

STATE OF CALIFORNIA
 AGRICULTURAL LABOR RELATIONS BOARD

PACIFIC FARMS,)	
)	
Employer,)	No. 75-RC-31-S
)	
and)	
)	3 ALRB No. 75
UNITED FARM WORKERS OF AMERICA,)	
AFL-CIO,)	
)	
Petitioner.)	
)	

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

On October 7, 1975, an election was held for the employees of Pacific Farms. The tally of ballots showed the following results:

UFW	4
No Union	0

The employer filed timely objections, of which the executive secretary dismissed one. A hearing was held on the remaining two objections and hearing officer James Flynn issued a report recommending that the objections be dismissed and that the election be upheld. The employer filed timely exceptions to the report. Because we overturn the election on grounds other than those presented by the employer's objections, we do not evaluate either the objections or the exceptions to the hearing officer's report .

The nonrepresentative vote requires that this election be set aside. To determine whether a vote is representative, we

do not look to numbers alone;^{1/} we look to whether those not voting chose not to vote or whether they were prevented from voting by the conduct of a party or of the Board. Those choosing not to vote are bound by the choice of the majority of those voting. But where a significant number of eligible voters is actually prevented from voting, the election is not representative.

In this election, 4 out of 35 eligible employees voted. Those 4 were all members of one family and no longer worked for Pacific Farms. None of the 13 eligible voters who worked at Pacific Farms on election day voted.^{2/} The polls were open from 6:00 to 7:30 p.m. The employees worked beyond this time. Foreman George Shingu would not release the-employees to vote when representatives of the UFW went to the ranch to offer them a ride to the polls. The evidence is insufficient to support a finding that the employer had notice of the time of the election, Time and location of an election is usually established at a preelection conference. Here, there was no pre-election conference. While copies of the notice of election giving the time were left at the employer's headquarters the day before the election, there is no evidence that any agent of the employer saw them.

^{1/}The NLRB certified an election where only 3 of 16 eligible employees voted for the petitioner since there was no evidence any employee was prevented from voting. Valencia Service Company, 99 NLRB 343, 30 LRRM 1074 (1952).

^{2/}There were 16 eligible voters no longer employed by Pacific Farms. Although only 4 of them voted, we do not set aside the election on this basis. The employer's failure to provide an address list meant few of these employees received notice of the election. An employer may not rely on its own misconduct as grounds to set aside an election. 8 Cal. Admin. Code Section 20365(d).

The employer did not cooperate with the Board agent in charge of the election. Not only did it never furnish an address list for its employees, it made no official response to the petition at all although informed of the requirement to do so. After making several requests of the employer for its response, the Board agent copied the names of workers from a foreman's tally book in order to have an eligibility list. The failure to hold a pre-election conference was not litigated, and there is no explanation in the record. In some instances, delivery of the notice of election to the employer's headquarters would be adequate notice, but here the Board agent was aware that there was not always someone present at the headquarters. While we do not condone the employer's conduct, nevertheless, the evidence is insufficient to prove that the employer worked later than usual to prevent the employees from voting.

Therefore, we set the election aside.

Dated: September 8, 1977

RICHARD JOHNSEN, J R . , Member

ROBERT B. HUTCHINSON, Member

RONALD L. RUIZ, Member

STATE OF CALIFORNIA
AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of:

PACIFIC FARMS,

Employer,

Case No. 75-RC-31-S

and

UNITED FARM WORKERS OF
AMERICA, AFL-CIO,

Petitioner.

Robert W. Islip, Arostegui, Islip, Cooke,
Marquez, Epley & Gengler, for the
Employer.

Daniel Yamshon, for the United Farm
Workers of America, AFL-CIO.

DECISION

STATEMENT OF THE CASE

JAMES E. FLYNN, Investigative Hearing Examiner: This case was heard before me on February 14 and 15, 1977, in Yuba City, California. The objections petition, filed by Pacific Farms (hereafter also referred to as the "Employer") and served on the United Farm Workers of America, AFL-CIO, (hereafter the "UFW"), alleged three instances of misconduct which the Employer argues require the Agricultural Labor Relations Board (hereafter the "Board") to set aside the election conducted among its employees on October 7, 1975.^{1/}

^{1/} Unless otherwise specified, all dates refer to 1975.

By order dated November 23, 1976, the Executive Secretary of the Board dismissed one objection and ordered that this hearing be conducted to take evidence on the remaining two objections.

All parties were represented at the hearing and were given full opportunity to participate in the proceedings. Both parties presented oral argument on the record at the conclusion of the taking of evidence.

Upon the entire record, including my observation of the demeanor of the witnesses, and after consideration of the arguments made by the parties, I make the following findings of fact, conclusions, and recommendations.

FINDINGS OF FACT

I. Jurisdiction

Neither the Employer nor the UFW challenged the Board's jurisdiction. Accordingly, I find that the Employer is an agricultural employer within the meaning of Labor Code Section 1140.4(c), that the UFW is a labor organization within the meaning of Labor Code Section 1140.4(f), and that an election was conducted pursuant to Labor Code Section 1156.3.

II. The Alleged Misconduct

The objections set for hearing allege two instances of improper conduct by the Board agent in charge of the election which, the Employer argues, require the Board to set aside the election. First, the Employer alleges that the Board agent held the election more than seven days after the filing of the petition for certification in violation of Labor Code Section 1156.3(a)(4). Second, the Employer alleges that the Board agent conducted the election at

a site not contiguous or adjacent to the Employer's farming property and more than one mile from the farming operation, and that no adequate notice of the time and place of the election was placed on the farm property.

In response, the UFW argues that the Employer made no showing of prejudice by the late holding of the election and that the Employer did not cooperate in arranging for the election and, in particular, by failing to provide an employee list with current addresses, the Employer was responsible for any problems in disseminating notice of the election, and that a low voter turnout was due largely to Employer's misconduct.

IV. Findings of Fact

A. The Operation of the Business

Pacific Farms is a general partnership engaged in the harvesting of tomatoes grown on properties leased from other persons. The partners are Joseph W. Perrucci and Clem Perrucci, both of whom reside in San Jose, California.^{2/} The Employer's principal place of business is 2858 Tierra Buena Road (hereafter the "Pacific Farms headquarters") in Yuba City, Sutter County, California.^{3/}

In September and October, Pacific Farms was harvesting tomatoes on two fields located about 7 to 10 miles apart near

2/ Employer Exhibit 6 is a Fictitious Business Name Statement filed with the Clerk of Sutter County on February 10, 1975, which lists the Perruccis as partners and gives 2858 Tierra Buena Road in Yuba City, California as the address of Pacific Farms.

3/ The Pacific Farms headquarters consists of a residence with shops for storing and maintaining equipment in back and a surrounding prune orchard. The bookkeeper for Pacific Farms, Catherine Meschendorf, lives in the residence year round except for occasional short trips to San Jose or San Francisco.

Marysville.^{4/} One field of 175 to 180 acres was located on Feather River Boulevard, 12 to 15 miles south of Marysville (hereafter referred to as the "Feather River field"); the other field of 55 to 60 acres was located near Beale Air Force Base, 12 to 15 miles southeast of Marysville (hereafter referred to as the "Beale Air Base field"). Although Pacific Farms was owned by the Perruccis,^{5/} the day-to-day management of the business was carried out by George Shingu, Les Perrucci, and Catherine Meschendorf.

George Shingu was foreman for Pacific Farms in September and October of 1975.^{6/} Under a verbal agreement with the Perruccis, he was paid \$1,000 a month, or 5% of the gross, in return for his services. Shingu was responsible for hiring workers. According to his testimony, prospective employees would come to the harvesting site and ask for work; then if he needed workers, he would hire them.^{7/} Shingu kept a tally book in which he kept the names of employees and their hours worked. The Employer's bookkeeper, Catherine Meschendorf, would then make up weekly time tickets from

^{4/}UFW Exhibit 1 is a map of Yuba and Sutter Counties which was marked at the hearing with the locations of the two fields and the election site. Both parties agreed that the sites marked on the map closely approximated the locations of places on which testimony was received.

^{5/} Unless otherwise specified, the term "Perruccis" refers to Joseph W. and Clem Perrucci.

^{6/} Shingu was no longer employed by Pacific Farms at the time of the hearing.

^{7/} Trinidad Lule, an employee at Pacific Farms until September 26, testified that he was hired by Shingu.

the information contained in Shingu's tally book.^{8/} These tickets were then used to compute wages owed and to issue checks. Meschendorf was the mother of Les Perrucci and lived in the residence at the Pacific Farms headquarters.

To understand Les Perrucci's role in the Employer's business, it is necessary to know something about other farming businesses owned and operated by the Perrucci family in the Marysville-Yuba City area. As previously stated, Joseph W. and Clem Perrucci were partners in Pacific Farms. Joseph W. Perrucci also owns BJW Ranch by himself and P & P Ranch in partnership with Joseph J. Perrucci.^{9/} Farm equipment for all these businesses, including the tomato harvesters, is stored at the Pacific Farms headquarters when not in use. Les Perrucci is responsible for repair and maintenance of the equipment of all these businesses. He also manages P & P Ranch and BJW Ranch and is paid for this service by his brother Joseph W. Perrucci. According to testimony by Shingu, Les Perrucci assisted him in repairing and moving the harvesters. When Shingu was busy, he would ask Les Perrucci to call his brother and get the answers to questions he might have.^{10/} Shingu testified that he did not consult with

8/ ALRB Exhibit 2 consists of weekly time tickets for four payroll periods during Employer's 1975 harvest: September 19 to 25, September 26 to October 2, October 3 to 9, and October 10 to 16. These cards were provided by the Employer in an attempt to determine from them when harvesting shifted from the Feather River field to the Beale Air Base field.

9/ Joseph W. Perrucci is Les Perrucci's brother; Joseph J. Perrucci is his uncle; and Clem Perrucci is a cousin. Catherine Meschendorf is his mother.

10/ Shingu testified that he saw Joseph W. Perrucci perhaps twice and Clem Perrucci once during the 1975 harvest. Both Trinidad Lule and another employee, Alicia Gomez, testified that they saw Les Perrucci coming and going on the property on some occasions during the harvest. In general, most communications with the owners was done either directly by Shingu or Perrucci through telephone calls to them in San Jose.

Les Perrucci on hiring, the land which was to be worked each day, the hours worked by employees each day, or the time within which harvesting had to be completed. Because of this the Employer argued that Les Perrucci was neither the employer nor an employee of Pacific Farms. Evidence does not support this argument, but rather is consistent with my finding him an agent of the Employer.^{11/}

Pacific Farms used two harvesters to bring in its 1975 tomato crop. Each machine carried between 14 and 18 workers depending on the amount of dirt clods or green tomatoes coming through the sorter.^{12/} Time tickets for the period from September 19 to October 16 show an employee complement which varied from 31 to 36 employees when two harvesters were operating, and from 14 to 20 employees when one

11/ Les Perrucci never told either UFW representatives or the Board agent in charge of the election that he was not the owner or an agent of Pacific Farms. Testimony showed that the Board agent in his dealings with Perrucci was led to believe that he was in contact with the Employer or someone speaking for the owner. The Board agent testified that Shingu said that Perrucci was the owner and said he could be found at the Pacific Farms headquarters. Employer's attorney emphasized that it was unclear whether Les Perrucci or Mr. Perrucci was used by Shingu, but evidence clearly showed that the person who subsequently met the Board agent at the Pacific Farms headquarters was Les Perrucci, not either of the Perruccis who were the actual owners. Furthermore, I found Les Perrucci's informed testimony about the operation of Pacific Farms and his ability to obtain business records of the Employer totally inconsistent with the argument that he was not connected with the Employer. Employer's argument rests solely on the technicality that Les Perrucci was not compensated for his services by Pacific Farms. It is clear from a reading of Labor Code Section 1140.4 (c) definition of an agricultural employer that the Act contemplates a broad definition of agency in an election context. That section provides that the term "agricultural employer" is to be "liberally construed to include any person acting directly or indirectly in the interest of an employer in relation to an agricultural employee." I, therefore, find that Les Perrucci was an agent of the Employer for purposes of this election. Similarly, foreman Shingu was an agent of the Employer.

12/ Employees were classified as boom operators, tractor drivers, Harvester drivers, sorters, cleaners, and timekeepers.

harvester was in use. On days when only drivers or maintenance employees worked, the number of employees ranged from 1 to 5.

B. Events Prior to the Filing of the Petition

In late September, the UFW began organizing for an election among employees of Pacific Farms. Authorization cards were obtained from 27 of the 35 workers who were then harvesting tomatoes on the Feather River field.^{13/} As early as September 23, foreman Shingu was aware that an organizing campaign was going on among Pacific Farms employees. On that day, he saw Liz Sullivan, a UFW organizer and director of the union's Marysville field office, in the Feather River field with workers as he was driving by in a pickup truck. According to Shingu, he saw a paper in Spanish and English containing information on employees' rights which Sullivan had given to a worker.^{14/}

C. Events After the Filing of the Petition

On September 29, Sullivan filed a petition for certification at the Board's Sacramento Regional Office.^{15/} The same day, Sullivan served a copy of the petition on Les Perrucci at the Pacific Farms headquarters. Sullivan testified credibly that Perrucci stated at that time that he had been a policeman, that he understood the law, and that he did not want any trouble and wanted to cooperate.

^{13/} Cards were gathered by four employees named Jose Mejorado, Maria Mejorado, Elia Mejorado, and Trinidad Mejorado (hereafter the "Mejorado family"), and by Sullivan and another organizer named Cresenciano "Chano" Gonzalez.

^{14/} Trinidad Lule testified that he signed an authorization card on September 23. Sullivan testified that the conversation with Shingu about employees being laid off because tomatoes were too green occurred on the day Lule signed. Shingu testified that he kidded Sullivan that he was going to stop one machine because the tomatoes were too green.

^{15/} Employer Exhibit 1.

She then told him that the instructions were on the back of the petition and that a Board agent would probably be getting in touch with him.

On October 1, Sullivan called the Sacramento Regional Office to find out when the UFW was going to receive the list of employees with their social security numbers and addresses. Sullivan was transferred to Board agent Guadalupe M. Perez who had that day been assigned to the case. Perez told Sullivan that he was still working on getting the list. After reviewing the petition to see if it met statutory requirements, Perez had attempted to telephone George Shingu, who was listed on the petition as the Employer's agent or representative to contact, at the number given, but there had been no answer.

Perez continued his efforts to reach Shingu by telephone before the next day driving to the Pacific Farms headquarters itself. Perez went through the premises, including the shops, but found no one and left without leaving a message. The same day, Perez drove to the Feather River field. Neither Shingu nor Les Perrucci were there, but Perez spoke to a man working on a tomato harvester. The man told him that he was just an employee and could give him no information.

Harvesting was completed at the Feather River field on October 2,^{16/} and began again on October 6 at the Beale Air Base

^{16/} After a review of employee time tickets for October 2 through October 7, parties stipulated that the last day of work on the Feather River field was October 2, and that only drivers worked on October 3 and 4.

field.^{17/} The last day of work for the Mejorado family with Pacific Farms was October 2; they did not work when harvesting resumed at the Beale Air Base field. The UFW argued that Spanish surnamed workers were laid off because of union activity and replaced with Korean workers by Shingu at this time. As evidence of this, the UFW introduced testimony by Sullivan that on the day of the election UFW organizer Pancho Votello told her that Shingu had said, "How can you have an election if I fired all the workers who signed with you?"^{18/} Other than this hearsay testimony, there is no other direct testimony that the lay off of the Mejorado family was motivated by anti-union animus, and Shingu denied making the statement. While certain circumstantial evidence and serious question as to Shingu's credibility supports the UFW position, I cannot find as a matter of fact that pro-union employees were laid off by Shingu in order to interfere with the election.^{19/} Sullivan testified that some workers

17/ Les Perrucci testified that the trucking company which hauled tomatoes to the cannery for Pacific Farms told him that: the first two loads came out of the Beale Air Base field on October 6. Time tickets for that day show that one harvester was operating for the first time since work ended on October 2 at the Feather River field.

18/ Shingu allegedly made the statement when Vo-tello and others went to the Beale Air Base field the night of the election to pick up employees and transport them to the election site.

19/ Time tickets for October 2 show that the Mejorado family worked only 11/2hours while other employees with only one exception worked 8 to 11 hours. Time tickets for September 30 to October 9 show that the number of Korean workers increased from 2 to 6 during this period Finally, Shingu at first testified that as many as 11 Korean workers were employed in harvesting Feather River field, but this testimony was contradicted by business records which showed that no more than 4 Korean employees worked at the Feather River field, and that their number grew to 6 on the day of the election.

had left to take work with other employers because rain cut down on the work available with Pacific Farms.^{20/} Furthermore, no unfair labor practice charges have been filed.

On October 3, three days after he was assigned the case, Perez succeeded in reaching a person who identified herself as Shingu's daughter and left a message for him. This person also gave Perez a telephone number for Les Perrucci. Perez then went to the Feather River field again and this time found Shingu there. Perez told Shingu that he was- there because he was trying to conduct an election. Shingu responded that he had seen the certification petition, but that he was not the owner.^{21/} Shingu also told Perez that Perrucci had the petition and that he was the owner.^{22/} Perez was then given the address of the Pacific Farms headquarters on Tierra Buena Road as the place Perrucci could be found. Perez then went to the headquarters. Shingu was there when he arrived, and Les Perrucci arrived a short time later. Perrucci told Perez that he had seen the certification petition, that it was in the bookkeeper's "in" basket, and that he knew what it was about. Perez informed Perrucci

20/ Trinidad Lule indicated that he worked for Pacific Farms only two days and then moved to another ranch to get -more hours of work.

21/ Shingu at first testified that he was not aware that a petition had been filed or that "any of this" was going on. The UFW then showed him, the Employer's attorney, and this hearing examiner a declaration filed on November 18 as a supplement to the Employer's objections petition. Under questioning, Shingu asked Employer's attorney where he had signed the declaration, and the attorney responded in his office. Although not introduced as an exhibit, the declaration stated that on September 29, Shingu "was advised by Mr. Perrucci that a petition for an election under the California Agricultural Labor Relations Act had been delivered to him" and that he "was not personally served with a copy of the petition." Upon being confronted with the declaration, Shingu changed his testimony to state that he never received a copy of the petition in his hand. As in other areas of his testimony, Shingu was evasive and not credible on this point.

22/ See Footnote 11, supra. Perez testified that the Employer was finishing up and pulling out the equipment from the Feather River field on October 3.

that the Employer was required to provide a list of employees and addresses within 48 hours of the filing of the petition, but Perrucci said he did not have a list. Shingu then said that he had a tally book which had the names of employees working on the ranch during the relevant eligibility period. Perez copied these names from the book, but the list obtained did not have social security numbers or addresses as required.^{23/} Sometime between leaving Perrucci and Shingu and October 6, Perez told Sullivan to find a neutral location for the election.^{24/}

On Monday, October 6, Sullivan and the Mejorado family met with Perez at the Sacramento Regional Office. Sullivan and the Mejorados suggested to Perez that the election be conducted on the Reginio Escalante Ranch, at 817 Plumas Road in Marysville.^{25/} Perez followed their recommendation and set the next day as the date of the election because he felt that it was the last day of the seven-day period.^{26/} Sullivan told Perez that the evening would be the best time for the election since it would allow workers an opportunity

23/ UFW Exhibit 3 is a copy of the list of employees taken from Shingu's tally book, dated October 3, and signed by G. M. Perez. The list contains 31 names. Four names are written in in pencil. Perez testified that these names were added as eligible voters by him on October 6 after discussion with the UFW. There are five full or partial addresses written on in ink which Sullivan testified were added at a later time.

24/ Sullivan testified that she was not sure whether she suggested the Plumas Road site that day when Perez stopped by the union field office on his way to Sacramento, or whether she phoned him later.

25/ According to Sullivan, this site was chosen because it was known to the employees and was on the road they would take in traveling home from the Feather River field.

26/ Perez testified that he felt Board regulations provided that Sundays were excluded in the computation of the seven-day period.

to stop on their way home from work and vote. According to Sullivan, she and the Mejorado family disagreed with Perez on the hours of voting, with the UFW wanting voting from 5:00 to 8:00 p.m. to allow for variations in employees' quitting time and Perez stating that he did not want to be around that long.^{27/} Eventually Perez set the voting time for 6:00 to 7:00 p.m. and gave Sullivan copies of the official Board direction and notice of election with instructions that it was important to get a copy to the Employer. On returning to Marysville, Sullivan went to the Pacific Farms headquarters and found no one there. After looking around, ringing the doorbell, and waiting 30 minutes, she placed a notice on the door and another in the mailbox.^{28/}

Testimony was inconsistent in some respects as to the notice which was given to eligible voters. It is clear that Perez himself did not distribute the notices, but instead relied on the UFW to do so. It is also clear that Sullivan, Gonzalez, and another organizer Mayolo Silva distributed union fliers announcing the election^{29/} and the official Board notice^{30/} at the Beale Air Base

27/ Alicia Gomez testified that employees quit work at 5:00, 6:00 or 7:00 p.m., depending on the circumstances. Les Perrucci testified that the work day generally began around 6:00 or 6:30 a.m.

28/ Sullivan stated that she saw a light on in the house.

29/ UFW Exhibit 2 is a copy of the union flier. It was in Spanish and English and stated that there was going to be an election on Tuesday, October 7, at the Reginio Escalante Ranch at 817 Plumas Avenue in Marysville. The time of the election was given as 6:00 to 7:00 p.m., with the "7:00 p.m." written in ever an "8:00 p.m." which had been scratched out. At the bottom of the flier was a "Vote UFW" with a box marked with an "X" and the union black eagle symbol.

30/ Employer Exhibit 2.

field on the morning of the election, but they did not post a copy of the notice on the property.^{31/} It is possible that not all workers were handed notices as they entered the property, because the UFW organizers stated that the field itself was in a distance from the road where they were standing.^{32/} While leafletting, they noticed workers entering by a second entrance and split into two groups to cover both entrances, Silva and Gonzalez going to one and Sullivan remaining at the other.

Later in the day, Sullivan and Gonzalez went to find a group of workers who had been laid off and had started work at a ranch near Robbins.^{33/} Another group of UFW organizers went to the Beale Air Base field about 6:45 p.m. to tell workers to vote and to provide transportation to the polls.^{34/} According to Jose Luis Vasquez, the organizers saw one harvester near their end of the field, and the other going away in the opposite direction. Shingu then came over to find out what they wanted.^{35/} Votello told Shingu

31/ Sullivan testified that the official Board notice was not posted at the Beale Air Base field because the organizers were not sure where the Pacific Farms property was and did not want to mistakenly place it on the property of another ranch.

32/ Alicia Gomez testified that she thought she received a "paper" on October 7, but could not identify either the UFW flier or the Board notice as the one she received.

33/ Sullivan testified that they returned late after the polls had been opened.

34/ Jose Luis Vasquez testified that this group included Silva, Gonzalez, Votello, Segun and himself.

35/ Shingu testified that he saw two cars arrive and that he thought they might be waiting to pick up their family. He then stated that he went over to see what they wanted, but first denied Vasquez's testimony that Votello told him they were there to transport employees to the polls. Later, Shingu changed his testimony to state that he could not recall any mention of an election being made. I find Shingu's version of the facts highly improbable and not credible.

that there was an election and that they were there to provide transportation for the workers, Vasquez testified credibly that Shingu told Votello he did not care about the election; that all he cared about was finishing the load; that they would finish about 8:00 p.m.; and that if the cannery needed more tomatoes, the workers would stay until 2:00 a.m.

Employee time cards for the period from September 19 to October 16 show that employees worked on an average more hours on the day of the election than on any other day during the harvest season with the exception of September 28; however, on that date only one harvester was used, while on October 7, two harvesters were in operation. On these two dates most employees worked 11 1/2, 12, or 12 1/2 hour days.

It is unclear from testimony what kind of attempts to notify workers were made by the UFW on the day before the election. Official Board notices were not prepared and given to Sullivan until sometime on October 6. Gonzalez testified that he passed out fliers with Silva and Sullivan in the morning and afternoon on the day before the election, and that on the afternoon of October 6 he went to notify workers in their homes that an election would be held the next day. ^{36/} He stated that he also handed out "Vote UFW" buttons at the time, but did not recall passing out the official Board notice. Jose Luis Vasquez testified that he went with Votello the day before the election and passed out fliers and that he went one other time

36/ The Employer in cross-examination of Sullivan attempted to elicit evidence that the UFW had addresses for employees obtained at the time authorization cards were signed. Sullivan testified that she could not recall whether this was done. Sullivan stated that she had no address for Trinidad Lule when she went to look for him. Regardless of whether this was true, possession of some employee addresses by the union would not remove the Employer's duty to provide a list of employees with addresses.

before that at lunch time. He also stated that the night before the election, Sullivan gave him a list of names and addresses and he went to homes of voters and passed out fliers.^{37/} Vasquez did not recall passing out the official Board notice.

On the day of the election, Perez and another Board agent set up the polling place at the Escalante Ranch. Two members of the Mejorado family were observers.^{38/} They voted as did two other members of the Mejorado family, according to Sullivan. No other persons voted, and none of the Mejorado family were working for Pacific Farms the day of the election. Time tickets for October 7 show that 35 employees worked, but that only 13 were eligible voters on the list.^{39/} Perez stated that everyone who voted did so by 7:00 p.m. The polls, however, appear to have been kept open late, until perhaps 7:30-p.m. When the polls were closed, the ballots were tallied. The UFW observers and Perez signed a Certification on Conduct of the Election and Tally of Ballots.^{40/} Pacific Farms did not have observers present. By letter dated October 10, 1975, Perez served Employer with the tally of ballots and informed it of the right to file objections.^{41/}

37/No testimony was elicited as to how many names and addresses were on this list.

38/ Observers 'were Jose and Rosalina Mejorado.

39/ Of the 35 employees on the eligibility list, 16 were no longer employed when the petition for certification was filed; four left after the filing and before the election, but they voted. Thirteen eligible voters worked the day of the election. Two other names appear on the eligibility list but not on the time tickets. Time tickets list 39 employees in the eligibility period from September 19 to September 25. The time cards contain all the names on the list provided by Shingu, with the exception of the two previously mentioned, which were written in later, plus several more. Of those 39 employees, 18 had gone by the time the petition was filed; four left after the filing and before the election, but voted. The remaining 18 worked on election day.

40/ Employer Exhibit 4. The tally showed the following results: DFW - 4; No Union - 0; Total Voters - 4; Eligible - 35.

41/ Employer Exhibit 5.

ANALYSIS AND CONCLUSIONS

I. Failure by Board Agent to Conduct Election Within Seven Days

Upon receipt of a petition for certification, the Board must immediately investigate the petition, and, if it has reasonable cause to believe that a bona fide question of representation exists, it must direct a representation election by secret ballot to be held, upon due notice to all interested parties within seven days of the filing of the petition.^{42/} The Board has held that failure to conduct an election within the seven-day period, while an irregularity, is not a jurisdictional defect. Absent evidence of prejudice to any party or persons, the Board will not overturn an election held after the seven-day period, since to do so would penalize workers, whom the Act was designed to protect, for Board agent error.^{43/}

Based on the findings of fact, there is no doubt that Board agent Perez conducted the election on the eighth day following the filing of the petition for certification because of an incorrect reading of 8 Cal. Admin. Code Section 2.0400.5 (a) (1975) ; re-enacted as 8 Cal. Admin. Code Section 20480(a) (1976) . Perez testified that he excluded an intervening Sunday in computing the seven days in which to hold an election. This was incorrect. Intervening Sundays and holidays are not excluded unless the period of time prescribed for

^{42/} Labor Code Section 1156.3(a) .

^{43/} Klein Ranch, 1 ALRB No. 18 (1975), see also William Pal Porto & Sons, Inc., 1 ALRB No. 19 (1975); Waller Flower Seed Company, 1 ALRB No. 27 (1975); J. J. Crosetti Co., Inc., 2 ALRB No. 1 (1976); Jake J. Cesare & Sons, 2 ALRB No. 6 (1976); Ace Tomato Co., Inc., 2 ALRB No. 20 (1976); Mapes Produce Co., 2 ALRB No. 54 (1976); TMY Farms, 2 ALRB No. 58 (1976); John Elmore Farms, 3 ALRB No. 16 (1977); and Vista Verde Farms, 3 ALRB No. 19 (1977) .

action is less than seven days. Consequently, under a proper reading of the regulations, Perez should have conducted the election on Monday, October 6, rather than on Tuesday, October 7.

In spite of this irregularity, the question remains whether the holding of the election eight days after the filing prejudiced any party or persons. From the evidence introduced at the hearing, I can find no evidence of prejudice which would warrant setting aside the election. The Employer relied on the mere technical fact that the election was not held within seven days and the low voter turnout. While there was evidence that voters had left Pacific Farms to take work with other ranches between the filing of the petition and the election, the turnover occurred prior to October 6, 1975. Thus, even had the election been held within seven days, a large number of employees would not have been working that day for Pacific Farms. To the extent that the Employer can argue that because employees worked only an average of six hours on October 6, as opposed to 12 to 13 hours average on October 7, more would have had an opportunity to vote had the election been held timely, this is counterbalanced by the fact that on October 6 only one harvester worked, while on October 7 two harvesters were working. There was no showing to indicate which harvester carried the majority of eligible voters or whether they were divided somewhat evenly between the two. As discussed below, the low voter turnout was the result of factors other than holding the election one day late. Accordingly, this objection should be dismissed.

II. Election Site Not Contiguous or Adjacent to Farm Property

Elections are conducted at times and places ordered by the Board or the regional director. The Board agent supervising an election has reasonable discretion to set the exact times and places to

permit the maximum participation of the employees eligible to vote. 8 Cal. Admin. Code Section 20350(a) (1975); re-enacted as 8 Cal. Admin Code Section 20350(d) (1976). There is no requirement in the statute or law which requires that an election be conducted at a site contiguous or adjacent to an employer's farming property. To set an election aside on these grounds, a party must show that the Board agent abused his discretion in selecting the time and place of the election. Thus, the Board has refused to overturn an election in which the Board agent held an election in a shed in the midst of company buildings and offices, since there was no showing of abuse of Board agent discretion and no evidence establishing that conducting the election on the farm would be intimidating to employees.^{44/}

The Employer did not introduce evidence establishing that Board agent Perez abused his discretion in selecting the Escalante Ranch as the election site. While it is true that he relied on UFW organizer Liz Sullivan and the Mejorado family in making the site selection, no evidence was introduced to show that the site itself was the reason for the low voter turnout. Sullivan testified that the Escalante Ranch was chosen because it was known to the workers and was on the way home from the Feather River Boulevard field. While Perez testified that he knew harvesting was either completed or almost completed at this site on October 3, he was not aware that harvesting activity had shifted to the Beale Air Base field. Sullivan's testimony was unclear as to the time she learned of the shift in working sites and whether it was before the meeting with Perez on Monday at which election notices were prepared.

44/ Bud Antle, Inc., 3 ALRB No. 7 (1977); see also Ralph Samsel & Co., 2 ALRB No. 10 (1976).

In any event, the evidence when viewed in the best light for the Employer would only show that employees working at the Beale Air Base field would not have had to pass by the Escalante Ranch on their way home. While Perez did not ask Perrucci or Shingu about having the election on the farm itself, it is equally true that neither Perrucci nor Shingu ever initiated any contact with Perez to determine the location of an election, even though they were on notice with service of the petition that an election would be conducted in seven days. Furthermore, only 13 eligible voters worked the day of the election. The Employer did not introduce testimony by any of those eligible to vote as to the reasons for not voting. Evidence showed that these employees were kept at work through the election hour. As to those eligible employees who did not work that day, only one testified. Trinidad Lule stated that he was not aware than an election was being conducted that day, and Sullivan testified that she did not have Lule's address on the list given her by Perez when she went to look for him at home, although the list has an address which Sullivan stated was written in at a later date. The list contains only 5 full addresses for 35 workers. The reason they were not notified was that they were not working the day of the election and did not get the notices handed out to workers that day. The Employer never provided a list with addresses so that the union could contact workers at home.

III. Inadequate Notice of Time and Place of Election

A. Notice to Employer

The question of inadequate notice of the time and place of the election revolves around the issues of notice to employer and

notice to the employees. The Board has held that the employer is on notice that an election will be held in seven days once a petition is served on it. For purposes of its election campaigning, more specific notice of time and place, although desirable when possible, is not required.^{45/} Under the applicable regulations, service of a petition for certification on an employer is accomplished by the party filing the petition in the manner set forth in 8 Cal. Admin. Code Section 20345 (1975); re-enacted in substance as 8 Cal. Admin. Code Section 20300 (f) (1976).^{46/} Under Section 20345 of the former regulations, the petition for certification could be served either personally or by registered mail or by telegraph, or by leaving a copy at the principal office or place of business of the employer. Furthermore, filing and service of the petition requires an employer to immediately designate the name, address, telephone number and location of its agent within any county in which the unit sought is located for the purpose of receiving subsequent process concerning the petition.^{47/} Evidence showed that Sullivan filed the petition and served it on Les Perrucci at the Pacific Farms headquarters. Sullivan also left copies of the official Board notice and direction of election at this same place on the night before the election. At no time did Les Perrucci or George Shingu ever designate a person other than themselves as the Employer's agent. By their conduct, they held

45/ Kawano Farms, Inc., 3 ALRB No. 25 (1977).

46/ 8 Cal. Admin. Code Section 20310 (a) (1975) ; re-enacted in substance as 8 Cal. Admin. Code Section 20300 (f) (1976).

47/ 8 Cal. Admin. Code Section 20310 (f) (1975); re-enacted as 8 Cal. Admin. Code Section 20310 (a) (1) (1976).

themselves out as agents of the Employer under the broad definition of agency set forth in Labor Code Section 1140.4(c) . Therefore, the Employer had adequate notice of the election for purposes of its campaigning.

B. Notice to Employees

Board agents have discretion to give as adequate a notice as possible of the exact time and place of an election,^{48/} and to devise means appropriate under the circumstances.^{49/} In this regard, the Board has noted that the requirement of the Act that an election be held within seven days of the filing of a petition combines with rapid turnover in the workforce characteristic of much of California agriculture to create peculiar difficulties in providing such notice. The burden of confronting these difficulties, the Board has held, falls in the first instance on the regional director and Board agents in charge of an election, but particularly in view of the time constraints involved, the parties themselves are expected to participate in efforts to notify employees.^{50/}

Applicable regulations also provided that upon the filing and service of a petition the Board or its agent will seek the cooperation of all parties in the dissemination to potential voters, of official Board notices of the filing of the petition and of the direction of an election, where appropriate.^{51/} There is no require-

^{48/} R. T. Englund Company, 2 ALRB No. 23 (1976) .

^{49/} Lu-Ette Farms, 2 ALRB No. 49 (1976) .

^{50/} Lu-Ette Farms, *supra*, note 49 .

^{51/} 8 Cal. Admin. Code Section 20310 (g) (1975); re-enacted as 8 Cal. Admin. Code Section 20350 (c) (1976) .

ment that notices be posted on the farming property of the Employer.^{52/}
The concern in assessing the notice procedures is substance, not form;
the question is whether or not employees were denied the opportunity to vote as a
result of the notice procedures used in the election.^{53/}

The facts of this case are similar to those in the Lu-Ette Farms case
in which the employer objected that there was insufficient notice of the election
which resulted in an unrepresentative vote. The Board held that, in the absence of
evidence that any voter or voters were denied the opportunity to vote by the notice
procedures used, the mere fact that a minority of eligible voters participated in
an election would not indicate that a vote was unrepresentative and would not in
itself constitute grounds for setting aside an election. In this case, 35
employees appeared on the eligibility list supplied to Board agent Perez by Shingu.
Sixteen of those 35 employees left Pacific Farms or were laid off prior to the
filing of the petition. As a result, they could not have been notified except
individually at their addresses. Such individual notice by a Board agent is not
mandatory, since even if a complete list was timely furnished, the burden of
supplying individual notice within the seven-day period may simply be
too great.^{54/} The Employer supplied a list without a single address only 3 days
before the election. In Lu-Ette Farms, the Board stated that partial compliance

52/ An employer who fails to post notices of election or to supply lists of
eligible voters is estopped from raising the argument of an unrepresentative
vote, as ground for setting aside the election. Lu-Ette Farms, supra, note 49
and National Mineral Co., 39 NLRB 344, 10 LRRM 13 (1943Ti

53/ Lu-Ette Farms, supra, note 49 .

54/ Lu-Ette Farms, supra, note 49 .

with the employee address requirement under the facts of that case made any other means of notifying employees by either Board agents or the unions largely a matter of guesswork. Here the Board agent had no way of knowing that a number of the employees on the list submitted were no longer working for the employer and might not be reached by the notice procedures selected. The Employer does not assert that it made any efforts to reach these employees itself.

Of the remaining 19 eligible voters, thirteen were working the day of the election. As discussed above, evidence showed that UFW organizers handed out copies of the official Board notice and a UFW flier, which contained substantially the same information, on the morning of the election. These 13 employees would have had an opportunity to vote but for the fact that the Employer's foreman kept people working through the hours of the election. Testimony by Vasquez indicated that Shingu told UFW organizers who went to transport workers to the polls that workers would not finish until 8:00 p.m., that all he was concerned about was finishing the load, and that they would work until 2:00 a.m. if the cannery needed tomatoes.

Testimony showed that copies of the official Board notice were left at the Employer's principal place of business by Sullivan who was directed by Board agent Perez to get copies to the Employer. For purposes of serving the Board notice, Sullivan was an agent of the Board under the duty imposed on parties to cooperate in distributing notices to workers. Constructive notice was therefore achieved when a copy of the official Board notice was left at the Pacific Farms headquarters on the night before the election.

Of the remaining 6 persons on the eligibility list, four

cast votes in the election. The other two did not appear on the Employer's payroll cards either during the eligibility period or on the day of the election and no addresses were provided for them.

This objection should be dismissed. The Employer may not raise its own misconduct and problems in conducting an election which directly resulted from its failure to cooperate as grounds for setting aside the election.

RECOMMENDATION

Based on the findings of fact, analysis, and conclusions, I recommend that the Employer's objections be dismissed and that the United Farm Workers of America, AFL-CIO, be certified as the exclusive bargaining representative of all the agricultural employees of the employer in the State of California.

DATED: May 23, 1977

Respectfully submitted,



JAMES E. FLYNN
Investigative Hearing Officer

JEF:ph