefits with those of the union, immediately phoned Wesley J. Fastiff, attorney for the employer.

Harris testified that he was continually in touch with Fastiff to determine whether or not the petition which was served on the company had in fact been filed with the Board. Harris testified that he did not know from the lawyers whether the petition 'had been filed as of Tuesday, October 14th. Felix Gonzales testified, however, that on October 11th he posted a "Notice to All Employees of Mondavi C. & Sons" on a door near the entrance to employer's labor camp. (UFW Exh. No. 8.) The notice was posted in Spanish and English. Gonzales had received the copies of the notice (UFW No. 8) from Liz Sullivan, the person to whom he gave the Petition for Certification for filing with the Board. (Testimony of F. Gonzales.)

The Board assigned Guadalupe Perez as its agent to oversee the election. Perez, a field agent for the ALRB, on contract from the Department of Conservation, testified that he received the case Wednesday morning, the 15th of October. Perez stated that he contacted the employer and that employer's attorney supplied the relevant payroll information for the determination of eligible voters the same day.

By the morning of the 15th of October, Rennick Harris was engaging in a campaign to inform the employees of the merits of company benefits along with information regarding the upcoming election whose date had not yet been set. Harris testified that

he had distributed a leaflet (UFW Exh. No. 1} informing them of their right to a free election; and, warning them against union abuses and unfulfilled promises. The leaflet was on employer stationary and was distributed to about one half of the employer work force/ according to Harris. Harris further testified that UPW Exh. No. 1 may or may not have been an exact copy of what was actually distributed, but that it was similar. The distribution of this leaflet took place late in the afternoon of October 15th as the employees left work.

The employer campaigning continued on October 16th with the distribution of a leaflet by Harris similar to UFW Exh. No. 2. Harris testified that this reached as many as forty members of the employer work force.

On the 16th of October, two events occurred: lawyers for the employer went to the Superior Court during the day seeking an injunction to halt the election, and a pre-election conference was held in the evening. Perez testified that he first scheduled a pre-election conference for 2:30 PM on the 16th, but a failure to appear by employer lawyers (who apparently were in court seeking the injunction) forced the continuation of the conference to 5:00 PM the same day. The conference, according to Perez, finally began at 6:00 to 6:30 PM.

Perez testified that by the time the pre-election conference started, he knew that the employer lawyers had successfully obtained a Temporary Restraining Order to halt the election.

Nonetheless, Perez proceeded with the pre-election conference. All parties were present and apparently all participated in the conference despite the issuance of the TRO. At the conference, Perez testified that he completed the Direction and Notice of Election (UFW Exh. No. 9) by setting the election for the following day, from 10-12 AM at the East End of Trubody Lane, Yountvillle, California. Whether this notice was actually distributed to the employees is unclear from the record, but it apparently was not. (Testimony of R. Harris.)

The morning of the 17th of October, the day of the election, Harris testified that he brought a sheriff to Peres to formally serve the TRO on him so that the election would not be held. Perez testified that he was there to tell the employees that there would be no election. In fact, no election was held during the scheduled 10 AM to 12 PM time period on the 17th.

Later in the day, however, events took another turn. All parties were in court -- including Harris, lawyers for the employer, and lawyers for the United Farm Workers -- for further arguments on the Temporary Restraining Order. At 3:00 PM, the judge, according to undisputed testimony, lifted the TRO. Perez testified that he received a call from Marcuz Lopez, who was also at the Courthouse and also associated with the Board, to proceed with the election. Almost simultaneously, Harris testified that at about 3:00 PM he phoned the Ranch from the Courthouse and told agents of the employer that the election would proceed, that

observers should be located, and that the workers should be held so that they could vote in the election.

The election began, according to Perez, a little over one hour later at about 4:05 PM at the place initially designated on the Notice of Election -- the East End of Trubody Lane, Yountville.

It may be inferred from the testimony of Harris that subsequent to his phone call to the employer to hold the employees, that the employer made efforts to inform the employees of the new time of the election. Further, Richard Dominguez, a union organizer, testified that he drove up to the election site to inform the employees of the time of the election. He was not sure how many of the workers he actually notified. In any case, when the tally was complete 85.5% of the eligible voters cast a ballot. Each party had three observers who viewed the election as is indicated by the Tally of Ballots (ALRB No. 6).[8/]

Employer argues that the election procedures -- from the filing of the Petition for Certification to the casting of the first ballot -- were riddled with such confusion that both employer and employees suffered from lack of adequate notice requiring that the election be set aside. On the face of it, there is, indeed, confusion. The Board did not officially notify the employer of the filing of the petition until the 14th or 15th of October despite repeated calls from employer lawyers. Why

[8/] See Footnote 10, infra, re employer arguments regarding misconduct in the choice of the observers.

the Board did not take prompter action is not part of the record. Further, the granting of the TRO on the 16th of October and the lifting of the TRO on the 17th of October created further confusion. The apparent confusion, however, is not the issue before me. The issue is two pronged: (1) did the employer have adequate notice of the election so that they could fully inform the work force regarding their position in the upcoming election; and (2) were the employees informed of the election so that eligible employees could, in fact, cast a ballot in the upcoming election? As to each prong, the answer is that the notice was adequate. I start from the premise that in the agricultural setting time periods and notice requirements, because of the transitory nature of the work force, are short in duration. Thus, Labor Code Section 1156.3 (a) provides:

> Upon receipt of such a signed petition (for certification) , the Board shall immediately investigate such petition, and, if it has reasonable cause to believe that a bona fide question of representation exists, it shall direct a representation election by secret ballot to be held, upon due notice to all interested parties and within a maximum of seven (7) days _of the filing of the petition. (Emphasis added. )

This seven day requirement is shortened to a mere forty-eight (48) hours if a strike is in progress at the time of the filing of the Petition for Certification. 1156.3(a) , supra. The need for speed in the holding of agricultural elections is further manifested in Board regulations requiring prompt filing of information by employers [20310(a) of the New Regulations] and

the provisions regarding Intervention (20325 of the New Regulations).

As a corollary to the above, the Board in Samuel S. Vener (1975) 1 ALRB 10 questioned the utility of the NLRB's "laboratory conditions" rule and wrote:

> The typically seasonal and often transitory nature of that employment makes repetition of the experiment difficult, particularly if the harvest season in which the original election was conducted is over by the time the election is reviewed. Setting an election aside in the contest of agricultural employment thus carries implications beyond those involved in the normal industrial situation. At 3.

It is with these concepts in mind that I find the following:

The employees had adequate notice of the election:

Despite the "confusion" regarding the 'time and place of the election 85.5% (118 of 138) eligible employees went to the polls. I note that even if all the eligible employees who did not vote actually voted for the employer the result of the election would have been no different. ALBB decisions are replete with factual settings where notice to the employees was short, but the percentage of voter turn out and/or the actual results of the election mandated a finding, that the employees had adequate notice of the details of the election so they might vote for bargaining representative as intended by the Act. Thus, in Carl Joseph Maggio Inc. (1975) 2 ALRB 9, where a lesser percentage of the actual voters turned out than herein/ but the mathematics were similar, the Board wrote: "we overrule these objections solely

because the votes of employees who could have voted had they been notified would not have changed the results of the election." At page 2. In Maggio the facts were more aggravated than the case at bar -- a lesser percentage of the eligible employees voted and some of the work force had already left by the time. of the election. In Maggio, as in the case at bar, the time for notice of the election was short, a mere 2 and 1/2 hours. See also: West Foods, Inc. (1975) 1 ALRB 12, where the fact that 184 of 203 eligible persons voted indicated that the "election was noticed by a substantial number of employees. We find that. the question of adequacy of notice does not, in the circumstances before us, warrant a setting aside of the election." At page 4; Yamano Bros. (1975) 1 ALRB 9, where the election was first noticed less than 24 hours after the pre-election conference. Since virtually all the eligible voters voted there was no problem in regard to the notice; and, Yamada Bros. (1975) 1 ALRB 13, where despite the fact that there was no notice until minutes before the polls opened, 93 out of the 100 eligible voters voted indicating adequate notice to the employees regarding the time and place of the election. . Finally, RT Englund Co. (1975) 2 ALRB 23, where because of the high percentage of the vote and the fact that even if all the eligibles who did not vote voted against the union, the result would have been the same, the election was upheld.

Thus, the fact that Perez held the election just a little over one hour after the lifting of the TRO and the fact that the

Notice of Election did not state the time of the election and was probably never handed out does not warrant setting aside the election. The high voter turn out and the impossibility of changing the result of the election given the actual vote mandate the finding that the employees had adequate notice of the occurence of the election.

In their questioning of Board Agent Perez, and again in their brief, employer implies that there may have been more eligible employees who could have voted even though they were not on the most recent payroll list {UFW Exh. No. 7). These "other" employees, they conclude, would have changed the percentage of those who voted, and, if their numbers be significantly large, might have changed the result of the election. Agent Perez testified that he agreed that .the most recent payroll list does not necessarily include all of the possible eligible voters, but stated that in this case he knew of no other eligible voters who did not appear on the list. If there be such "other" eligible voters and if notice to them was inadequate, the employer has the burden to so show. As the Board succinctly noted in Jack or Marion Radovich (1975) 2 ALRB 12:

> When determining whether employees received adequate notice of an election, the Board looks not merely at the amount of lapsed time between the notice of election and election, but also on what effect, if any, the time lapse had on the voters. Hence, to prove its claim, the employer would have had to produce evidence that some employees, who otherwise might haye voted, did not do so because they did not receive notice of the election. (Emphasis added, at page 11.)

The employer herein has not met his burden. They have produced absolutely no evidence that there were "other" eligible voters other than those on UFW No. 7 who would have changed the percentage and/or the outcome of the election.

In LU-ette Farms (1975) 2 ALRB 49, the Board wrote:

> We are committed to the principle that every effort should be made to notify eligible employees of an election and give them an opportunity to vote. However, we note that the requirement of the ALRA that an election be held within 7 days of the filing of a petition combines with rapid turnover in the work force characteristic of much of California agriculture to create peculiar difficulties in providing such notice. The burden of confronting these difficulties falls in the first instance on the Regional Director and Board agents in charge of the case, but particularly in view of the time constraints involved, the parties themselves are expected to participate in efforts to notify the employees. At 5.

In the election at employer's ranch all the parties met their burden. Ren Harris told the employer not to release the work force. UFW organizer Richard Domingues notified, the employees. Board Agent Perez moved quickly to set up the election. Eighty-five and one-half percent turned out. "Their voice will be respected." Admiral Packing Co. (1975) 1 ALRB 20 at 5.

The employer had sufficient time in which to fully inform the work force regarding their position in the upcoming election: Aside from the question of whether the employees were informed about the occurence of the election, notice may still be inadequate if the employer is not given sufficient time to inform the employees about his position regarding the election. Thus,

notice is a two pronged concept. Yamano Bros., supra, at 4. I find that the employer herein did have sufficient notice to, and did in fact, inform the employees of his position regarding the upcoming election.

The evidence reflects, and I so find, that employer was highly sensitive to the" need to inform his employees about his position on employer-employee relations. To this end, Rennick Harris of the California Winegrowers Foundation was specifically contracted to discuss and outline for the workers the various positions of the employer. In fact, during late August and early September, well before the filing of the Petition for Certification, the California Winegrowers sent "no union" campaign literature to many wineries including employer's; (See UFW nos. 4, 5 and 6.) While it is true that these particular leaflets probably reached no more than a small percentage of those who actually voted in the election (see testimony of R. Harris), the mailing does reflect employer's desire to make its election views known.

Further, during the organizing of the UFW at employer's ranch, Emilio Ibarra, another CWF employee, spent time at employer's ranch among the employees explaining the company position to the workers. (See testimony of Emilio Ibarra.) On several occasions he testified that he was at the work camp explaining the company program.

It is true that Harris testified that an optimum campaign consisted of at least five days so that maximum use could

be made of employer computers in analyzing what the company had given the employee in the past and what he could expect in the future in relation to union statements of benefits. Harris further testified that because of the delay in learning of the filing of the petition he could not use the computer printouts.

First, I do not find credible the notion that the employer was not or could not have been aware of the filing of the petition until the Board finally notified them on the 14th or 15th of October. The testimony indicated that Notice of the Filing was posted as early as October 11, 1975. Further, Rennick Harris knew of the service of the petition on the 10th of October and a simple communication to the agent of the UFW (whose name and address and phone number were on the Petition for Certification, ALRB No. 4) might have confirmed whether the petition was in fact filed with the Board. Harris testified that despite these signals that an election would be held within seven days, he did not start his campaign without official notice from the Board because of the cost involved and a fear of loss of credibility with the workers if, in fact, the petition were not filed. While this reasoning is plausible, it does not negate the fact that the events from October 10th on should have placed the employer on constructive notice that an election was imminent and that his campaign among the workers should begin immediately.

Second, even if the employer could not or should not have known of the filing of the petition and the imminence of the

election until the 14th or 15th of October, the facts indicate, and I so find, that he did inform the employees of his position in regard to the election. As indicated supra., on the 15th or 16th of October Rennick Harris prepared and had distributed two campaign flyers which were directly distributed to the employer work force for this election. Harris testified that it was peak season, and since he waited till the end of the work day to distribute the materials he no doubt reached a good portion of the work force. By his own testimony, he reached almost half of the work force.

The flyers themselves (UFW Nos. 1 and 2} explained numerous aspects of the ALRA, concepts about contracts, and warnings regarding the union and its conduct. While Mr. Harris and his agents would no doubt have preferred to do more, I find that he and the employer did, in fact, provide the employees with their side of the story. Notice to the employer was, not in this regard, deficient.

Employer in his brief cites Borgia Farms (1975) 2 ALRB 32, to support his position that he had insufficient notice to talk with his employees regarding the election. The case is not on point. In Borgia, Board representations resulted in the employer having virtually no communication with his employees prior to the election. In Borgia, the Board concluded that the employees were only exposed to union literature and therefore "deprived of the opportunity to weigh the alternatives open to

them and make an informed choice." At page 3.

Such is hardly the case herein. Employer had hired a special person to handle relations with the employees. The CWF had distributed literature to the Krug ranch well before the election and also for two days directly preceeding it. CWF had people in the work camp discussing the company program with the employees. In Yamano Bros., supra, the period for dissemination of company literature was less than in the instant action. In West Foods, Inc., it was virtually the same. Both Board decisions upheld the adequacy of notice in terms of employer contact with their employees. To be sure, the Board delay in actually notifying employer about the filing of the petition and the confusion surrounding the TRO were unfortunate, but I cannot say that in light of everything else the employer did to notify its employees of its position that they deprived the employees of "the opportunity to weigh the alternatives open to them and make an informed choice." Borgia, supra.

Therefore, I find the notice to be adequate in all its aspects.[9/]

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[9/] It should be pointed out that in regard to notice, the employer raises two additional issues. First, that the lack of notice outlined above, made it impossible for the company to have sufficient time to choose or instruct their observers. Second, that the lack of notice did not allow the company to object to Pedro Tellez as an observer for the United Farmworkers of America. (See p. 44 and p. 49 of Employer's Post Hearing Brief, respectively.)

First, employer correctly points out that neither side chose observers at the pre-election conference held on October 16th. —->

II. FAILURE TO PROVIDE BALLOTS IN PORTUGUESE AND A NOTICE OF ELECTION: IN PORTUGUESE DID NOT AFFECT THE FREE CHOICE OR OUTCOME OF THE ELECTION

A. FAILURE TO PROVIDE NOTICE OF ELECTION IN PORTUGUESE;

Given my conclusion in regard to the Notice of Election in I., supra, and given the state of facts regarding notice I may easily dispose of the contention that failure to provide Notice of Election in' Portuguese materially affected the outcome of the election.

According to the testimony of R. Harris, supra, there was no notice of election that stated the 4:05 PM starting time of the election in Spanish or in English. The only Notice of Election indicated in the record is that stating that the election would be on the 17th of October at 10.00 AM which apparently was never distributed to the employees. This is a case where/ despite the fact there was no Notice of Election in any language,

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P. 45, 1. 11-13, Employer's Post Hearing Brief. Thus, neither side had an advantage in the early choice of observers. Employer acted promptly to secure observers immediately upon notification of lifting of the TRO. (See testimony of R. Harris.) In fact, Tony Amaral testified for employer that he was asked to be an observer 2-3 weeks prior to the election and that, in fact, he was instructed as an observer just prior to the election. Altino Mariano Tavares, another company observer, also testified that he was instructed regarding the voting. Finally, Guadalupe Perez testified that he instructed all observers regarding the conduct of the election. I find the record to be totally devoid of any evidence to indicate that the short notice on which the election was held in any way prejudiced' any of the parties or in "any.... way affected the outcome of the election because of inability to properly choose or instruct observers.

Second, the argument regarding Tellez is equally without merit. The entire thrust of employer's case was that Tellez, acting as an agent of the Union, created such misconduct during and prior to the election that free choice became an impossibility. ⟶

I still find notice to be adequate as fully expounded in I., supra. Since the evidence indicated that there were only 7, and possibly 8/ Portuguese employees at the ranch of employer (see testimony of Tony Amaral; Floriano Tavares; and Lionel Tavares) it would be difficult to understand how failure to provide Notice of Election in Portuguese could have affected this election when no notice of any kind still resulted in a voter turnout of 85.5%.

The absurdity of the situation is compounded when it appears from the record that at least four of the Portuguese employees actually knew of the election/ i.e. Altino Tavares, Tony Amaral, Floriano Tavares and Lionel Tavares (see respective testimony of each). As for the other three or four Portuguese employees, employer has presented no evidence to indicate that they were unaware of the election. Even if they were, it is clear that they would not have affected the outcome of the vote.

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In other words, Pedro Tellez was a notorious union agent impeding the free election. If this be the case (the agency of Tellez is discussed at Footnote 12, infra.), the company was under a duty to challenge Tellez as an observer prior to the election. "Any party objecting to the observers designated by another party must register the objection and the reasons therefore with the Board agent supervising the election prior to the commencement of the election. Failure to so register such objections will be constructed as a waiver of the right to contest the conduct or result of the election on such ground." Section 20350 (b) Old Regulations. At the election site, when all observers were known, no objection, was voiced with the Board Agent. In fact, no objection as to an observer was ever voiced with the agent following the election or in the Objections Filed by Employer to the Election. See ALR3 Exh. No. 7. I find employer has waived his objection. See also 20350(b) of the Mew Regulations. —->

B. FAILURE TO PROVIDE BALLOTS IN PORTUGUESE:

The failure to provide ballots in Portuguese as well as Spanish, on its face, poses a more difficult question. The relevant portion of the ALRA states:

> The Board shall make available at any election under this chapter, ballots printed in English and Spanish. The Board may also make available at such election ballots printed in any other language as may be requested by an agricultural employee eligible to vote under this part. ALRA Section 1156.3(a). Emphasis added.

Since the language of the Act is not mandatory in regard to ballots in languages other than Spanish and English, both the Old and New Regulations spell out more clearly what an employer must do to obtain ballots in another language. The Old Regulations provided in Section 20320 that such request shall be in writing and state the languages required and the number of employees requiring each such language....such request shall be filed no later than 24 hours prior to the scheduled time of the election." Similarly, the New Regulations provide that when the employer submits his information after filing and service of the Petition for Certification he must also submit a statement of languages he requests other than Spanish and English and the number of employees who would need the ballot. (New Regula-

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I also find that even if the employer did not waive this objection, that the record is devoid of any evidence to indicate that Tellez' presence at the polls influenced the outcome of the election. Employer engages in much speculation in his Post Hearing Brief, but presented no evidence at the hearing to substantiate his contention.

tions, 20310(a)(8)). The New Regulations further provide that requests by any organization or employee for such foreign language ballots shall be in writing and "where practicable, requests for additional foreign languages on the ballot will be granted." (New Regulations, Section 20320.)

The record herein indicates no written request by employer for any such other foregin language ballot. Were I to apply the seemingly mandatory language of the regulations employer would waive his objection because of failure to comply with the regulations. The policy of the act demands, however, that employees understand the nature of their choice at the polls. Therefore, it appears to me that if a request is made for other foreign language ballots, although not in writing, it should be granted in the appropriate case, where practicable.

Evidence as to a request for foreign language ballots herein, reflects the following! The testimony of Rennick Harris indicated that he requested approximately 25 Portuguese ballots from Board Agent Perez. According to Harris, Perez said this would be no problem. Perez does not contradict Harris and stated that he did consult with a UFW lawyer, Barbara Rhine, about who spoke Spanish. Despite these discussions no Portuguese ballots were provided.

I find the failure to provide the ballots to have had no impact on the election at all. As indicated, supra, there were only 7 and possibly 8 Portuguese employees. Of these, at least

three indicated that they had no trouble understanding the ballot. Altino Tavares testified that he recognized the symbols on the ballots. Tony Amaral, another Portuguese employee, was also a company observer at the election. Because of his status and because he said he could recognize 8 or 9 votes against the union because of the thinness of the ballot, it strains credibility to believe he did not understand the ballot himself. Floriano Tavares, another Portuguese employee, also said the ballot, and where to mark it, was clear. Of the remaining Portuguese employees, the employer presented no evidence that any had trouble understanding the ballot.

Employer urges Fibre Leather Manufacturing Corporation (1967) 167 NLRB 393 to support his theory that the lack of Portuguese ballots herein prejudiced the election. Fibre Leather is clearly distinguishable. It was a case where the election was close and where there was a clear agreement to provide Portuguese ballots. Further, the large number of Portuguese employees in the unit made it apparent that they could have a significant impact on the election. Those factors are not present here. The Portuguese employees were small in number and their vote could have had no impact on the election given the final tally.[10/] Besides, as noted above, there is

[10/] Employer argues in Footnote 51 of his Post Hearing Brief that the Portuguese ballots could, in fact, have influenced the outcome of the election. They reach this conclusion by alleging that the eligibility list may be incorrect because of the short—

every reason to believe that they in fact understood well the ballot because of the insignias on it. See also: Craft Manufacturing Co. (1958) 122 NLRB No. 44 and Palm Container Corp. (1957) 117 NLR3 No. 59. The former noting "most significantly, there is no evidence whatever of any employee who has claimed that his ballot, as marked, did not express his true intent." At 436. In this case, I find no prejudice in the failure to provide Portuguese ballots.

## III. THREATS, COERCIVE CONDUCT IN THE FORM OF A "PATTERN" OF ECONOMIC INTIMIDATION, AND THE QUESTION OF WHETHER THEY CREATED "AN ATMOSPHERE IN WHICH EMPLOYEES WSRE UNABLE. TO FREELY CHOOSE A BARGAINING REPRESENTATIVE."

### A. THE FACTUAL SETTING; THE STATEMENTS OF PEDRO TELLEZ, FELIX GOHZALEZ, AND OTHERS:

Nine employer witnesses testified regarding statements made by a Pedro Tellez, who worked for employer since 1972 and was working at the time of the election (whether he was an agent of the UFW is considered below), and Felix Gonzale2 whom it was stipulated was an agent of the UFW. Some of these employees testified regarding statements made by both, while others testified to statements made by one or the other. Other persons

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notice and that when one adds the 18 persons who were known not to have voted to the 8 Portuguese ballots, one ends up in a virtual tie. Therefore, they conclude, the failure to print the ballot in Portuguese in conjunction with the lack of notice did effect the outcome of the election.

Such a theory totally ignores the state of the evidence. First, there is no evidence that any additional eligible voters, Other than those already on the list, existed. (See discussion pp. 11-12, supra.) Second, the number of Portuguese voters was more likely 7 and of those 7 at least three Portuguese clearly →

testified to various other statements and incidents by persons other than Felix Gonzalez and Pedro Tellez. Before I may consider whether any of the statements amounted to threats or constituted a pattern of coercion through economic intimidation, I must first consider the record of the statements themselves,

(1) The statements of Pedro Tellez: Altino Mariano Tavares, a Portguese employee, testified that prior to the election Tellez variously told him that if he did not vote for the union he would be "laid off" or that he would be "sent home." He also stated that Tellez said if he voted against the union he would lose his job. He also indicated that Tellez said he would go in the streets" if he did not vote for the union.

Tony Amaral, another Portuguese employee, related that Tellez never told him he would be laid off, but that Tellez used the word "chingada" to describe what would happen to him if he voted against the union. If the union won, Amaral further related, Tellez said he would be "chingada." Tellez also told him the "Portuguese would be the first to be chingada."

Floriano Tavares also related being told by Tellez that if he didn't vote for the union he would be "chingada." Floriano, also a Portguese employee, related that these conversations took place before and after the election.

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understood where to vote (see pp. 19-20, supra). Further, there is no evidence at all to indicate confusion on the part of any Portuguese voter.

The testimony of Lionel Tavarez, a fourth Portuguese witness, was somewhat unclear but also related that he heard the "chingada" statement many times although he never discussed with Tellez what would happen if he voted against the union.
He heard the chingada statements in the camp and in the field, but he could not recall the specific times.

Although the meaning of "chingada" was varied at the hearing, all the witnesses seemed to agree that it meant to be "put out on the streets; to be laid off; or, to lose one's job." (See testimony of the above Portuguese witnesses.)

Emilio Ibarra, a Spanish , speaking employee of the CWF, testified to having been in the presence of Tellez several times while he (Ibarra) was explaining the company program to the workers. He related that once, prior to the election, Tellez called him an SOB, a traitor, and a sellout. He said that Tellez told the others not to listen to him and that after Tellez left, other workers would express their fear of the union (these later comments were never clarified on the record and who these workers were, remains unclear). Ibarra finally related that after the election (around November 3, 1975) Tellez grabbed him, called hin an SOB, a motherfucker, and hit his arm.

Tellez, for his part, denied speaking to the Portuguese employees prior to the election. He denied making the statements attributed to him, although he did understand the word "chingada" to mean "get us out of a job or go to hell." He also denied

threatening or assaulting Emilio Ibarra after the election.

(2) The statements of Felix Gonzalez; Gonzalez, an admitted union organizer, was also known throughout employer's ranch as El Cubano. Ismael M. Apolinar, Gustavo Garcia, Jose Luis Aguilar, and Jose Sandoval Lua (whose deposition is a part of this record) all testified to a meeting they attended at the home of N. Adina Rodriguez and her husband. With the six of them present, Felix Gonzalez spoke, regarding the union, it was approximately one and one half months prior to the election. While the testimony of each differs to some degree, the four witnesses who testified herein all gleaned the impression from Felix Gonzalez that if they signed union authorization cards they could receive "green cards" so they might in the country legally.

Gustavo Garcia and Jose Luis Aguilar also testified that Felix Gonzalez told them at the meeting that if they did not sign authorization cards and the union won "they could take our job, there would be no work" and "if the union won, we would have no card and would be fired," respectively.

Felipe Moran, also stipulated to be a union organizer, was also present at the meeting at N. Adina Rodriguez's. He was alleged, by Jose Luis Aguilar, to have made promises of better treatment and more money.

Felix Gonzalez was also alleged to have made promises of seniority and better pay by Ismael M. Apolinar (again at the

same meeting). Lionel Tavarss testified to promises of $4.00 to $4.50/ hour by Felix Gonzalez. Tony Amaral further said Felix Gonzalez promised higher pay in front of 30 employees prior to the election. Except for comments at the Rodriguez home about losing their jobs, Felix Gonzalez was alleged to have made few, if any other, comments about loss of work.

Felix Gonzalez, stated that he, not Tellez, was responsible for organizing the Portuguese workers; that he only explained union benefits and did not make promises; that he explained how the UFW would give job security and that with a union, arbitrary firing would end. In regard to the "green card" incident, he denied having promised green cards, but stated he told the workers at the Rodriguez home that the union could assist them in getting green cards by helping obtain proof of employment for immigration.

(3) Other statements, rumors and incidents: Tony Amaral testified that Jose Luis Aguilar had told him that Miguel Ochoa Batista, a union supporter and observer at the election, was after him with a gun. Since this incident was not testified to by Aguilar himself, its veracity is doubtful and will play no part in the analysis that follows. Similarly, conversations related by Emilio Ibarra about discussions with Guadalupe Mendoza (deceased at the time of the hearing) about Mendoza[1]s fear of the union and threats by union people, and the reactions of others present at the time, since uncorroborated and not subject to cross examination, will also not be considered. See Footnote 11, infra.

Finally, Jose Luis Aguilar, Ismael M. Apolinar, and Gustavo Garcia also testified to rumors they heard with regard to automatic raises they would receive if the union won. Gustavo Garcia also testified to rumors regarding loss of work if one failed to vote for the union.

B. THE FACTUAL RECORD DOES NOT SUPPORT A FIND OF A LACK OF FREE CHOICE RESULTING FROM THREATS AND A PATTERN OF ECONOMIC INTIMIDATION.

At the outset, it should be noted that much of the factual setting relates to what could be construed as questions of misrepresentations and promises by the union. As such, they are partially beyond the scope of this hearing. Employer's objections 7, 8 and 11 were previously dismissed by the Executive Secretary. Those objections related to the obtaining of authorization cards through some of the alleged promises and misrepresentations considered here. Those objections are not properly before this hearing and will not be considered here. See Interharvest, Inc. 1 ALRB No. 2, n. 1 (1975). Rather, these factual allegations outlined above are only considered as they relate to threats and contributing to a "pattern" of economic intimidation resulting in lack of free choice in the election.

Patterson Farms Inc. 2 ALRB No. 59 (1975).

First, I find that the record is devoid of any physical threats to employees or threats of imminent physical danger.[11/]

[11/] The Guadalupe Mendoza incident merits further discussion. Ibarra testified that Mendoza told him that he was afraid of physical violence from the union. Others in the area were also ⟶

No Portuguese employees who related the "chingada" statements felt it meant physical harm. Thus, Altino Tavares specifically testified on cross examination that despite the "chingada" statement he was never "threatened" by Pedro Tellez. I infer that he meant this in the common sense of the word, i.e. physical harm. Further, Emilio Ibarra testified, after reviewing the payroll list, UFW No. 1, that he could recall no person other than Guadalupe Mendoza who complained to him regarding union threats. The only incident of physical harm related to Pedro Tellez and Emilio Ibarra. Tellez denied the incident, but regardless, it occurred after the election. Ibarra made reference to other persons who were allegedly threatened by the union, but when pressed further could recall none of the persons he spoke with.

The state of the evidence herein need only breifly be compared with cases such as: Poinsett Lumber and Manufacturing Co. (1956) 116 NLRB No. 251 at 1732 where employees were physically

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alleged to have indicated fear of violence and beatings from the union.

During direct and cross examination, Ibarra could not recall who else was present nor could he recall any names of persons who were physically threatened by the union other than the Mendoza. In fact, he still could not recall after refreshing his recollection with the employer payroll list (UFW Exh. No. 7} from which the eligibility list was drawn.

Since Mendoza and others did not testify about the alleged threats, the testimony is hearsay in its purest sense. Mendoza[1]s unavailability does not remedy the problem. Since the testimony is uncorroborated it is not to be relied upon in these proceedings. 8 Cal Admin. Code 20370(c). At best the statement of Mendoza and others is admissible as circumstantial evidence →

threatened and put in fear of imminent physical danger; and Steak House Meat Co. (1973) 206 NLRB No. 3 at 28 where an employee was told he would be killed if he voted against the union/ a knife was brandished and he was threatened again one week later. The employee testified that because of the threats he did not. vote in the election. For a full discussion of these and other physical threat cases see Patterson Farms Inc., supra, at 7-10. While there are vague references to physical harm in the record, I do not find substantial evidence that the employees feared physical harm or that fear of physical harm polluted the election so as to destroy freedom of choice.

The real issue to be decided here is whether the statements of Pedro Tellez[12/] Felix Gonzalez and others outlined above can be considered to be threats -- even though they do not relate to actual physical harm -- or can be considered to have

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of the state of mind of Ibarra himself as a result of hearing the statements. That is, they are admissible not for the truth of the matter, but for a non-hearsay purpose. See Cal Evidence Code Section 1200. Aside from this speculation and conjecture regarding Mendoza and others, little of any other assaultive or threatening conduct is apparent from the record.

[12/] Given my conclusion regarding the nature of the statements made by all persons, including Pedro Tellez, I need not reach the issue of whether he was in fact an agent of the union. As I indicate, infra, I do not believe the statements alleged to be made (chingada, etc.) warrant setting aside the election even if made completely by union organizers.

The evidence in regard to ellez's agency is in tremendous conflict. Most employer witnesses testified that they felt he was an agent of the union and that Felix Gonzalez told them if they had questions about the union to ask Pedro Tellez. (See testimony of A. Tavares, Tony Amaral, F. Tavares, L. Tavares.) ⟶

amounted to a pervasive pattern of economic intimidation thereby destroying the possibility of freedon of choice.[13]

(1) Statements about "chingada," "put on the street" and "layoffs" and similar rumors do not amount to threats or a pervasive pattern of economic intimidation.

In Patterson Farms Inc., supra, at page 9, the Board engaged in a rather exhaustive examination of cases where union organizers allegedly told employees that if they did not vote for the union they would be laid off or out of work and where there were rumors among employees to the same effect. Thus, in Bancroft Manufacturing Co., Inc. 210 NLRB 90 (1974) an organizer told employees that if they did not vote for the union they would be laid off. Other employees testified to similar rumors among the work force. The Board noted that they doubted these could be construed as threats since the union did not have the power to carry them out, and the employees were capable of

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Further, Tellez was an observer at the election. Also subsequent to the election, Tellez was elected vice president of the Ranch Committee.

Tellez testified that he did not pay dues to the union, did not work for the union, and, in fact, only really got involved with the union eight days prior to the election. Both union organizers testified that they had little contact with Tellez and never asked him to work for the union. (See testimony of R. Dominguez and Felix Gonzalez.)

While not reaching the issue of his actual agency, I do find that he was clearly associated with the UFW by many of the workers at the Krug ranch.

[13] The argument infra assumes that many of the statements regarding "chingada," "put on the street," "layoffs" and various promises of higher wages, job security, and the like were actually

evaluating them as mere campaign propaganda. Similarly in Rio de Pro Uranium Mines, Inc. 120 NLRB No. 14 at 91, statements were made regarding employees being out of work if the union won the election. The Board wrote: "and as to those statements which were made, even if made by union agents, [they] were such that they contained neither assertion which the employees could not evaluate nor threats within the union's power to carry out..." At 94.

In Patterson an employee and union supporter made comments about loss of work and "death by starvation" for non-support of the union in front of 10 to 15 persons. Aside from citing the cases referred to supra, the Board also noted that the statements did not dissuade people from going to the polls (99 out of 110 voted) and that the number of persons to whom the comments were directed was relatively small. The Board also noted that the comments regarding loss of work might not be threats at all but

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made. Given my opinion below, I need not engage in a long discussion of the credibility of each witness.

I do find, however, that, while not as pervasive as employer witnesses would have it, such statements were in fact made. To be sure, each side has its reasons to be doubted. Emilio Ibarra worked for the CWF. Two employer witnesses, A. Tavares and Tony Amaral were observers at the election. F. Tavares and L. Tavares are related to A. Tavares. F. Gonzalez and R. Dominguez were actually employed by the union, and, it is clear to me that Pedro Tellez was seen by many employees as being associated with the union.

Nonetheless, Pedro Tellex did corroborate the employer witnesses meaning of the term "chingada." Further, some of F. Gonzalez's testimony regarding the meeting at N. Adina Rodriguez's house tended to corroborate the employer version. On the other hand, I find incredible employer testimony that Tellez made the ——>

rather reference to the fact that the union would attempt to negotiate Union Security Clauses in its contract with the employer -- a permissible clause within 1153 (c) of the Act.

The Patterson analysis is applicable to the facts herein. First/ the statements made by Tellez and Gonzalez were not within the union's power to carry out. Accord: "The statement is not a threat because the union cannot lower wages if it loses an election." Radovich, supra, at 3.

Second, the employees could analyze them as mere campaign propaganda. In fact, the second employer leaflet distributed the day before the election indicated to the employees that the union "could not assure their job." (See last Q. and A. of UFW Exh. No. 2. While it does not say the union can't fire, it does imply that the employer not the union has control over jobs.)

Third/ the comments about loss of jobs by Tellez were apparently directed to the Portuguese only, who numbered seven or eight at the ranch. Thus Altino Tavares said that Tellez made the comments to him while he was alone. Tony Amaral said that Tellez said the Portuguese employees would be the first to be chingada, and Floriano Tavares said the chingada comments

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chingada statement 200 times prior to the election. It also appears to me that they were made in a generally limited setting to the Portuguese employees (chingada) and at the home of N. Adina Rodriguez (promises). I find the "rumor" testimony to be of little value.

In conclusion, I believe that the statements were probably made although I do not believe them to be as pervasive as was testified to by employer witnesses. Even if they were as pervasive as employer witnesses would have it, my analysis below indicates they should not be grounds to set aside the election.

were made to the Portuguese employees.

In this regard, it is interesting to note that most of the testimony regarding being laid off and loss of jobs came from the Portuguese speaking witnesses only. Aside from the "rumor" testimony on the part of the Spanish speaking witnesses — Gustavo Garcia, Ismael M. Apolina and Jose Luis Aguilar — they testified that only on one occasion were they directly told they might lose their jobs. They were told this by Felix Gonzalez at the home of N. Adina Rodriguez one and one half months prior to the election with only six persons present. Most of the Portuguese witnesses testified that Felix Gonzalez never told them they would be laid off, lose their jobs, or be "chingada," if the union won. None of the Spanish speaking witnesses said that Pedro Tellez directed loss of job or layoff statements at them. The inference to be drawn is that the comments about loss of jobs, layoffs, in the streets and chingada were primarily between Pedro Tellez and the Portuguese employees.

Fourth, the comments may, as in Patterson, be construed to be references to the negotiation of Union Security Clause.

Fifth, and finally, it did not dissuade employee participation in the election. Eighty-five and one half percent of the eligible employees voted in the election. Of these, two of the Portuguese who allegedly bore the brunt of the "threats" actually served as company observers. (See Tally of Ballots, ALRB 6.)

Therefore, I do not find that the statements and rumors regarding "chingada," "loss of work," "layoff," and "out

in the streets" "created a general atmosphere of confusion and fear of reprisal." Patterson, at 10-11.

(2) The pre-election encounter between Emilio Ibarra and Pedro Tellez: Virtually all of the testimony regarding Pedro Tellez revolved around the statements considered in (1), supra. One Tellez encounter merits separate discussion — the encounters with Emilio Ibarra. As noted above, Ibarra and Tellez — by the testimony of Ibarra — engaged in an intense pre-election encounter at the work camp. Ibarra claimed that Tellez called him a traitor, an SOB and told others not to listen to him.

Tellez testified that he encountered Ibarra on two separate occasions prior to the election. The first encounter was approximately eight days prior to the election and the second approximately three days prior to the election. On the first occasion, Tellez was accompanied by union organizer Richard Domingues. Ibarra was there with other persons supporting the company including a Raphael Rodriguez. Both sides addressed the workers and at one point an argument between the two sides ensued. (The record is not altogether clear but it appears that it involved a question, of union women "selling love" to gain support.) At this first encounter, according to Tellez, words were also exchanged between Ibarra and Dominguez.

Tellez described the second pre-election encounter with Ibarra as involving a dispute over whether the CWF followed through on their promises to the workers. In each case, Tellez

denied the words attributed to him by Ibarra. He also denied telling workers not to speak to Ibarra.

Even if the Ibarra account of .the exchange is accurate it is certainly no more aggravated than the factual setting of Tamooka Bros. (1975) 2 ALRB No. 52. Therein, prior to an election, a Teamster organizer approached a union organizer addressing some workers. The Teamster organizer grabbed the UFW leaflet and threw it in a small campfire. He told the workers that the UFW got support from Europe or Asia; that UFW supporters crawl on their bellies to get jobs; and, that if Christ returned, the UFW would be the first to crucify him. The Board held this to be "obvious campaign propaganda, clearly recognizable as such by the employees." At 7, citing Merk and Co. 104 NLRB 124 (1953).

I find that the Ibarra-Tellez exchange as described by Ifaarra (of course, as an agent of the CWF his testimony is just as suspect as that of Tellez who was associated with the union in many employees[1] minds) was clearly an exchange in the middle of a heated organizing effort at employer's ranch and was clearly recognizable as such. While I agree that such conduct as described by Ibarra "has no. place in a representation election" (Tamooka Bros., supra, at 7), I do not find that it was of such a nature to influence the outcome of the election or to keep persons away from the polls. It is difficult to imagine any election campaign that is truly adversarial in nature not becoming heated, intense, and beyond the bounds of that which

would be ideal. Apparently, the campaign at Krug was no different.

(3) "Promises" of higher wages, seniority, guaranteed employment and the "green card" incident: It should be re-emphasized that the question of promises and misrepresentation (if they be such) are only considered herein to determine if they contributed to a "pattern of economic intimidation" interfering with freedom of choice in this election. I am not independently considering grounds for overturning the election that have already been dismissed by the Executive Secretary.[14/]

Most of the promises herein were alleged to have been made by Felix Gonzalez or Felipe Moran at the meeting at N. Adina Rodriguez' s house. Additionally, Gonzalez was alleged to have made promises regarding wages and work security to Lionel Tavares and Tony Amaral. Finally, there was testimony from employer witnesses regarding rumors around the ranch, prior to the election, regarding promises of higher wages, job security, etc.

[14/] Several employer arguments in their post hearing brief appear to be beyond the scope of the hearing itself. One which I believe is arguable beyond the scope of the hearing, but which I have already considered on the merits, is the question of the selection of observers and Pedro Tellez as an observer. Another issue that I find beyond the scope of this hearing is the question of whether or not racial appeals affected the outcome of the election. The first time such an argument was made was in the employer brief at page 81. Of course, the union had no notice of such an argument and did not respond in its own brief. Even so, aside from the fact that the evidence reflects some tension between Portuguese and Spanish workers, it certainly does not reflect a racially based campaign by either side.

To be sure, these comments do not amount to threats. In Radovich, supra, where the union claimed, according to employer testimony, that wages would drop to $1.45/hour if they lost the election, the Board noted that the "statement was not a threat because the union cannot lower wages if it loses an election." At 3. So too, a union victory at Krug could not result in any unilateral action by the UFW in regard to wages or job security.

It appears to me that the alleged statements do not even amount to misrepresentations. I find, as in Dessert Seed Co.(1975) 2 ALRB 53 that "during election campaigns, a union naturally attempts to convince the workers that it will bargain for desirable benefits on their behalf if it wins the election. Such statements are only promises of what the union will attempt to accomplish in the future and do not constitute misrepresentations ." (Emphasis added, at 9, Note 5.)

Even if the "promises" and other statements be considered to be misrepresentations on the part of the UFW at Krug, Radovich should again be noted. The Board admonished the parties that:

> In the case of Jack J. Cesare & Sons, 2 ALRB 6 (1976), we noted our agreement with the reservations expressed by NLRB about overturning elections on the basis of the Board's evaluation of campaign statements out of the context of a heated election campaign. We said that insofar as the NLRB's current standards for judging the impact of misrepresentations is based on the notion that elections should be conducted in 'laboratory conditions' that analysis may have limited applicability to elections conducted

> among agricultural employees. Samuel S. Vener Company, 1 ALRB 10 (1975). In addition our authority to overturn elections on the basis of misrepresentations must be exercised in line with the provisions of the First Amendment and of Section 2 of Article I of the California Constitution. Wilson v. Superior Court, 13 C3d 652 (1975). See also Labor Code Section 1155 at 3-4.

With this adminition from Radovich in mind, in conjunction with other criteria applied in Radovich, I find that if these statements amount to misrepresentations they do not warrant overturning this election. First, these statements were no more part of an organized election campaign than were the statements in Radovich. In Radovich, a union organizer made the statement to about seven workers. Here the statements alleged were made primarily at a meeting among six workers and also to other isolated individuals at different times.

Second, as in Radovich, the employees had no special reason to believe that the union had some mystical power to make the statements become a reality.

Finally, as in Radovich, "the employer not only had an opportunity to reply, but did reply." Radovich at 4. UFW No. 2, distributed to much of the work force by employer, read in relevant part:

> Question: Some union organizers have shown us sample contracts and have told us that upon winning the election the same benefits which we now have will be negotiated. Is this true?
>
> Answer: No I Promises and sample contracts are absolutely worthless. If the union wins an election they have only won the right to bargain with the grower, nothing more. The grower has no obligation

> to agree to a union demand. The union can promise you anything to get your vote--but please remember-- promises are easily broken. (See UFW No. 2, 2d Question and Answer.)

Since the leaflet was prepared by the CWF, it is also probable that their other representatives — including Raphael Rodriguez made the same representations to the company workers during the campaign.

Thus, even if they be classified as misrepresentations, the response by the employer, the nature of the statements, the lack of evidence that they affected either the turnout or the freedom of choice, and the dictates of First Amendment considerations compel me to conclude that the statements do not warrant the overturning of this election. I believe a similar analysis may be applied to the "green' card" incident. I similarly conclude the alleged statements regarding green cards do not warrant overturning this election.[15/] The statements regarding “green cards" were made to a relatively small group of persons. The employees

[15/] I find Gonzalez's testimony of what occurred at the N. Adina Rodriguez home to be credible insofar as it relates to the question of "green cards." The employer brief misstates what Gonzalez had to say about the meeting. It appears to me that Gonzalez could have told the persons present that he might be able to assist in procuring green cards, and that the persons could have left the meeting with the impression that they testified to. Again, even if the employer were correct in its characterization of the Gonzalez testimony, it would not be grounds for setting this election aside.

present at the meeting had no reasonable cause to believe Felix Gonzalez had special knowledge or position with immigration to single handedly obtain these papers. Finally, the company responded to the alleged Gonzalez representation regarding green cards. The employer claims that by promising green cards in return for authorization cards, the union necessarily influenced more votes for itself. In UFW No. 2, however, the employer responded to the alleged misrepresentation:

> Question: If I have signed an authorization petition for the union am I obligated to vote for that union?
>
> Answer: No, you have not conmited yourself to the union. What's more you may vote for no union even though you have signed a union card. Remember it is a secret ballot election, no one will know who you voted. (UFW No. 2, 1st Question and Answer, emphasis added.)

"In determining whether campaign rhetoric is sufficient to set aside an election, we look not only to the nature of the speech itself, but also to whether in the light of the total circumstances it improperly affects the result. Albert C. Hansen (1975) 2 ALRB 61, at 5. The total circumstances herein regarding alleged "threats," "promises," and "misrepresentations," warrant the finding that there was not an atmosphere and pattern of economic intimidation. The election should not be overturned.

## IV. THERE WAS NO IMPROPER ELECTIONEERING OR OTHER CONDUCT BEQUIRING THE SETTING ASIDE OF THE ELECTION IMMEDIATELY BEFORE, DURING, OR AFTER THE POLLING

### A. THE FACTUAL SETTING: CONDUCT PRIOR TO POLLING

Rennick Harris testified that prior to the polling he "saw a mob of people milling around." He also testified that he saw two non-Krug employees with Richard Dominguez. Tony Amaral, a second employer witness, testified that five to 10 minutes before the election 20 to 30 people in the polling area were shouting "Viva Chavez"; there were knives in the hands of some of the workers — used for picking grapes — but he was not sure if they were in the air; that there were UFW bumper stickers;

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noise, jumping and shouting. Emilio Ibarra testified that there was only one car with a UFW bumper sticker; that when the workers came to vote, Pedro Tellez led the pack yelling "farmers will get it;" and, Richard Dominguez was there stating "okay boys, you know what has to be done." On cross examination by the UFW he also indicated that as the workers came to vote, some had knives in the air. The final employer witness to testify in this regard, Gustavo Garcia, indicated that nothing happened while he was in line to vote. He said nothing else.

Union witness M. Ochoa denied that there was any shouting or knives prior to the vote.

Board agent Perez testified that there were no disturbances prior to the balloting and no shouting until after the balloting. He said some workers had knives, but none were in the air.

B. THE FACTUAL SETTING: CONDUCT DURING THE POLLING

Employer witnesses indicated the following. Tony Amaral indicated that UFW organizer Richard Domingues left prior to the start of the balloting after handing some papers to union observers Pedro Tellez and Miguel Ochoa. (For a discussion of Pedro Tellez as observer in the area and its affect on the election, see Footnote 12.) He also stated that before the voting the shouting stopped and the cars with the bumper stickers left. Emilio Ibarra stated that after a second request, Richard Domingues left prior to the start of the balloting. Other than

this, there was no other employer testimony regarding impropriety during the voting.

Union testimony revealed the following. Felix Gonzalez stated that he, Richard Domingues and two non-Krug employees (including UFW attorney Barbara Rhine) left the area prior to the balloting and stood some 500 feet away during the balloting itself. Miguel Ochoa stated that he was an observer during the voting and was, just prior to the start of the voting, handed a list by Richard Dominguez outlining who he sould watch for challenges. Pedro Tellez indicated that Richard Domingues left prior to the voting with the DFW attorney and another non-Krug employee and that there were no disturbances during the voting.

Board Agent Perez related that there were no disturbances during the voting. He further indicated that Richard Domingues and Barbara Rhine left prior to the voting.

C. THE FACTUAL SETTING; CONDUCT DURING THE COUNTING OF THE BALLOTS

Employer testimony revealed the following. Altino Tavares stated that during the counting there were shouts of "Viva Chavez," but that he heard no one say anything would happen if he voted against the union. Tony Amaral confirmed that no one said anything about losing jobs, but he also stated that there were shouts of "Viva Chavez." He indicated that there might have been some "chingada" comments, but he could not be sure who said it.

Union testimony revealed the following post election conduct around the polling area. Felix Gonzalez stated that no

one yelled "Viva Chavez" during the tally of ballots/ but that the workers were happy that Chavez had apparently won. Miguel Ochoa stated that at first during the counting there was no shouting of "Viva Chavez," but, when it became apparent that the UFW had won, the workers did start shouting "Viva Chavez." He further denied that Board Agent Perez ever asked for quiet during the count or that he ever threatened to stop the counting if the persons in the area did not quiet down. Pedro Tellez claimed there was no shouting until after the results were known.

Board Agent Perez, on the other hand, testified that there was shouting during the counting of the ballots; that he had to admonish the employees to be quiet and he stated that it was possible that he threatened to stop the counting if they failed to comply with his request.

D. THE FACTUAL SETTING IN ITS LEGAL CONTEXT:

One need not even look to union testimony to establish the lack of impropriety in conduct immediately preceding, during and immediately after the voting.

First, the testimony is devoid of any indication of threats during the relevant time periods. Tony Amaral indicated that there might have been a "chingada" comment, but he and Altino Tavares agreed that no one made any comments about loss of jobs. The testimony regarding the knives is likewise devoid of any substance in terms of its effect on the election. Again, employer testimony reveals no comments regarding knives during or

after the election, and prior to the election only Emilio Ibarra -- the agent of the CWF -- indicated knives were in the air. Tony Amaral indicated that he was not sure if there were knives in the air. As Board Agent Perez pointed out, he presumed that the workers had knives, but he did not see any in the air. Further, Perez testified to no verbal threats or physical violence prior to, during or after election. I find that threats and/or physical violence played no role whatsoever during these time periods.

Second, it is clear from employer testimony that Richard Dominguez, the UFW organizer, had left the area along with the non-Krug employees prior to the voting. Board decisions where organizers have remained in the area have been held not sufficient to overturn an election (see RT Englund (1975) 2 ALRB 23) so impropriety in this election where Richard Dominguez left is obviously not present.

Third, I find that the presence of UFW bumper stickers in the area prior to the election is not grounds to set aside , the election. According to Ibarra, there was only one such sticker and each employer witness seems to agree that there were no UFW insignias in the area during the balloting itself. See Samuel S. Vener, supra; Harden Farms, Inc. (1975) 2 ALRB 30.

Fourth, I find that there were no disturbances of any sort either prior to or during the voting itself. If there was significient slogan shouting, before or during the balloting, Agent Perez, charged under the law with the conduct of the election, did not hear it. I further find that there probably was shouting

of "Viva Chavez" during the tally. Perez himself said that he had to try to quiet the workers. Nonetheless, I conclude that the record is devoid of any evidence to indicate that this in any way affected the outcome of the election. The incidents during the tally do not amount to misconduct unless they are .. "associated with electioneering or disruption of the voting process." Hemet Wholesale (1975) 2 ALRB 24, at page 3.

Finally, in regard to Pedro Tellez[1] alleged statement, "the farmers will get it," as he headed the "pack"; I find it lacking credibility, since Tellez was in the area well prior to the arrival of the majority of the workers since he was to be an observer in the election and was receiving instructions from the state.

In conclusion, I find no improper conduct during these time periods to warrant the setting aside of the election.

V. OTHER ISSUES; THE SECRECY OF THE BALLOT AND THE "EARLY" CLOSING OF THE POLLS

Employer raises two other issues which may be dealt with briefly. (Additional issues of employer are dealt with in the footnotes, supra.) First, there is nothing to indicate that the ballot was not secret. * It is true that employer witness Tony Amaral stated that he could see eight or nine ballots because they were so thin. He was contradicted, however, by another employer witness Altino Tavares. Further, there was no other evidence presented on the issue of any substance.

On this record, there is absolutely no indication that the secrecy of the vote was violated or that if it were it in any way affected the vote in this election.

Second, employer's contention that the polls closed early is frivolous. As previously indicated, eighty-five and one half percent voted. There is no indication that anyone was disenfranchised as a result of the early closing of the polls.

CONCLUSION

I agree with employer's contention in his brief that the election process is to be viewed in its totality in determining whether the vote was done-in an atmosphere conducive to free choice and full participation. The totality of the circumstances in this election indicate that, in fact, it was marked by high voter turnout and an atmosphere conducive to free choice.

The record does reflect that there was some confusion in the issuing of notice herein. It also reflects that no Portuguese ballots were issued. It finally reflects that, during the course of the heated campaign non-judicious comments were made on both sides.

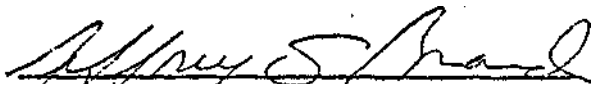
More importantly, however, the record reflects that eighty-five and one half percent turned out to vote. Both sides engaged in vigorous efforts' to inform the voters of their relative positions — the union through its organizers and the

employer through the CWF. The record also reflects that despite a heated contest the voting process went extremely smoothly on very short notice. Perhaps employer's own witness Floriano Tavares said it best: "where to vote was clear, the election was free."

I conclude that the UNITED FARM WORKERS OF AMERICA, AFL-CTO should be certified as the sole bargaining representative at C. MONDAVI and SONS d/b/a CHARLES KRUG WINERY.

DATED: February 8, 1977

Respectfully submitted,



JEFFREY S BRAND
Investigative Hearing Officer

EXHIBIT A: EXHIBITS IDENTIFIED AND/OR IN EVIDENCE

| | |
|---|---|
| UFW No. 1: | One page, both sides, employer campaign leaflet on C. Mondavi and Sons stationery. IN EVIDENCE. |
| UFW No. 2: | One page, both sides, employer campaign leaflet in Question and Answer form, on C. Mondavi and Sons stationery. IN EVIDENCE. |
| UFW No. 3: | Contract comparisons prepared by CWF. NOT IN EVIDENCE. |
| UFW No. 4: | CWF, "No Union" campaign materials. IN EVIDENCE. |
| UFW No. 5: | More CWF materials. IN EVIDENCE. |
| UFW No. 6: | More CWF materials. IN EVIDENCE. |
| UFW No. 7: | Payroll list of employer from which eligible voters drawn. IN EVIDENCE. |
| UFW No. 8: | Notice to all employees. IN EVIDENCE. |
| UFW No. 9: | Direction and Notice of Election. IN EVIDENCE. |
| UFW No. 10: | Tally of Ballots. IN EVIDENCE. |
| UFW No. 11: | One page form entitled Service of Petition. In Spanish on reverse. IN EVIDENCE. |
| Employer No. 1: | Additional Declarations of Jose Luis Aguilar. IN EVIDENCE. |
| Employer No. 2: | Letter from Board to Employer re filing of representation petition with a copy of the petition. IN EVIDENCE. |
| Employer No. 3: | "Desafio de el Observador de el Patron." NOT IN EVIDENCE. |
| Employer No. 4: | Deposition of Luis Sandoval Lua. IN EVIDENCE. |
| Employer No. 5: | Proceedings from Napa County Superior Court Action re this election. NOT IN EVIDENCE. |

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| ALRB No. 1: | English declaration of Emilio Ibarra. IN EVIDENCE. |
| ALRB No. 2: | Spanish declaration of Emilio Ibarra. IN EVIDENCE. |
| ALRB No. 3: | Subpoena Duces Tecum and Petition to Revoke. IN EVIDENCE. |
| ALRB No. 4: | Petition for Certification. IN EVIDENCE. |
| ALRB No. 5: | Direction and Notice of Election. IN EVIDENCE. |
| ALRB No. 6: | Tally of Ballot. IN EVIDENCE. |
| ALRB No. 7: | Petition Setting Forth Objections to Election. IN EVIDENCE. |
| ALRB No. 8: | Notice of Hearing and Order of Partial Dismissal Of Petition. IN EVIDENCE. |
| ALRB No. 9: | Notice of Hearing. IN EVIDENCE. |