

STATE OF CALIFORNIA  
AGRICULTURAL LABOR RELATIONS BOARD

<b>MUSHROOM FARMS, INC.,</b>	)	Case Nos.: 2017-RD-001-SAL
	)	2017-RC-001-SAL
Employer,	)	
	)	
and,	)	
	)	
<b>ANTONIO GAMBOA,</b>	)	43 ALRB No. 1
	)	
Petitioner,	)	(March 24, 2017)
	)	
and,	)	
	)	
<b>UNITED FARM WORKERS OF AMERICA,</b>	)	
	)	
Intervenor,	)	
	)	
and,	)	
	)	
<b>UNITED FOOD AND COMMERCIAL WORKERS, LOCAL 5,</b>	)	
	)	
Certified Bargaining Representative.	)	
	)	

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**DECISION AND ORDER**

On February 16, 2017, Antonio Gamboa (Petitioner) filed a petition to decertify the United Food and Commercial Workers, Local 5 (UFCW) as the bargaining representative of the agricultural employees of Mushroom Farms, Inc. (MFI or Employer). The United Farm Workers of America (UFW) filed a petition for intervention on February 21, 2017. The election was held on February 23, 2017, between 7:00 a.m. and 9:00 a.m. and the tally of ballots was as follows:

UFCW.....	38
UFW.....	32
No Union.....	2
Unresolved Challenged Ballots .....	0
Total .....	72

On March 2, 2017, the UFW filed two objections to the conduct of the election. Election objections are set for hearing when the declarations supporting the objection petition set forth facts which, if uncontroverted or unexplained, would constitute sufficient grounds for the Agricultural Labor Relations Board (ALRB or Board) to refuse to certify the election. (Board regulation sections 20365(c)(2) and 20365(f).) Section 20365(c)(2)(B) of the Board’s regulations requires that the facts stated in each attached declaration be within the personal knowledge of the declarant, and that the details of each occurrence and the way the occurrence could have affected the outcome of the election be outlined with particularity. For the reasons discussed below, we dismiss both of the UFW’s objections for insufficient declaratory support as required by Board regulation section 20365(c)(2)(B).

**Objection 1**

The UFW’s first objection, as set forth in the detailed statement of facts submitted by the UFW, alleges that MFI agricultural employee Jose Flores, who is alleged to be a known UFCW supporter, intimidated and threatened other MFI workers who supported the UFW during the time leading up to the election. The objection alleges that Flores is an “in-law” of UFCW officer, Pete Maturino. In support of this objection, the UFW submitted declarations by four other MFI workers.

One declarant described an incident in the fall of 2015 when her car tires were slashed while she was parked in the MFI parking lot. This declarant stated that another worker who is a friend of Flores mocked her and made rude comments to her after the tire slashing incident. A second declarant, described three incidents in early 2016 when Flores and two other workers addressed her in an intimidating manner to tell

her that she should not say anything (presumably to management) about work-related issues unrelated to any union. Both of these declarants stated that many coworkers did not vote in the February 23 election because those coworkers were afraid of threats, but neither declarant described any conduct that took place close in time to the election nor did they state that the vandalism or threats were related to support for or opposition to any union. Neither declarant claimed to have personal knowledge to support their belief that particular coworkers did not vote in the election due to fear caused by threats.

Two other declarants described a lunch time meeting between workers and UFCW representatives in late January 2017 when Flores allegedly yelled at and threatened them when they spoke up in the meeting and made positive comments about the UFW's medical plan. One of the declarants stated that other workers were intimidated by Flores' angry outburst and did not provide their opinions during the meeting. This declarant also stated that he thought that the work environment affected the results of the February 23 election due to the intimidation from Flores and other workers.

Initially, the UFW asserts that Flores' actions should be attributed to the UFCW as the UFCW's agent because of his alleged family ties to Maturino; however, none of the declarations submitted refer to any such familial relationship, nor do any declarants aver facts that would support a finding of an agency relationship.

The UFW further argues that even if Flores' actions cannot be attributed to the UFCW, his conduct could still be unlawfully coercive under the test in *Westwood Horizons Hotel* (1984) 270 NLRB 802. In *Westwood Horizons*, a case dealing with election objections based on threats and intimidation by pro-union employees, the National Labor Relations Board (NLRB) stated that where "there is no evidence of union involvement in the misconduct, the test to be applied is whether the misconduct was so aggravated as to create a general atmosphere of fear and reprisal rendering free election

impossible.” (*Westwood Horizons Hotel, supra*, 270 NLRB 802, 803.)<sup>1</sup> This test has also been applied by the ALRB. (*T. Ito & Sons Farms* (1985) 11 ALRB No. 36, pp. 10-16.) The NLRB further explained the test as follows:

In determining the seriousness of a threat, the Board evaluates not only the nature of the threat itself, but also whether the threat encompassed the entire bargaining unit; whether reports of the threat were disseminated widely within the unit; whether the person making the threat was capable of carrying it out and whether it is likely that employees acted in fear of his capability of carrying out the threat; and whether the threat was “rejuvenated” at or near the time of the election. (*Westwood Horizons Hotel, supra*, 270 NLRB 802, 803. Footnotes omitted.)

The UFW argues that the *Westwood Horizons* test is met here because Flores’ words and conduct communicated to his coworkers that “he and his gang of friends would perpetrate violent acts, vandalize their property, and/ or, at the very least subject them to loud, public scoldings, insults and public humiliation” if they expressed support for the UFW or nonsupport for the UFCW. Because the threats were made during large group meetings where many workers were present, the UFW contends knowledge of the threats was widely disseminated. Moreover, the UFW argues, it was clear that Flores was capable of carrying out his threats, as he had done so in the past. Finally, the UFW argues that the threats took place close in time to the election, in or after late January 2017.

We conclude that the declarations supporting Objection 1 do not set forth facts which, if uncontroverted or unexplained, would constitute sufficient grounds for the Board to refuse to certify the election under the *Westwood Horizons* test. The timing and nature of the threats alleged in the declarations differ in significant ways from those described in *Westwood Horizons* and *T. Ito & Sons Farms*.

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<sup>1</sup> The NLRB has made it clear that the standard also applies where there is a narrow election margin as there is in this case. (See *Mastec N. Am., Inc.* (2011) 356 NLRB 809, 810.)

In *Westwood Horizons*, the NLRB set an election aside where the conduct at issue included an employee's use of actual physical force on the day of the election to bring another employee to the voting place, conduct that was witnessed by fifteen other employees. Two weeks before the election, the employee who used physical force on the day of the election, told other employees that he would beat them up if they did not vote for the union. Threats were also made to take other workers by physical force to the polling place if they did not go and vote immediately, and as workers waited in line to vote, the pro-union workers who had made the threats stood close by repeatedly chanting to vote for the union. (*Westwood Horizons Hotel, supra*, 270 NLRB, 802, pp. 802- 803.)

In *T. Ito & Sons Farms*, the Board set aside an election on the basis of numerous incidents in which striking employees threatened large groups of non-striking employees with physical harm, brandished sticks at them, blocked their vehicles, punctured a tire on a working employee's vehicle, and frequently threatened to report replacement workers to the U.S. Immigration and Naturalization Service (INS). Renewed threats to call in the INS, as well as new threats of job loss if voters failed to support the union, were made to numerous voters on the day of the election. Threats of force were made during the time workers waited in line to vote, all with the purpose of coercing workers to join the strike or, on the day of the election, to vote for the union. (*T. Ito & Sons Farms* (1985) 11 ALRB No. 36, pp. 6-9.)

In contrast, here, the declarations describe conduct that took place in the fall of 2015, in January 2016, and at the latest, on January 31, 2017, and approximately February 7, 2017. The decertification petition was filed February 16, the UFW filed a petition to intervene on February 23, and the election was held on February 23. None of the declarations describe threats or insults made in the days after the petition was filed or on the day of the election. Moreover, none of the alleged conduct is described as connected with the election campaign. (See *NLRB v. Bostik* (6th Cir. 1975) 517 F.2d 971, 974.)

It is well-settled that “the Board will not set aside an election based on third-party threats unless the objecting party proves that the conduct was ‘so aggravated as to create a general atmosphere of fear and reprisal rendering a free election impossible.’” (*Mastec N. Am., Inc.*, *supra*, 356 NLRB 809, 811 *NLRB v. Eskimo Radiator Mfg. Co.* (9th Cir. 1982) 688 F.2d 1315, 1319 [“Incidents which are not properly attributable to the union are ‘entitled to less weight’ in determining whether a free election was possible]; *Agri-Sun Nursery* (1987) 13 ALRB No. 19, p. 5 [“elections will be set aside on the basis of threatening conduct not attributable to one of the parties where the conduct is sufficient to create an atmosphere of fear of reprisal rendering employee free choice impossible”].) No such evidence exists here. In fact, there is no evidence any of the incidents alleged by the UFW had any inhibitory effect on the voters on election day (or even on the ability of the decertification proponents to gather sufficient signatures to trigger an election, or on the UFW’s ability to intervene in the election). (*NLRB v. Bostik*, *supra*, 517 F.2d, 973 [noting that the alleged “threats” at issue “had no inhibitory effect on the voters”].)

The speculative opinion of one of the declarants that the work environment affected the results of the election due to the alleged intimidation by Flores and other workers does not constitute sufficient grounds for the Board to set aside the election. The test of whether threatening statements are coercive does not turn on their subjective effect upon the listener, but rather on whether they would reasonably tend to have an intimidating effect. (*Agri-Sun Nursery*, *supra*, 13 ALRB No. 19, p. 5.) “It is well-established that ‘the subjective reactions of employees are irrelevant to the question of whether there was, in fact, objectionable conduct.’” (*Corner Furniture Discount Center, Inc.* (2003) 339 NLRB 1122, 1123.)

In this respect, the stated opinions of the first two declarants that many coworkers did not vote because were afraid of threats are directly undercut by the

election turnout recorded on the tally of ballots. Seventy-two individuals voted out of approximately 75 or 76 workers on the employee lists submitted by the employer.<sup>2</sup>

Therefore, Objection 1 is dismissed because the UFW did not provide sufficient declaratory support setting forth facts constituting sufficient grounds for the Board to refuse to certify the election.

### **Objection 2**

Objection 2 alleges that voters were not fully apprised of the time of the election. In support of this objection, the UFW submitted one declaration from a worker who started working at MFI at the beginning of January 2017 (he does not specify the date he began work). This individual stated that on February 23, 2017, he worked from 7:00 a.m. to 3:30 p.m. and was not told that there was an election. He states that he has never participated in a representation election at any other company where he has worked.

We find that Objection 2 is directly undercut by the high voter turnout recorded on the tally of ballots. As discussed above, seventy-two individuals voted out of approximately 75 or 76 workers on the employee lists submitted by the employer. Assuming that the declarant's statement is true, and even if it is assumed that there were as many as four workers who did not vote in the election because they were not told what time the election would take place, the votes of these individuals could not have provided the shift in votes required to change the outcome of the election. Therefore, we dismiss

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<sup>2</sup> The employee list submitted by MFI as required by sections 20310(a)(2) and 20310(a)(3) of the Boards regulations lists 80 employees. The list indicates that fifteen of these workers were either on vacation, medical leave or a leave of absence during the payroll period immediately preceding the election. MFI also submitted a list of ten workers titled "Temporary Employee List." This indicates that there were approximately 75 workers eligible to vote in the election. The answer to the petition for decertification filed by MFI indicates that 76 agricultural employees were employed in the payroll period immediately preceding the filing of the petition.

Objection 2 for insufficient declaratory support as required by Board regulation section 20365(c)(2)(B).

**ORDER**

Objections 1 and 2 submitted by the United Farm Workers of America are dismissed.

IT IS ORDERED that the Executive Secretary issue the Certification of Representative.

DATED: March 24, 2017

Genevieve A. Shiroma, Chairwoman

Cathryn Rivera-Hernandez, Member

Isadore Hall, III, Member

## CASE SUMMARY

MUSHROOM FARMS, INC.  
(Antonio Gamboa, Petitioner)  
(United Farm Workers of America, Intervenor)  
(United Food And Commercial Workers,  
Local 5, Certified Bargaining Representative)

Case Nos.: 2017-RD-001-SAL  
2017-RC-001-SAL

43 ALRB No. 1

On February 16, 2017, Antonio Gamboa (Petitioner) filed a petition to decertify the United Food and Commercial Workers, Local 5 (UFCW) as the bargaining representative of the agricultural employees of Mushroom Farms, Inc. (MFI or Employer). The United Farm Workers of America (UFW) filed a petition for intervention. An election was held on February 23, 2017, with a tally of UFCW, 38; UFW, 32; No Union, 2. The UFW filed two election objections.

### **Board Decision and Order**

The Board dismissed both objections because neither were supported by declarations setting forth facts which, if uncontroverted or unexplained, would constitute sufficient grounds for the Board to refuse to certify the election.

Objection 1 alleged that MFI agricultural employee Jose Flores, an alleged UFCW supporter, intimidated and threatened other MFI workers who supported the UFW. The Board concluded that the misconduct described in the supporting declarations was not so aggravated as to create a general atmosphere of fear and reprisal rendering free election impossible, under the test set forth in *Westwood Horizons Hotel* (1984) 270 NLRB 802, and applied by the ALRB in *T. Ito & Sons Farms* (1985) 11 ALRB No. 36.

Objection 2 alleged that voters were not fully apprised of the time of the election. The single declaration supporting this objection indicated that one worker was not told about the election time; however, Objection 2 was directly undercut by the high voter turnout recorded on the tally of ballots, and the number of additional votes would not have been sufficient to shift the outcome of the election.

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