STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

J. A. WOOD COMPANY, Employer, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Petitioner.	)	Case No. 77-RC-9-E 4 ALRB No. 10

DECISION AND CERTIFICATION OF REPRESENTATIVE

Pursuant to the provisions of Labor Code Section 1146, the Agricultural Labor Relations Board has delegated its authority in this matter to a three-member panel.

Following a petition for certification filed by the United Farm Workers of America, AFL-CIO (UFW} , on February 6, 1977, a secret ballot election was conducted among the agricultural employees of the Employer on February 11, 1977. The UFW received a majority of the valid votes cast, the tally of ballots showing:

UFW	141
No Union	39
Void Ballots	1
Challenged Ballots	14

Thereafter, the Employer filed timely objections to the election, two of which were set for hearing, namely: (1) Whether an agent of the UFW fraudulently procured the signatures of two entire crews on a blank piece of paper, on which a typed statement was thereafter added, to the effect that the signatory employees

supported a vote for the UFW; and C21 whether this alleged conduct affected the outcome of the election.

Subsequent to the hearing, Investigative Hearing Examiner (IHE) Susan Matcham Urbanejo issued her initial Decision in this matter, recommending that the objections be dismissed and that the UFW be certified as the exclusive collective bargaining representative of the employees involved. The IHE found that the Employer had failed to prove that the alleged objectionable conduct had occurred and further concluded that, in any event, such conduct would not have affected the outcome of the election under applicable NLRB precedent.

The Employer has excepted only to the IHE's denial of its motion for a one-week continuance, made orally at the opening of the hearing. The Employer's motion was based upon the unavailability of its three witnesses. The witnesses were seasonal employees of the Employer and were out of the State.

The Employer argues that it made its motion for continuance on the day of the hearing because it was still in the process of trying to locate its witnesses. The three individuals had failed to report to the company's Arizona location for work in the lettuce harvest as had been expected, which was the only way the company could have contacted them.

The Executive Secretary's official notice of hearing was dated October 5, 1977, and directed the hearing to commence on October 26, 1977. The Employer at least had time to notify that office of a potential problem in advance of the hearing date and make its request for a continuance. Having failed to do so, the

IHE was required to choose between going ahead with the hearing or incurring additional expense to the agency and the UFW by granting the continuance only on the chance that the witnesses would then be available. Under the circumstances, her decision to deny the motion was a proper exercise of her discretion and will not be disturbed on review. NLRB v. Algoma Plywood and Veneer Co., 121 F.2d 602 (7th Cir. 1941), 8 LRRM 777; Schlothan v. Rusalem, 41 Cal.App.2d 414 (1953), 260 P.2d 68.

In view of the above findings and conclusions, and in accordance with the recommendations of the IHE, the Employer's objections are hereby dismissed, the election is upheld, and certification is granted.

CERTIFICATION OF REPRESENTATIVE

It is hereby certified that a majority of the valid votes have been cast for the United- Farm Workers of America, AFL-CIO, and that, pursuant to Labor Code Section 1156, the said labor organization is the exclusive representative of all agricultural employees of J. A. Wood Company in the State of California, for the purpose of collective bargaining, as defined in Labor Code Section 1152.2(a), concerning employees' wages, working hours, and other terms and conditions of employment.

Dated: March 14, 1978

GERALD A. BROWN, Chairman

RONALD L. RUIZ, Member

HERBERT A. PERRY, Member

CASE SUMMARY

J. A. Wood Company (UFW)

4 ALRB NO. 10
Case No. 77-RC-9-E

IHE DECISION

After an election won by UFW, a hearing was held on two Employer objections: (1) that the UFW fraudulently procured signatures of 63 employees on a blank paper, to which was later added a typed statement of support for the UFW; and (2) that such conduct affected the outcome of the election.

Employer contended that three employees (Navarro, Tercero, and Castro) would not have signed had they known that a pro-UFW message would later be added above their signatures. Despite prior knowledge that these three signers were not available to testify, Employer's counsel did not move for a continuance until the day of the hearing.

IHE denied the motion, in absence of showing that Employer used due diligence to locate the witnesses, finding no "extraordinary circumstances" to warrant a continuance per 8 Cal. Adm. Code Section 20365 (g). On the basis of the record, including testimony of Navarro's two sisters, a list of signatures and a UFW authorization card signed by Navarro, the IHE found that Employer had failed to prove that the list in evidence had been signed by Navarro or that the list had ever been distributed to employees, and concluded that setting aside the election would not be warranted either under Hollywood Ceramics, 140 NLRB 221, or Shopping Kart Food Market, 228 NLRB 190.

BOARD DECISION

Employer excepted only to IHE's denial of its motion for a continuance. The Board affirmed the IHE, holding that she did not abuse her discretion in denying the belated motion, citing NLRB v. Algoma Plywood and Veneer Co. 121 F2d 602 (CA Y7T941), 8 LRRM 777, and Schlothan v. Rusalem, 41 Cal. App. 2d 414 (1953), 260 P. 2d 68.

Objections dismissed, Election upheld. Certification granted.

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of:

J.A. WOOD COMPANY,

Employer, Case No. 77-RC-9-E

and

UNITED FARM WORKERS OF AMERICA, AFL-CIO,

Petitioner.

Scott A. Wilson, Imperial Valley Vegetable Growers, for Employer.

Tom Dalzell, for the United Farm Workers of America, AFL-CIO.

Enrique Mendez Flores, Spanish Interpreter for the Agricultural Labor Relations Board.

DECISION

STATEMENT OF THE CASE

SUSAN MATCHAM URBANEJO, Investigative Hearing Examiner; This case was heard before me on October 26, 1977, in El Centre, California.

A petition for certification was filed on February 6, 1977, by the United Farm Workers of America, AFL-CIO (hereafter "UFW"), and an election was held on February 11, 1977. At the election the UFW received a majority of the votes cast. The Tally of Ballots discloses that 195 of 325 eligible voters cast ballots. There were 141 votes for the UFW, 39 for no union, 14 unresolved challenged ballots, and one void ballot.

Thereafter, the employer filed a timely petition pursuant to Labor Code §1156.3(c) objecting to the certification of the election. Ten of the objections were dismissed by the Executive Secretary on August 18, 1977, pursuant to 8 Cal. Admin. Code §20365(e). The following two issues were set for hearing:

1. Whether an agent of the United Farm Workers fraudulently procured the signatures of two entire crews, Crews #1 and #16, on a blank piece of paper, after which a typed statement that the members of those crews supported a vote for the UFW was added.

2. Whether this alleged conduct affected the outcome of the election.

The employer and the UFW were represented at the hearing and were given full opportunity to participate in the proceedings. Both parties presented oral arguments at the close of taking of testimony.

Upon the entire record, including my observation of the demeanor of the witnesses, and after consideration of the arguments of the parties, I make the following findings of fact and conclusions of law:

FINDINGS OF FACT

I. Jurisdiction

Neither the employer nor the UFW challenged the Board's jurisdiction in this matter. Accordingly, I find that the employer is an agricultural employer within the meaning of Labor Code §1140.4(c) and that the UFW is a labor organization within the meaning of Labor Code §1140.4(f).

II. The Alleged Misconduct

The employer contends that the UFW persuaded 63 people in two different ground crews to sign a blank sheet of paper that

later had the following words typed on it in Spanish:

> Sisters and Brothers;
>
> With this, we of the ground crews SI and #16 of the J.A. Woods Company ask your support in the coming elections. Remember that in return, we are with you.
>
> We think that united together with the United Farm Workers Union directed by Cesar Chavez that we will win a great triumph.
>
> It is good to remember the past and all your sorrows, but it is much more beautiful to forge a productive future for all farm workers and all the future generations.

Employer specifically alleges that Raul Navarro, Manuel Tercero, and Henry Castro, members of employer's ground crews #1 and #16, would not have signed the list if they had known that words supporting the UFW were going to be typed on the paper.[1/]

[1/] The employer made an oral motion to continue the hearing for a week in the hope that Raul Navarro, Manuel Tercero and Henry Castro could be located to serve as witnesses. The three men were thought to be in Arizona and thus beyond the subpoena power of the Board. Counsel for employer stated that he had only recently been given the case and had made contact with the company but a week before the hearing. The company had told him that they would try to find the witnesses; it was for this reason that he had not asked for a continuance before the day of the hearing.

The motion for continuance was denied for the following reasons,__ The employer could give no assurances as to when the three men would be found. They were supposed to .have reported for work at employer's farms in Arizona at the start of the harvest season, but they had failed to do so. The employer had ample time to search for the witnesses prior to the hearing. The objections were set for hearing on August 18, 1977. No request for review was filed, thus the employer was on notice as of that date of the issues to be discussed. Notice of the hearing date itself was sent out to the parties on October 5, 1977. This gave the employer additional notice of the issues set. Finally, the employer was in contact with members of Raul Navarro's family, including his sisters, who testified, and his father who is a foreman for the J.A. Woods Company. Presumably Haul's family members could assist the company in locating this witness if he was to be found at all.

As a general rule, unavailability of a witness is a ground for continuance. See Standards of Judicial Administration adopted by the Judicial Council, Young v. Redman, 55 Cal. App. 3d 827, 831-832, 128 Cal. Rpt. 86 (19767"! Here, however, employer made no "noticed motion," but rather, chose to raise the matter orally on the date set for hearing. The motion was not made promptly when necessity for the

Rosario Navarro and Dora Navarro, sisters of Raul Navarro, were called to testify on behalf of the employer. Prior to the election, Dora and Rosario worked on lettuce packing machines in crew #10. Their brother, Raul Navarro, worked for' the employer during the same time period as a stapler in crew $16. Rosario testified that at some time prior to the election, Raul was persuaded to sign a list on a blank piece of paper "so the machines would not be stopped from working." [2/] On cross-examination,

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1/ (cont.)continuance was ascertained, since the problem had been apparent for over a week to the attorney of record and slightly less than two months to the employer. There was no showing that the employer used due dilignece to find the, witnesses. In view of the time employer had to locate witnesses prior to the hearing; counsel's argument that he personally did not have enough time to seek out the witnesses is not sufficient to warrant a continuance. County of San Bernadino v. Engineering Corp., 72 CA 3d 776, 140 Cal. Rpt. T31 (1977) .

Board regulation 8 Cal. Admin. Code §20365(g) states in part, "Requests for continuances shall be granted only in extraordinary circumstances.[11] Although here, the three witnesses were important to employer's case, the extraordinary 'Circumstances do not exist which would warrant delaying the resolution of this election any longer.

[2/] During the hearing, this statement was admitted into evidence as a hearsay exception as defined in California Evidence Code 1251 - Statement of declarant's previously existing mental or physical state. After consideration, I have determined that there are two statements involved here and that neither one constitutes hearsay. The first statement, by the holder of the list to Raul, is offered to prove its effect on the listener, Raul. The second statement made by Raul to Dora is offered as circumstantial evidence of Raul's mental state as to why he signed the list. Statements offered for some purpose other than to prove the truth of the fact stated therein are not hearsay. California Evidence Code §1200.

Rosario elaborated that an organizer told Raul he should sign the paper to support the people on the machines, that the machines were going to be stopped, and that Raul's support would help people to continue working.[3/]

Following the election, Dora Navarro and Raul visited the office of the employer's attorney. At that time Raul identified a list of workers' names with words supporting the UFW written across the top (Employer's Exhibit fl) as the blank list he had signed earlier. Dora testified that Raul stated Employer's Exhibit #1 must have been the list he signed, because he remembered signing-only one list. This statement cannot be used as- a basis for a finding since it is uncorroborated hearsay.

The UFW introduced into evidence Union Exhibit £1 which is a copy of a UFW authorization card signed by Raul Navarro. By way of the authorization card, the UFW attempted to contradict the employer's contention that Raul would not have signed a blank list if he had known words supporting the UFW were going to be typed on it.

ANALYSIS AND CONCLUSION

Employer contends that an agent of the UFW faudulently procured the signatures of crews #1 and #16 on a blank piece of paper, after which a typed statement, that the members of those crews supported a vote for the UFW, was added. It is alleged that this list was used to influence other people to vote for the UFW on the basis of misrepresentation and that this misconduct affected the outcome of the election.

A party alleging that improper campaign materials were

3/The testimony of employer's witnesses conflicts with the employer[1] offer of proof where it was stated that Raul was told to sign the list so that Teamster dues would not be deducted from his paycheck.

distributed must come forward with evidence to demonstrate in what way the materials were improper and show that the distribution of the materials was misconduct affecting the result of the election Lawrence Vineyards, 3 ALRB No. 9 (1977). Here, the employer claims that the signatures of at least three workers (Raul Navarro, Manuel Tercero and Henry Castro) were fraudulently procured because the union did not represent to the workers the true purpose of the list. The employer has come forward with evidence pertaining to the signature of only one of those workers - Raul Navarro. Through the testimony of Raul's sisters, the employer attempted to demonstrate that Raul signed a blank list based on a misrepresentation. Similarly, the UFW presented evidence concerning only Raul Navarro. Union Exhibit #1, a UFW authorization card signed by Raul, was introduced into evidence for the purpose of showing that Raul was a UFW supporter. The UFW theorized that by showing Raul to be a UFW supporter, the conclusion could -then be drawn that he would not have protested signing a blank list that was later used for UFW propaganda purposes.

Whether or not the individuals in question are established to be UFW supporters does not minimize the gravity of a union engaging in misrepresentation and fraudulent campaign practices. The employer may still argue that the UFW engaged in serious misconduct by misrepresenting the purpose of the list to employees, procuring the employees' signatures and then creating the erroneous impression that this list was a willingly signed, pro-union employee statement. Tinken-Detroit Axle Company Case, 98 NLRB 790, 29 LRRM 1401 (1952). Employer, however, has failed to establish several vital links in its case. First, the employer has made no showing that Employer's Exhibit $1 is in fact the blank list which

Raul and the others allegedly signed. Employer failed to establish the connection between the blank paper which Raul signed and the UFW propaganda signed by sixty-three J.A. Woods employees. Secondly, employer has failed to present any direct evidence that this petition, even if fraudulently composed, was, in fact, distributed to other employees. No witnesses were brought forward who could testify that they saw the list at the time it was supposedly distributed to the workers. Counsel for the employer stated that it was unlikely that the list could have been used for any other purpose and that the list probably created a 'band wagon effect in persuading voters to vote for the UFW. This conclusion, however, is mere conjecture on the part of the employer.

In reviewing this evidence, I conclude that the employer has not met its burden. It has not been shown that the campaign propaganda in question (Employer's Exhibit $1) was in fact the list which Raul Navarro signed, or that this list was ever distributed to other workers, thereby affecting the outcome of the election.

The employer was handicapped in presenting its case by the absence of three important witnesses. Therefore, following the denial of the motion to continue, employer made the following offer of proof - that Raul Navarro, Manual Tercero and Henry Castro would testify they signed a blank list, that their signatures were fraudulently procured, and that the list was used to influence other" people to vote for the UFW on the basis of a misrepresentation. Assuming that what the employer stated in its offer of proof was true, I cannot conclude that the misconduct in question was substantial enough to require setting aside the election on the basis of a misrepresentation or a fraudulent campaign practice.

The employer suggests that the election should be set aside because the UFW misrepresented the purpose of the list to the workers. The National Labor Relations Board in the case of Hollywood Ceramics, 140 NLRB 221, 51 LRRM 1600 (1962) established the policy that elections would be set aside because of campaign misrepresentations. The NLRB held that in order to preserve the "laboratory conditions" deemed essential to a fair election, an election should be set aside where there has been "a misrepresentation or other similar campaign trickery, which involves a substantial departure from the truth, at a time which prevents the other party or parties from making an effective reply, so that the misrepresentation, whether deliberate or not, may reasonably be expected to have a significant impact on the election." Id. at 224.

The ALRB has questioned whether this rule should be adopted in its entirety. The Board has noted that the "laboratory condition analysis may not apply to agriculture since the seasonal and often transitory nature of agricultural employment makes repetition of the election experiment difficult. Samuel S. Vener Company, 1 ALRB No. 10 (1975). Recently, the NLRB reversed its Hollywood Ceramics decision in Shopping Kart Food Market, 228 NLRB 190, 94 LRRM 1705 (1977), by holding that election will no longer be overturned on the basis of a misrepresentation. Thus, Hollywood Ceramics is superseded by Shopping Kart as setting NLRB precedent for ALRB decisions. The ALRB, however, may still prefer to adopt the stricter Hollywood Ceramics rule when considering misrepresentation cases in the agricultural context. The Board is not precluded from doing this since Labor Code §1143 states that the Board must only follow applicable precedents of the National Labor .Relations Act as amended.

It is evident, after applying the Hollywood Ceramics

criteria to the election in the present case, that the alleged misconduct would not require invalidating the election. Under Hollywood Ceramics, an election will be set aside when: (1) the misrepresentation was substantial enough to have influenced the voters' choice, (2) the subject matter of the misrepresentation was close enough to election issues to influence the voter? (3) the opposing party did not have adequate opportunity to reply to the misrepresentation before the election, (4) the misrepresentation came from a party having special knowledge of the subject matter, so the voter would be likely to rely on its accuracy, and (5) the voters lacks independent knowledge of the subject. Several factors in the present case indicate that the alleged misconduct does not meet this standard. First, it is questionable whether the "misrepresentation" was substantial enough to have influenced the voters' choice. Possibly a voter would be swayed by the fact that 63 employees out of a possible 325 eligible voters signed a petition supporting the UFW. However, 63 votes constitutes less than 20% of the electorate. Moreover, the employer can point to only three persons who actually claim to be misrepresented. I do not believe that "misrepresenting" the leanings of three people out of a voting population of 325 is misconduct so substantial as to prevent the exercise of free choice by the voters.

Secondly, the workers, who were supposedly affected by the fraudulent campaign material, were presumably able to inquire of the members of ground crews #l and #16 as to who actually supported the UFW. Thus, despite the possibly fraudulent procuring of signatures, the facts which were arguably misrepresented were not within the special knowledge of the party at fault. Finally, the employer failed to show that there was so little time between the making of the "misrepresentation" and the election itself that the opposing party would not have adequate opportunity to reply to

the misrepresentation before the election.

The employer could have also argued here that the election should be set aside on the basis of a fraudulent campaign practice. In Shopping Kart Food Market, the NLRB, which held that it will no longer set elections aside on the basis of misleading campaign statements, also stated it would continue to set elections aside where a party has engaged in deceptive campaign practices. Id. at 1708. The Board noted that the essential difference lies in the fact that while employees are able to evaluate mere propaganda claims, there is simply no way any person could recognize a forged document for "what it is" from its face since, by definition it has been altered to be that which it is not. NLRB cases dealing with this legal theory emphasize (1) that the fraudulent campaign practice must be "so misleading" as to prevent the exercise of free choice by employees in the selection of their bargaining representative, and (2) that the employees must be so blinded by the deception that they cannot recognize the contents as fake nor evaluate it as propaganda. United Aircraft Corp., 103 NLRB 102, 31 LRRM 1437 (1953).

The arguments against this theory operating in the present case dovetail with the arguments against the use of the misrepresentation theory. The deception does not appear "so misleading" as to prevent free choice - only 20% of the electorate signed the list and out of those signatures only three are alleged to be fraudulently procured. Unlike most NLRB cases, the deception did not take the form of a forged letter from a source the workers were unfamiliar with. See, United Aircraft Corp., 103 NLRB 102, 31 LRRM 1437 (1953), Sylvania Electric Products, Inc., 119 NLRB 824, 827-831 41 LRRM 1188 (1957), Cascade Corp., 205 NLRB 638, fn. 2, 84 LRRM 1933 (1973) . Here, the allegedly fraudulent campaign material came

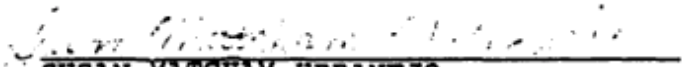
from fellow workers who were working during the same time period and in the same general area. The workers themselves had the means of inquiring from the source of the signatures, as to whether the list was actually a willingly signed, pro-union employee statement.

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:

Respectfully submitted,



SUSAN MATCHAM URBANEJO
Investigative Hearing Examiner