

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

LAWRENCE VINEYARDS FARMING CORPORATION,)	
Employer,)	Nos. 75-RC-18-F/40-F
and)	3 ALRB No. 9
UNITED FARM WORKERS OF AMERICA, AFL-CIO ,)	
Petitioner,)	
and)	
WESTERN CONFERENCE OF TEAMSTERS, Agricultural Division, I.B.T. ,)	
Cross-Petitioner.)	

Pursuant to provisions of Section 1146 of the Act, the Board has delegated its powers in connection with the case to a three-member panel.

The employer and the Teamsters object to the conduct of an election held on September 9, 1975, in which no party received a majority of the votes.^{1/} The issues presented for hearing were as follows: (1) whether the unions engaged in mass electioneering during polling times at the polling area; (2) whether the UFW intimidated voters by taking photographs of them, questioning them in the presence of Cesar Chavez , President of the United Farm Workers of America, and creating the impression of surveillance; (3) whether ballots were improperly tallied; (4) whether the employer

^{1/}The tally of ballots showed that 150 votes were cast for the UFW, 110 for the Teamsters, 22 for no union, 1 void ballot and 24 unresolved challenged ballots. See discussion infra resolving challenged ballots.

distributed improper campaign material; (5) whether the employer created the impression of surveillance; and (6) whether the Board did not require identification of economic strikers.

(1) Whether the unions engaged in mass electioneering at the polling area.

All parties have stipulated to the physical layout of the election site. The election was held on the employer's premises in a barn. The barn is located 120 feet from a chain link fence which surrounds the property. Only one gate, variously estimated to be open between 3 and 12 feet in width, was kept open during the time of the election. The gate opens to a parking area about 56 feet wide which runs along the fence between the fence and a public road.

Employees arrived at the polling area in crews consisting of 30 - 45 persons. A supervisor of the employer and an observer for each union drove out to each crew's work place and the employees in the crew then followed the supervisor and observer in their private cars back to the polling area. On one occasion, two or three crews were brought in at the same time because the Board agent requested that employees be brought in at a faster pace. When crews arrived, they parked their cars in the area between the fence and the public road or on the far side of the public road. They then passed through the gate to the polling place in the barn.

The objections regarding electioneering at the polls are based on the fact that UFW and Teamster representatives and sympathizers stood on the north and south sides, respectively, of the gate just outside the fenced-in area during the entire polling

period.^{2/} Estimates of the number of persons associated with each union who were there vary from witness to witness. It appears that there were at least 8 - 10 UPW supporters present outside the gate from the beginning of the polling period at 6:30 a.m. Between 8:00 a.m. and 8:30 a.m., Cesar Chavez arrived outside the gate and was accompanied by 10 - 12 other UPW supporters, although the testimony is that most of these people remained on the opposite side of the public street. In addition, there were approximately 4 - 5 Teamster supporters at the south side of the same gate. It appears that both Teamster and UFW people stood within a few feet of the gate although the credible evidence is that Chavez himself stood some 20 - 30 feet northeast of the gate.

The evidence with respect to alleged electioneering by the UPW is that UFW supporters greeted some employees and shook hand with them or gave a clenched-fist salute. Chavez, during the 30 - 75 minutes that he was present, was approached by a few employees who shook hands with him and was embraced by one or two others. Chavez did not approach anyone or initiate any contact with voters but instead responded to employees who approached him. A Teamster witness testified that one employee, who called out "Si, se puede"^{3/} and "Que venceremos"^{4/} as she was leaving the enclosed area, went up to Chavez, embraced him and then called over a few other employees who were also leaving the polling area. Finally, there is evidence that at one point, apparently upon Chavez's arrival, people outside

^{2/} The Board agent did not designate any physical boundaries for a restricted area around the polls in which campaigning was prohibited.

^{3/} An English translation of this phrase is "yes, it can be done."

^{4/} An English translation of this phrase is "We shall overcome."

the gate shouted or made some kind of loud noise which could be heard from inside the barn where the polling was taking place. The Board agent in charge of the election briefly stopped the voting and went outside to the gate to warn the people assembled to stop shouting because they could be heard inside the barn. This was the only interruption in polling; one observer testified that everyone waited quietly until the Board agent returned from quieting the people outside and then voting continued.

The evidence is that the Teamster supporters also spoke briefly to a few voters.

The employer contends that the very presence of the union representatives along the "line of march" of voters going to the Polls^{5/} constitutes illegal electioneering and interference affecting the results of the election. The employer cites National Labor Relations Board cases in which the NLRB overturned elections where an employer or supervisor stationed himself outside the polling area but along the line of march of voters. In one case, the NLRB found that the mere presence of the employer or supervisors tended to interfere with employees' freedom of choice. Performance Measurement Co., 148 NLRB 1657 (1964). However, the NLRB has never overturned an election based upon the mere presence of union sympathizers along the line of march. In one case, the NLRB held that a union

^{5/}At one point, when more than one crew was brought in at once, a line of voters stretched from the barn to about 50 feet from the gate but there is no testimony regarding for what period of time the voter line remained that long. Testimony from one observer indicates that voters were processed through the polls quickly; thus, the line would have been quickly dissipated.

sympathizer's action in standing directly outside the room in which voting took place, despite the Board agent's repeated admonitions to leave, and approaching voters advising them to "vote right" and pointing out which box they should check on the ballot constituted conduct requiring that the election be set aside. Star Expansion Industries, 170 NLRB 364 (1968). In the companion case of Milchem, Inc., 170 NLRB 362 (1968), the NLRB held that sustained conversation by a union representative with persons waiting to vote inside the immediate polling area is a ground for setting aside the election.

We conclude that the precedent urged by the employer does not dispose of this case. The evidence is that the electioneering which occurred here was minimal in scope in that it was limited to greeting some prospective voters. Furthermore, the contact with voters took place outside of the employer's fenced property a substantial distance from the barn where balloting occurred. We do not find that such conduct interfered with the employees' freedom of choice. The objection is dismissed.

(2) Whether the UFW intimidated voters by taking photographs of them and creating the impression of surveillance. ^{6/}

The evidence with regard to the taking of photographs is that two photographers were present for an undisclosed period of time. One was a photographer accompanying Cesar Chavez; there is a dispute in the evidence as to whether the other was linked with

^{6/}An objection was also raised on the ground that the UFW questioned voters in the presence of Cesar Chavez. No evidence is offered to support this portion of the objection. Accordingly, it is dismissed.

the UFW or another party. The employer testified that he saw one photographer outside the gate for about 45 minutes and saw him raise his camera as if taking a picture three or four times and that he saw the other photographer raise her camera a couple of times. Cesar Chavez testified that the photographer traveling with him took a few pictures, all of him and three women voters who came to greet him after voting and wished to be photographed with him. A witness for the Teamsters testified that he saw one photographer point his camera toward voters approaching the polls, and saw at least five voters bend their heads and continue walking toward the polls.

The employer and Teamsters further allege that some voters were dissuaded from voting by a combination of the photographers and the presence of a number of UFW representatives near the gate. The only evidence offered in support of this allegation is that, of the last crew of 25 - 30 voters, only six or seven employees left their cars and entered the polling area. The employer argues that the rest of the crew must have been intimidated by the presence of UFW representatives or the photographers. The evidence does not permit us to draw that inference. The employer himself testified that several members of this particular crew had told him prior to the election that they did not want to have anything to do with unionization or the election. Thus, we cannot infer that they were dissuaded from voting at the last minute by photographers or the presence of UFW representatives.

We conclude that the evidence does not support a finding that voters were in any way intimidated by the alleged conduct nor was the impression of surveillance created among them. We, therefore, dismiss this objection.

(3) Whether ballots were improperly tallied.

The only evidence with respect to this objection is testimony on self-examination by the employer's attorney that, during the ballot count, he observed seven ballots which had marks which crossed over part of the UFW symbol.^{7/} He alleged that those ballots, although tallied as UFW votes, could be interpreted as no-votes against the union.

There is no evidence that the employer or his representative objected to the Board agent's decision to count these ballots during the tally. As is true in the case of challenges to a person's eligibility to vote, any challenges to the marking of a ballot or to the Board agent's determination that a ballot should be counted or is void must be raised at the time the ballots are counted in order to segregate those ballots for future resolution of the objections. By not raising any objection at the time of the tally, the employer waived his right to object in a post-election objection proceeding to the counting of these ballots. Cf. Hemet Wholesale, 2 ALRB No. 24 (1976); California Coastal Farms, 2 ALRB No. 26 (1976).

Accordingly, we dismiss this objection.

^{7/}Whether a ballot with markings outside the designated small box should be counted depends upon whether the ballot clearly reveals the intent of the voter. Pioneer Electronics, 112 NLRB 82 (1955). The NLRB has held that a ballot marked with an X above the "yes" box within the larger "yes" portion of the ballot is unambiguous and should be counted. Knapp-Sherril Co., 171 NLRB 1547 (1968). We take official notice that ALRB ballots are so designed that the symbol for each party is located adjacent to the small box provided for an X-mark within a larger box which separates a vote for that party from votes for other parties. The allegation in this case that some ballots had marks which went through the UFW symbol, if true, would not invalidate the ballot because all markings would have fallen within the larger box designated for the UFW.

(4) Whether the employer distributed improper campaign material.

The evidence with respect to this objection by the Teamsters consists of four documents introduced into evidence which began "To the employees of Lawrence Vineyards" and were signed by Jim Lawrence. Two of the documents contain statements to the effect that non-union workers do not have to pay fines or assessments. Except for the testimony of one employee of the Teamsters that the union has never levied a fine or assessment against any worker during the time she has worked for it, the Teamsters introduced no evidence directed toward showing that the documents contained misrepresentations. The documents do not reflect any promises of benefit or threats of reprisal if employees vote for the union and therefore are free speech protected by Labor Code Section 1155. Furthermore, there is no evidence with respect to when, if ever, the documents were distributed to employees.

A party alleging that improper campaign materials were distributed must come forward with evidence to demonstrate in what way the materials were improper and show that the distribution of that material was misconduct affecting the result of the election. In the absence of such evidence, we dismiss the objection.

(5) Whether the employer created the impression of surveillance.

The Teamsters, who raised this objection, offered no evidence in support of it. The only evidence on this point is the employer's own testimony that during the election he remained in the area outside the gate to the polls for most of the polling period, primarily sitting in a car across the street and some

distance south of the entry gate. The employer's presence at a point so remote from the polls cannot alone be said to constitute evidence of improper surveillance. Accordingly, the objection is dismissed.

(6) Whether the Board failed to require identification of economic strikers in contravention of 8 Cal. Admin. Code Section 20350 (c)

An observer for the employer testified that when economic strikers arrived, only the first two were asked for identification by the Board agent. All subsequent economic strikers, were directed to the challenge table without first showing identification. The employer's observer at the challenge table testified that the Board agent handling challenges asked economic strikers only to identify themselves and sign in; he did not require that they show written identification.

The employer contends that the votes of the alleged economic strikers cannot be counted because the Board agent did not comply with Section 20350 (c) of our regulations^{8/} which requires that identification be shown. The eligibility of persons who were challenged and claim economic striker status is resolved in the second part of this decision. The economic striker ballots which are ordered counted are only those of persons who appeared at the Regional Director's investigation of challenged ballots and confirmed their identity. Therefore the objection does not reach any votes counted and cannot affect the election outcome. Accordingly, we dismiss this objection.

^{8/}8 Cal. Admin. Code Section 20350 (c) .

Challenged Ballots

The Regional Director recommended overruling the challenges to the two voters listed in Schedule A because the ground alleged for the challenge, that the two lived on company property at the time of the election, is not a ground for finding employees ineligible to vote. No party filed exceptions to the Regional Director's recommendation. Accordingly we overrule the challenges to those ballots.

The Regional Director recommended overruling the challenge to the voter listed in Schedule B. This voter had been challenged by the Teamsters observer for having no identification. The Regional Director found the UFW observer had checked off her name on the eligibility list indicating that he recognized her. No exceptions were filed. The challenge is therefore overruled.

The Regional Director made no recommendation regarding the two employees, listed in Schedule C, whose ballots were challenged on the ground that they are maintenance workers. The Regional Director could not locate them during the investigation of challenged ballots because of a layoff. It would have been appropriate for the Regional Director to investigate the job duties of maintenance employees of the employer from other sources in order to determine if their work is incident to and done in conjunction with the employer's agricultural operation. Cf. Salinas Marketing Cooperative, 1 ALRB No. 26 (1975); Carl Joseph Maggio, 2 ALRB No. 9 (1976); and Mann Packing Co., 2 ALRB No. 15 (1976). In the absence of sufficient facts to make that determination, we do not resolve these challenges.

Seventeen of the challenged ballots were alleged economic strikers. The Regional Director recommended overruling the challenges to the voters listed in Schedule D. He found each of these voters to

be economic strikers on the basis of the following: (1) each ceased working for the employer on or about July 29, 1973, the commencement of the strike;^{9/} (2) each participated in the strike or in strike-related activities; (3) each still lives in the area; (4) six of the seven have only seasonal employment or are unemployed;^{10/} (5) each has expressed the intention of returning to work at the employer's business when the strike ends; (6) none have reapplied for work with the employer nor put his or her name on the employer's reemployment list; and (7) none has accepted other permanent employment.

The employer presented no facts to controvert the Regional Director's findings but instead argued that Labor Code Section 1157 requires that the Board make rules and regulations governing the eligibility of economic strikers and the Board may not make such rules in case decisions; and secondly, that in any case, the determination cannot be made without a hearing during which the employer has the right to cross-examine all alleged economic strikers and perhaps impeach them.

With regard to the first point, our decision in George Lucas and Sons, 3 ALRB No. 5 (1977) as well as our decision in this case do not merely lay out rules of prospective application but instead decide issues raised by the case at hand and in the course

9/ The Regional Director's report on this point reads "The intervenor alleges that an economic strike against Lawrence Vineyards began July 29, 1973." The employer objects that the Regional Director made no finding that the strike began on that date. It is apparent from the context that the Regional Director's statement regarding the date the economic strike commenced is in fact a finding to that effect. The employer presents no contrary facts and indeed does not allege that the statement was incorrect.

10/ The seventh, Amelia Cadena, has a full-time janitorial job. As adopted in George Lucas & Sons, 3 ALRB No. 5 (1977), Pacific Tile and Porcelain Co., 137 NLRB No. 169 (1962) found that the mere acceptance of another job or of another job with better benefits does not alone constitute abandonment of one's economic striker status.

of so doing provide guidelines for the future interpretation of Section 1157. This is precisely the role of common law in our system of laws. We therefore find the employer's objection to be without merit.

The second point does not differ in substance from the argument that a hearing is required in every case where objections to an election are raised. In John V. Borchard Farms, 2 ALRB No. 16 (1976), we held that no hearing is required unless there are material factual issues in dispute. Since the employer does not allege facts which contradict those stated and relied upon by the Regional Director, no factual issue is raised requiring a hearing.

In George Lucas and Sons, supra, we held that a person whose name appears on the payroll immediately preceding the strike and who went on strike, is presumptively eligible to vote in the election. The seven voters listed in Schedule D have established those two facts. The employer has failed to rebut the presumption of their eligibility, and has failed to prove that any of these seven voters have abandoned their interest in the struck job. We therefore find the seven voters listed in Schedule D are economic strikers and were eligible to vote. Accordingly we overrule the challenges to their ballots.

The Regional Director recommended that the challenge to the ballot of the voter listed in Schedule E be sustained because she abandoned her economic striker status by returning to work for the employer for three days commencing September 24, 1975. That date was after the representation election which was held on September 9, 1975. The NLRB, in its determination of the status of an economic striker, has based its analysis of that status as of the date of the election. Q-T Tool Co. (1972) 199 NLRB No. 79. We, likewise, will

base our determination of an alleged economic striker's interest in his or her struck job as of the date of the election. Therefore the Regional Director's conclusion that economic striker status is determined at some later date is incorrect. Since the Regional Director does not state sufficient facts for us to determine if this voter is otherwise an eligible economic striker, we do not resolve the challenge to her ballot.

The Regional Director recommends sustaining the challenges to the ballots of the nine voters listed in Schedule F because the voters, who signed affidavits of economic striker status at the election and who appeared on the employer's payroll for the payroll period ending July 29, 1973, did not appear at the regional office's subsequent investigation of the challenges. We do not conclude that alleged economic strikers forfeit all right to that status by failing to appear at a subsequent regional office investigation. See George Lucas & Sons, supra. In that event the Regional Director should seek to confirm the alleged economic striker status of the voter from other sources. Therefore we do not resolve these challenges.

The ballots of the two voters listed in Schedule G were challenged on the ground that they were not on the eligibility list. These voters claim they were fired by the Employer on August 11, 1975, for their union activities. They are suing the employer in the Kern County Superior Court, alleging that their discharges were illegal. No decision has yet been issued in this case. The Regional Director recommended deferring a resolution of their eligibility until a decision is reached in the aforementioned litigation. We accept the recommendation of the Regional Director.

The Executive Secretary or Regional Director shall open and count the ballots of those voters listed in Schedules A, B, and D, and shall issue an amended Tally of Ballots. If the unresolved challenged ballots remain determinative after the above ballots are counted, the Regional Director shall reopen his investigation and shall find sufficient facts to determine those challenges or set for hearing those challenges which cannot be resolved by investigation.

If the challenged ballots remaining after the above order count are not determinative, the Executive Secretary shall certify the election.

Dated: February 7, 1977

Gerald A. Brown, Chairman

Richard Johnsen, Jr. , Member

Ronald L. Ruiz, Member

APPENDIX OF SCHEDULES

Schedule A - (open and count)

Vernon Russell
Don Dunkin

Schedule B - (open and count)

Matilde Verdusco

Schedule C - (resolution deferred)

Charles Bohanon
Don Cochran

Schedule D - (open and count)

Richardo Albay	Sagrario Montez
Jose C. Perez	Gilbert G. Ruiz
Ernestina Montez	Amelia Cadena
Hermelinda Perez	

Schedule E - (resolution deferred)

Maria Colon

Schedule F - (resolution deferred)

Manuel Saenz	Consuelo L. Luigan
Jose Sanchez	Juan Rangel aka Basilio
Raul Montes	Antonio P. Gonzales
Gustavo Silva	No Name *
Maria Sanchez	

Schedule G - (resolution deferred)

Aurelia Espinoza
Amada Herrera

* One person appeared to vote as an economic striker and the Board agent failed to write his name on the challenge envelope.