Delano, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

MID-STATE HORTICULTURE CO., Employer, and WESTERN CONFERENCE OF TEAMSTERS, AND ITS AFFILIATED LOCALS, Petitioner, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Intervenor.	)	Case No. 75-RC-51-F 4 ALRB No. 101

DECISION ON CHALLENGED BALLOTS AND OBJECTIONS

Pursuant to the previsions of Labor Cede 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 Western Conference of Teamsters and its affiliated Locals, herein called WCT or Teamsters, on September 10, 1973, an election by secret ballot was conducted on September 17, 1975, among the agricultural employees of Mid-State Horticulture Co. (Employer).

The Tally of Ballots furnished to the parties at that time showed the following results:

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WCT	69
UFW	54
No Union	4
Void Ballots	3
Challenged Ballots	64
Total	194

Because the challenged ballots are determinative of the outcome of the election, the Regional Director of the Fresno office conducted an investigation and issued a Report on Challenged Ballots,[1/] dated December 10, 1975, pursuant to 8 Cal. Admin. Code Section 20365 (e) (1.) (1975).

On February 16, 1976, in response to a request by the Agricultural Labor Relations Board for further investigation concerning the voting eligibility of certain persons who were not included on -he eligibility list, and of alleged supervisors, the Regional Director issued a Supplemental Report on Challenged Ballots.

The WCT, the Employer and the Intervenor, United Farm Workers of America, AFL-CIO (UFW), timely filed exceptions to the initial report on Challenged Ballots as permitted under 8 Cal. Admin. Code Section 20365 (f) (1975). The UFW also timely filed exceptions to the Supplemental Report.

Having reviewed the full record before us, we make the

[1/] Three categories of challenges were made: (1) 28 by the Board Agent, on the basis that those voters were not on the eligibility list; (2) 4 by the UFW, on the basis that they were not agricultural employees; and (3) 31 by the Employer, on the basis that they were not economic strikers.

following findings of facts and conclusions of law.

Board Challenges

Board Agent challenged the ballots of 28 voters[2/] on the basis that their names did not appear on the eligibility list. The Regional Director recommended that 23 of these challenges be sustained,[3/] and that the 5 others (Flavia Escobedo, Jose M. Hernandez, Lucio Cantu Leal, Estella Mojarro, and Refugio Revas Tello, whose names he found appeared on the Employer's payroll records for the appropriate period) be overruled. As no exceptions have been filed to the Regional Director's recommendations, we hereby overrule the challenges to the ballots of the 5 named employees and sustain the other 23 challenges.

The UFW excepted to the Regional Director's recommendation to sustain the challenges to the ballots of Santana Morales, Jose Antonio Garcia, and Juan Hernandez. As to Santana Morales, an examination of the Employer's payroll records revealed that she was not employed in the appropriate payroll period. The UFW argues that the reason Ms. Morales' name is not found on the payroll eligibility list is because she was an economic striker. Although Ms. Morales participated in an economic stroke which began at the Employer's vineyards on July 29, 1973, the investigation revealed that she was employed by the Employer during July and August of

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[2/] The Regional Director erred in stating that there were 29 voters in this category, as one of them (Ricardo Linares) was listed twice.

[3/] The names of the 23 voters whose challenges were sustained on the basis that their names do not appear on the eligibility list are included in Appendix B, attached hereto.

1975. In order for an employee to have voting eligibility as an economic striker it must be found that she ceased her employment in support of an economic strike against her employer and that she has not abandoned the strike. Pacific Tile and Porcelain Co. , 137 NLRB 1358 (1962) . By accepting employment prior to the election from the Employer, against which she was previously on strike, Ms. Morales abandoned the strike. Accordingly, we hereby sustain the challenge to her ballot.

The UFW, in its exception to the Regional Director's recommendation to sustain the challenges to the ballots of Juan P. Hernandez and Jose Antonio Garcia, contended that their names do, in fact, appear on the Employer's payroll records. Our original emergency regulations, 8 Cal. Admin. Code Section 20355(1975), set forth the requirements for voter eligibility. If these workers were employed within the payroll period preceding the filing of the election petition en September 10, 19"3$_r$ both would be eligible re vote. However, the Regional Director's investigation showed that only two persons surnamed Garcia (Job and Raymond) were employed during the eligibility period, and that both of those employees voted. The earliest time a Jose Antonio Garcia appears on the Employer's payroll was one month after the election. Moreover, the Employer's payroll records established that Juan P. Hernandez was not hired by the Employer until eight days after the election. Therefore, neither Jose A. Garcia nor Hernandez was eligible to vote. Although the UFW made a general denial as to the Regional Director's finding as to these two persons, it failed to present

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evidence supporting its contention.[4/] Thus, in accordance with the Regional Director's recommendation, we hereby sustain the challenges to the ballots of Jose Antonio Garcia and Juan P. Hernandez.

Intervenor Challenges

The UFW challenged the ballots of Alfredo Baez, John Kates, Manuel Ornelas, and Luis Zendejas, alleging that these individuals are supervisors within the meaning of Labor Code Section 1140.4(j).[5/] The Regional Director concluded that these four persons were not supervisors as defined in the Act and recommended overruling the challenges to their ballots. We disagree.

The initial Report on Challenged Ballots described the duties of these men as: "teaching, reviewing new workers' performance, directing the manner in which work is performed ...." The CFW excepted, asserting -hat these duties are sufficient: to establish supervisory status. After further investigation, the

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[4/] See M. V. Pista, 2 ALRB No. 8 (1976) in which we interpreted 8 Cal. Admin. Code Section 20365(b) as requiring that parties excepting to a Regional Director's findings make explicit exceptions, rather than general denials, and submit supporting fact: and legal authority.

[5/] The definition of supervisor is set forth in Section 1140.4(j), Labor Code:

> The term "supervisor" means any individual having the authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibility to direct them, or to adjust their grievances, or effectively to recommend such action if, in conjunction with the foregoing, the exercise of such authority is not of merely a routine or clerical nature, but requires the use of independent judgment.

Regional Director found that the men's duties only occasionally required them to instruct new employees regarding the manner in which work is performed, that they did not exercise independent judgment in connection with their teaching duties, and that their supervisor visited each crew three or four times daily to direct and review their work.

At the hearing on objections, evidence was introduced on the duties of Zendejas. The testimony of Zendejas' immediate supervisor, Luis Amaya, established that Zendejas: (1) assigns employees to rows of grapes to be picked when picking begins in an area; (2) is in immediate charge of a crew of up to 80 workers; (3) tells workers when to begin work and when to start and stop picking grapes; (4) inspects the employees' work to insure adequate performance; (5) remains in charge of the same group of workers as they move from ranch 10 ranch at harvest time, even though is immediate supervisor might change in connection with such moves; and (6) may have told laid-off employees to return to work when a lull in the harvesting ended. Amaya also testified that, although he is the general foreman of the ranch on which Zendejas worked, he does not spend all his time with Zendejas crew, our leaves Zendejas in charge, as he trusts Zendejas very much.

In summary, the record establishes that Zendejas responsibly directs a large crew of employees and that his exercise of such authority is not merely of a routine or clerical nature, but requires the use of independent judgment. Accordingly, we conclude that Luis Zendejas is a supervisor within the meaning of the Act, and therefore the challenge to his ballot is sustained.

Although little testimony was introduced at the hearing concerning the other three challenged voters whom the UFW contends are supervisors, it appears that they occupied positions similar to Zendejas'. However, because of inadequate evidence in the record, we are unable to resolve these three challenges at this time. If, after opening and counting the overruled challenges listed in Appendix A, attached hereto, the unresolved challenges prove to be outcome-determinative, the Regional Director shall, in his investigation of the unresolved challenges, determine the status of Baez, Kates and Ornelas in light of our findings with respect to Luis Zendejas.

Employer Challenges

Pursuant to 8 Cal. Admin. Code Section 20350 (b) (4), the Employer challenged the ballots of 31 voters who claimed that they were economic strikers. The Regional Director recommended that 26 of these challenges be sustained and that the remaining 5 be overruled. We consider all of these challenges in six separate groups, as set forth below.

Group 1. The Regional Director recommended sustaining the challenges to the ballots of: Yolanda Alejandro. Maria Antonio, Garcia, Asuncion Gonzales, Alberto Hernandez, Carmen Bibiana Hernandez, Rita Helena Hernandez, Margarito Munoz, and Refugia Vega, as he found that they had abandoned their status as economic strikers by applying for work with, or placing their names en a future-employment list with the Employer. As no exceptions have been filed as to this recommendation, we hereby sustain these eight challenges.

Group 2. The Regional Director recommended sustaining the challenges to the ballots of Connie Alejandro, Victor Garcia, Richard Montez Montoya, Catalina Munoz, Lucy Pimental, and Frank Valdez. Although these six persons appeared at the election and stated in declarations that they were economic strikers, their names do not appear on the Employer's payroll for the pay period preceding July 29, 1973. Labor Code § 1157. Neither their declarations nor a subsequent investigation by the Regional Director disclosed evidence which would establish their voting eligibility, either as employees or as persons having an expectation of regular employment with the Employer at the time the strike started, despite the fact that their names were absent from the appropriate payroll. Accordingly, we hereby sustain these six challenges.

Group 3. The Regional Director recommended sustaining the challenges to the ballots of Josa Rubio and Toribia Martinez. We do not agree. Their names appear on the Employer's payroll records at the time of the strike; they went out on strike on July 29, 1973, and thereafter participated in strike-related activities. In the course of a further investigation by Regional Director, these two men claimed economic-striker status as to a number of other employers as well as the Employer herein, and stated that if all the strikes against the other employers were to end simultaneously, they would return to work for those other employers. Based upon these statements, the Regional Director apparently concluded that they abandoned their interest in the strike against the Employer in the instant case.

In Pacific Tile and Porcelain Co., 137 NLRB 1358 (1962), the NLRB held that once economic-striker status is achieved, the economic striker is presumed eligible to vote in the election and that, to rebut this presumption, the party challenging the economic striker's ballot must affirmatively show, by objective evidence, that the economic striker has abandoned his interest in his struck job. The NLRB further held that acceptance of other employment will not in and of itself indicate abandonment of the strike, even if the striker failed to tell the new employer that he only wanted a temporary job. We do not consider that Jose Rubio's and Toribia Martinez' response to a hypothetical question is sufficiently objective evidence to overcome the presumption of their eligibility, Accordingly, we hereby overrule the challenges to their ballots.

Group 4. The Regional Director found that although Arnursc Gcnsaies Pientes claimed to be an economic striker, he had in fact continued working for the Employer after the strike began. Thus, as he is not an economic striker within the meaning of Labor Code Section 1157, we hereby sustain the challenge to his ballot.

Group 5. The Regional Director recommended overruling the challenges to the ballots of Carmen Alonzo, Jose Zruz Juana Garcia, Ruben Alfredo Hernandez, and Ramon Sanchez. These voters appeared during the investigation conducted by the Regional Director and substantiated their claim that they were economic strikers. Their names appear on the Employer's payroll for the pay period immediately preceding commencement of the strike on July 29, 1973. They went on strike on or about July 29, 1973, and participated in strike-related activities. The Employer excepts to

the recommendation on the grounds that it has not been established that these voters were economic strikers and retained their status as such.

As stated in Pacific Tile and Porcelain Co., supra, where a presumption of eligibility arises, it is the burden of the challenging party to establish by objective evidence that the economic striker has abandoned his interest in the strike. Although both the Employer and the WCT argue at length that they were denied an opportunity to have a hearing on the challenges, neither made use of its opportunity, in filing exceptions, to present facts or evidence to support the challenges. In John V. Borchard Farms, 2 ALRB No. 16 (1976), we held that an objections hearing pursuant to 8 Cal. Admin. Code Section 20365 (1975), is not required unless there are material factual issues in dispute. In the case of challenged ballots, when the parties have failed to raise, through specific assertions substantiated by evidence, a material factual dispute that would warrant further investigation or hearing, the Board is entitled to rely on the report of the Regional Director. Sam Andrews' Sons, 2 ALRB No. 28 (1976). As neither the Employer nor the WCT presented any evidence contrary to that found by the Regional Director, there are no material factual disputes to be resolved in this regard. Accordingly, we adopt the Regional Director's recommendation and hereby overrule the challenges to the ballots of these five voters.

Group 6. The Regional Director found that the names of Felix Alejandro, Jr., Lucia Alonza, Sara Garcia, Zenaida Munoz, Garciela Rios, Anita Rodriguez, Mauro Roman, Jose Valencia, and

Pete Zavalo appeared on the Employer's payroll for the pay period ending July 29, 1973. At the election, these persons signed affidavits of economic-striker status. However, because they did not appear during the investigation subsequently conducted by the Regional Director, he recommended that the challenges to their ballots be sustained. We do not agree. Under Pacific Tile and Porcelain Co., supra, a presumption is raised in favor of the voting eligibility of each of these employees, rebuttable only by sufficient proof that the employee has abandoned interest in the strike or in his or her struck job. George Lucas & Sons, 3 ALRB No. 5 (1977). The only factual information on that issue from which an inference arguably might be drawn is the evidence of their failure to appear during the investigation. However, we consider that nonappearance alone is not sufficient to establish abandonment in this case. Moreover, is not clear whether the Regional Director attempted to confirm the alleged economic-striker status of the voters from other sources, or whether the parties were offered an opportunity to rebut the existence of that status. In these circumstances, as we do not have sufficient facts to determine the voting eligibility of these nine persons, we make no revolution of the challenges to their ballots at this time.

CONCLUSION

The Regional Director is hereby ordered to open and count the twelve (12) ballots for which challenges have been overruled, as set forth in Appendix A, and to issue and serve a revised tally of ballots upon the parties. The 39 ballots to which challenges have been sustained, as set forth in Appendix B, shall not be

opened or considered.

If the ballots of the twelve (12) voters whose challenges have not been resolved, as set forth in Appendix C, prove to be outcome-determinative, the Regional Director shall conduct a further investigation along the lines suggested in this Decision.

Objections Hearing

Pursuant to Labor Code Section 1156.3 (c) , the Employer, the WCT, and the UFW timely filed objections. On January 15 and 16, 1976, a hearing was held in Delano, California. At the commencement of the hearing, the WCT withdrew all of its objections, and the Employer failed to present any evidence supporting its objections. Therefore, we decide only the objections raised and litigated by the UFW.[6/]

The UFW contends that the Employer promulgated and discriminatorily enforced an invalid no-solicitation rule: that Employer and WCT representatives, acting in concert, threatened and intimidated employees in a manner which deprived them of the free and rational exercise of their franchise; and that the Employer held a "captive audience" speech.

I. THE NO-SOLICITATION RULE, THREATS, AND INTIMIDATION

On August 12, 1975,[7/] the UFW telephoned the Employer for the purpose of determining its access policy. A man identified as

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[6/] The UFW filed 34 objections; a hearing was set on 22 of these. The record reflects that the UFW litigated the three objections considered herein.

[7/] The Agricultural Labor Relations Act, Labor Code Sections 1140 et seq., became law August 28, 1975.

Redger,[8/] answered the call stating that the Employer would not permit access for the purpose of union organizing. On August 20, 1975, three UFW organizers were arrested for trespass at the Employer's vineyard when they attempted to organize the employees there. The arrest was initiated by a citizen complaint filed by Ed Redger, ranch superintendent.

In K. K. Ito Farms, 2 ALRB No. 51 (1976), we held that excess access prior to the effective date of the Act is an appropriate subject for review and may be grounds for setting aside an election where such conduct involved coercion or intimidation of workers which interferes with their free choice of a collective-bargaining agent. A denial of access prior to the effective date of the Act is also a proper subject of review if it is established that such denial tended to interfere with the free choice of a bargaining agent by intimidating or coercing voters, or if the denial otherwise tended to undermine the basic fairness of the electoral process. Even if the Employer's pre-Act policy was to prohibit access, there is no evidence that any of the workers were aware of such policy. Thus, it cannot be said that the policy intimidated or otherwise tended to influence the electorate. The arrest occurred more than three weeks prior to the election, and it is unknown how many, if any, of those who voted had witnessed the incident. In view of its remoteness in time and the uncertainty as to the number of employee witnesses thereto, we find that the

[8/] Ed Redger was the Employer's ranch superintendent; his brother, Jim Redger, was an employee; which of the two answered the call is not clear.

incident did not tend to create a coercive or intimidating atmosphere in which the electorate were unable to freely exercise their franchise.

The UFW contends that the Employer maintained and enforced a policy of refusing to allow UFW organizers to come upon its property to speak to its employees, at lunch time or at any other time. In support of this contention, the UFW presented evidence of a post-Act incident which occurred some 27 days after the first denial of access .[9/] On September 15, 1975, between 11:45 a.m. and 11:55 a.m., four or five UFW organizers entered the Employer's vineyards. The record reflects that employees were still working when the organizers arrived, but ceased working within a few minutes after their arrival. As some workers were beginning to leave the fields for lunch, a UFW organizer was taken by the arm and directed from the vineyard by supervisor Ed ledger; there was no evidence of physical violence.[10/]

In Certified Eggs, Inc., 1 ALRB No. 5 (1975), we held that a single non-discriminatory denial of access will not warrant setting aside an election when effective access is otherwise obtained. See also Tomooka Brothers. 2 ALRB No. 52 (1976); Souza Boster, 2 ALRB No. 57 (1976). The UFW did not claim that it was

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[9/] It should be noted that the Board was enjoined from enforcing the access rule by state and Federal courts from September 3, 1975, to September 18, 1975.

[10/] The instant case is distinguishable from Phelan and Taylor Produce, 2 ALRB No. 22 (19761. In that case, we set the election aside because of a violent physical attack on a union organizer which occurred in the presence of workers. Redger's act was nonviolent. Further, it is not clear how many, if any, of the workers witnessed Redger's act.

denied access to the Employer's vineyards at any other time. Even on this occasion, at least four organizers communicated with the employees and distributed leaflets. However, unlike the situation in Certified Eggs, Inc., supra, in which the complaining union had obtained access on prior occasions, there is no evidence here that the UFW had obtained prior access. The UFW would have us find that the burden is on the Employer to show that access was allowed on other occasions. We disagree. It is well established that the party asserting a fact has the burden of proving it. The UFW has failed to show by a preponderance of the evidence that it was effectively denied access.

Arguably, the denial of access to one union on two occasions, combined with a showing that a rival union was granted extensive access by the Employer could preclude a fair election contest. The UFW sought to establish that and called three witnesses to show chat the Teamsters were given full access to the Employer's property, not merely to service their pre-existing union contract, but also to organize and campaign for the upcoming election. [11/] A UFW attorney testified that on September 15, as Redger was denying access to the UFW, Teamsters representatives are Maturino entered the fields carrying leaflets. Redger's explanation for the Teamsters' access was that the Teamsters had a contract with the Employer. The witness did not know what message the leaflets conveyed.

Another UFW witness, Alfredo Huerta, testified that on

[11/] The Teamsters and the Employer executed a collective bargaining agreement in July 1975.

September 15 and 16, and on other days after the election, Teamsters representative Frank Mendoza visited his crew [12/] but solely for the purpose of distributing Teamster magazines. On September 15, Mendoza arrived alone at the 9:30 a.m. break time, remained five minutes and left. On September 16, Mendoza arrived with two other persons about noon, again passed out magazines and left within five or ten minutes. Mr. Huerta did not know who the other two persons were, or whether they were organizers, or what they were doing there. The magazine carried a photograph of the Teamster president on it and was apparently the same one passed out before and after the election; Huerta did not read it. We do not consider this activity inconsistent with the Teamsters' exercise of their right of access to the workers to administer their contract.

The UFW's principal witness, in support of its contention that discriminatory access was accorded to the Teamsters and in support of its contention as to Employer and Teamster threats and intimidation was Raquel Ballonez. Ms. Ballonez testified that she was laid off about two weeks before the election. At that time she was working in Juan Martinez' crew. Three or four days before the election, she returned to work, this time in Luis Zendejas crew. She testified that while she was in Martinez' crew, Teamsters organizer Mendoza came out to the fields and threatened and frightened employees with discharge if they did not sign a checkoff card and/or vote for the Teamsters. However, she stated,

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[12/] The Employer at that time was using at least three crews. Huerta was in Flora Allmond's crew. Luis Zendejas and Juan Martinez were in charge of the other two crews.

Mendoza never approached or threatened her because he knew she would never comply, but he so succeeded in intimidating other workers that many of them did not vote, but hid under the vines when the bus came to take them to the polls. At one point in her testimony Ms. Ballonez stated that Zendejas was with Mendoza when the latter visited the Martinez crew; later she testified that Zendejas was with Mendoza when Mendoza visited Zendejas' crew. She stated that crew boss Zendejas was always urging the workers to vote for the Teamsters, although, unlike Mendoza, he never threatened or intimidated the workers. Zendejas, she testified, stood by the voter bus, and, as each voter boarded, said "Vote Teamsters". When reminded of the Board Agent's proximity, she changed her testimony and stated that the Board Agent was an Anglo and that Zendejas was speaking in Spanish and used the word '"damned" instead of Teamster, so chat what Zendejas was literally saying to each voter was "Vote damned". She testified that Zendejas did not approach her because he knew she favored the UFW.

In sharp contrast to Ms. Ballonez' testimony concerning Mendoza's comments to her crew is the testimony of Mr. Huerta that Mendoza's never threatened him or anybody else in his crew. On -he basis of the entire record, we are not persuaded that the allegations as to access, threats, and intimidation have been proved by a preponderance of the evidence. Accordingly, the objections that the Employer discriminatorily provided the Teamsters with access is dismissed; the objection that the Employer and the Teamsters, acting in concert, so threatened and intimidated the workers that they were deprived of a free, rational choice in the election is

also dismissed.

II. CAPTIVE-AUDIENCE SPEECH

The allegation that the Employer made a captive-audience speech concerns events which occurred on the morning of the election, September 17, 1975.

As previously set forth, there is some evidence that as workers were leaving the vineyard to board a company bus destined for the polls, crew boss Zendejas stationed himself at the entrance to the bus. As approximately 25 members of the crew passed through the door, he stated to each of them, "Vote Teamster". An ALRB agent was within hearing range. However, Zendejas spoke in Spanish and used another word for the term "Teamster". [13/] Whether the Board Agent spoke Spanish and understood Zendejas remarks is not known. Of those persons boarding the bus, several were members of the Zendejas family.

The UFW urges us to apply the rule of Peerless Plywood Co., 107 NLRB 427 (1953).[14/] In Peerless, the National Labor Relations Board held that an election speech delivered by an employer or a union to a massed assembly of workers, on company time, within 14 hours of an election was grounds for overturning in election. Even if Zendejas made the above remarks, they do not constitute a captive-audience speech, or otherwise objectionable conduct. Accordingly, this objection is hereby dismissed.

[13/] According to this version Zendejas would have been saying "Vote damned".

[14/] In Yamada Bros., ALRB No. 13 (1975), we noted the "captive audience" rule may not be appropriate under our Act.

Having considered the objections individually and cumulatively, as required by our holding in Harden Farms of California, Inc., 2 ALRB No. 30 (1976), we find them insufficient to warrant setting aside the election.

Dated: December 19, 1978

GERALD A. BROWN, Chairman

RONALD L. RUIZ, Member

ROBERT B. HUTCHINSON, Member

APPENDIX A

Challenges Overruled;

1. Carmen Alonzo
2. Jose Cruz Diaz
3. Flavia Escobedo
4. Juana Garcia
5. Jose M. Hernandez
6. Ruben Alfredo Hernandez
7. Lucio Cantu Leal
8. Toribia Martinez
9. Estella Mojarro
10. Jose Rubio
11. Ramon Sanchez
12. Refugio Revas Tello

APPENDIX B

Challenges Sustained:

1. Connie Alejandro
2. Yolanda Alejandro
3 . Gracelia Andrade
4. Raquel Ballonez
5. Sylvie Ballonez
6. Epifanio Ceja
7. Polly Cervantes
8. Maria Espinoza
9. Maria M. Espinoza
10. Jose Antonio Garcia
11. Maria Antonio Garcia
12. Victor Garcia
13. Asuncion Gonzalas
14. Gladys Graen
15. Alberto Hernandez
16. Carmen Bibiana Hernandez
17. Juan P. Hernandez
13. Rita Helena Hernanaez
19. Carmen Huerta
20. Ricardo Linares
21. Rodrigo Linares
22. Teresa Linares
23. Maria Lopez
24. Juana Madrigal
25. Teresa Madrigal
26. Andrea Martinez
27. Francisco Martinez
28. Maria Gloria Montemayer
29. Richard Montez Montoya
30. Santana Morales
31. Catalina Munoz
32. Margarito Munoz
33. Lucy pimental
34. Arnutao Gorzaies Puentes
35. Frank Valdez
36. Refugia Vega
37. Guadalupe Zamora
33. Luciano Hamcra
39. Luis Zendejas

APPENDIX C

Challenges Not Determined:

1. Felix Alejandro, Jr.
2. Lucia Alonza
3. Alfredo Baez
4. Sara Garcia
5. John Kates
6. Zenaida Munoz
7. Manuel Ornelas
8. Graciela Rios
9. Anita Rodriguez
10. Mauro Roman
11. Jose Valencia
12. Pete Zavalo

CASE SUMMARY

Mid-State Horticulture Co. 4 ALRB No. 101
Case No. 75-RC-51-F

ALO DECISION

At the hearing on objections, held on September 17, 1975, Petitioner Teamsters withdrew its objections. As the Employer submitted no evidence as to its objection, it was dismissed. Intervenor UFW withdrew 14 of its objections and presented evidence on the remaining 5 issues. The Administrative Law Officer (ALO) concluded that the Employer granted access in a discriminatory manner and that a supervisor urged employees to support the Teamsters. The ALO made no conclusions as to alleged threats and interrogation, but noted that several persons who worked for the Teamsters or the Employer and who may have had knowledge of the events in question were not called to testify. The record presented to the Board included the Regional Director's Report on Challenged Ballots and the exceptions to the Report which were filed by all three parties. The ALO made no recommendation as to the resolution of these potentially determinative challenged ballots, leaving that matter to the Board.

BOARD DECISION

Objections

The Board concluded that there was insufficient evidence to warrant setting aside the election, as there was insufficient evidence to establish that the Employer granted access in a discriminatory manner, and as the testimony concerning alleged threats was inconsistent. The Board found the remarks of a supervisor who allegedly urged employees to "Vote Teamster" did not constitute a captive-audience speech.

Challenges

The Board sustained the challenges to ballets of voters not included en the eligibility list where subsequent: investigation. supported -he challenge. The challenge to the ballot of an alleged economic striker was sustained, as it appeared that she worked at the vineyard after the strike began, indicating that she had abandoned the strike. No decision was made as to three challenges to alleged supervisors because of insufficient information, but challenges as to two others were sustained based on evidence that they exercised independent judgment in directing their crews. As to alleged, economic strikers, the Board ruled that, under ALRB precedent, where a presumption of eligibility arises because the worker's name appeared on the appropriate payroll list and s/he went on strike and participated in strike activities, it is the burden of the challenging party to establish that the worker has abandoned his or her interest in the strike or the challenge will be overruled.

The Board ordered the Regional Director to open the ballots as to which challenges were overruled and to issue a new tally of ballots; and, if there are further outcome-determinative unresolved challenges, to conduct further investigation.

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STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of: MID-STATE HORTICULTURAL CO., Employer, and Western Conference of Teamsters Petitioner, and United Farm Workers of America, AFL-CIO, Intervenor.	No. 75-RC-51-F REPORT OF HEARING OFFICER

I. PROCEDURAL STATEMENT OF CASE

The above proceeding was heard on January 15 and January 16, 1976, at Deiano, California. The election in this matter was held on September 17, 1975. Pursuant to Labor Code Section 1156. 3 (c) , objections were filed by Employer Mid-Stare on or about September 23, 1975, by Petitioner Western conference of Teamsters on or about September 23, 1975 and by Intervenor United Farm Workers of America on September 23, 1975. The initial Tally of Ballots showed 69 votes cast for Petitioner, 54 for Intervenor, 4 for no labor organization, 3 void ballots, and 64 challenged ballots . The Regional Director issued his Report on Challenged Ballots on December 10, 1975. The Regional Director recommended that 15 challenges be overruled and 49 sustained. Of the 15, 6 were alleged "economic strikers," 5 were

alleged to be "not on eligibility list," and 4 were challenged by the Intervenor as alleged "supervisors." Exceptions to the Report on Challenged Ballots were filed by all three parties. No final decision has issued with regard to the challenged ballots. The Report and Exceptions to it were admitted into evidence as part of the official record in this matter because of some of the similar factual matters involved in both issues.[1]

At the commencement of the hearing in this proceeding, both Employer and Petitioner moved for a continuance of the proceeding pending final decision on the challenged ballots. Alternatively, said parties moved to continue presentation of their own objections pending a final tally. These motions were denied. Both parties had had ample time to make such a motion prior to the hearing date. There was no showing nor allegation that witnesses were unavailable on this date or that either party was unprepared to proceed. Given legislative intent to expedite the electoral process in agricultural labor insofar as possible, and the complete lack of prejudice to any party in proceeding, the motions were denied.

Upon such denial, Petitioner withdrew all of its objections to the election. Employer did not withdraw its objections, but refused at all times during the proceeding

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1. See Exhibits 15-18. It should be noted that Exhibits 9-12 in this proceeding, stipulated to be part of the record by all parties, were not physically available to the hearing officer in this matter. All parties stipulated that Board staff would make said exhibits part of the record when this proceeding was transferred to the board. No evidence was taken or offered regarding these exhibits, and their inclusion in the record is principally for purposes of completeness. The exhibits were, respectively, Motion for Intervention, Direction of Election, Initial Tally of Ballots, and Intervenor's Detailed Statement of Facts (filed 1/7/76).

to present any evidence in support of said objections. Employers' lone objection was, therefore, dismissed at the close of the proceeding for failure to present evidence in support of the objection.

Intervenor UFW had filed a substantial number of objections to the conduct of the election. Many of these objections had already been dismissed by the board. During the course of the proceeding, Intervenor withdrew the following numbered objections still pending before the Board: 1, 2, 3, 6, 8, 9, 10, 11, 13, 14, 18, 27, 31, and 32. The remaining objections, summarized below, are numbered 15, 16, 19, 20, 21, 25, 28, 29, and 30.

II . ISSUES PRESENTED

1. Alleged promulgation and enforcement of invalid no solicitation rule and enforcement of rule in discriminatory manner. Pre-act and post-act product both involved.

2. Did Employer make captive audience speeches or allow Petitioner to do so in such a way, considering ail the circumstances, as to substantially interfere with the election?

3. Did Employer grant special privileges to Petitioner, as compared to Intervenor, in such a way as to affect the fairness of the election?

4. Did Employer and/or Employer and Petitioner acting in concert attempt to threaten or intimidate employees so as to deny them rights to freely exercise their choice at the ballet box?

5. Did Employer or Employer and Petitioner acting in concert interrogate employees so as to create a coercive

atmosphere repugnant to the right to vote freely one's choice in representation elections?

Upon the entire record, including my observation of the witnesses but excluding consideration of the briefs of the parties and the official transcript,[2] and with due deference to statutory and regulatory limitations placed upon Hearing Officers by the Board and Act, I make the following

III. REPORT TO THE BOARD RE EVIDENCE PRESENTED AT HEARING

A. EXISTENCE AND DISCRIMINATORY APPLICATION OF NO-SOLICITATION RULE (PARAGRAPH 15)

1. Pre-Act Conduct

Mr. Barry Winograd, an attorney for Intervenor, testified credibly under oath that he directed his legal department staff to undertake a survey in August of 1975 of Employer policies on union access in the Delano area. On August 12, 1975, a member of the UFW legal staff spoke by telephone with Ed Redger, admitted to be the Ranch Superintendent for Employer. As witness Winograd testified, and as confirmed by Intervenor's Exhibit 1 admitted into evidence, Redger stated that Employer policy was to allow no unions to have access to Employer property for union organizing purposes. Mr. Redger was personally present in the hearing room during part of the morning's testimony. He was not called to testify by Employer.

It was stipulated by the parties that on August 20, 1975, three persons, at least one of whom was a UFW organizer,

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2. Pursuant to Board instructions, this Report has been prepared prior to receipt of the Reporter's Transcript.

were arrested on Employer vineyard property at a specified location upon the citizen's complaint of Ed Redger. Said persons were arrested for violating Section 602 of the Penal Code at 12:00 noon of that day. It is further stipulated that the copy of the police report in said matter obtained by the parties is not clear as to the time that the incident was reported to the police. It was stipulated that Petitioner and Employer representatives at the hearing read the time on the police report as 11:35, while the Hearing Officer and Intervenor's attorney read the time reported as 11:55. It is not clear from the record whether said organizers appeared on the property before or at lunchtime. It is stipulated that they were arrested for trespassing upon private property.

2. Post-Act Conduct

There is uncontroverted evidence that Petitioner Teamsters were granted access to Employer's vineyards for organizers purposes. Witnesses Raquel Ballones and Alfredo Huerta each testified to pre-election organizing activities by Teamster Organizer Frank Mendoza, the man who signed the Petition for Certification, Exhibit 1 hereto.

These incidents are discussed more fully below Employer at no time represented that such access was not granted. The controversy between the parties centers more on the events of September 15, 1975, two days prior to the election. In assessing the following testimony, it should be noted that (1) Pete Maturino, Petitioner's representative at this proceeding, was also the principal' Teamster involved in the events of September 15, but chose not to testify; and (2) the Employer's

principal actor in the events of September 15, Ed Redger, also failed to testify on this point.

Employer's General Foreman, Louis Amaya, testified that he was in one of Employer's fields bordering on Cecil Avenue, on the morning of September 15, 1975. He further testified that at 11:45 or 11:50 a.m., four or five persons (one with a UFW button) walked in 300 feet or so from the road to talk with workers. Mr. Amaya then told one organizer, whom he identified as "Lolo" to leave the premises because he was trespassing. Lolo replied that he had a right to speak to workers on the property. Amaya further testified that he then called Ed Redger, his supervisor, on the car telephone at 11:50 or 11:55 a.m. Redger took ter minutes to get there. The workers were then called for lunch. Workers started working towards their cars, parked on Cecil, to get their lunches. Redger told the organizers to get out of the field. Mr. Amaya further testified that Lolo said "OK" and began to walk out. About three or four rows from the road, Lolo stopped for a minute. Redger then took his arm or shoulder, said, "Here, I'll help you," and walked with him until they reached the road. Mr. Amaya further testified that Lolo did not ask for such help. A car then pulled up to the field with Intervenor's attorney, Barry Winograd, in it. Winograd shouted loudly at Redger to take his hands off Lolo, got out of the car, spoke briefly to Lolo, then left. Amaya first stated that Winograd did not speak to Redger after he got out of the car, then stated that he had no recollection whether they had had any conversation or not. Winograd's testimony, where relevant, is basically consistent with that of Amaya in these regards. He states that

he came to the field at approximately 12:15 or 12:20 p.m., after a pre-election meeting at another ranch. He saw a man pushing Lolo Flores, the UFW organizer. He states, however, that he did converse with Redger, and that the latter man told him that the police were on their way and that organizers were not allowed upon the Employer's premises.

Winograd further testified that he then saw Maturino, Petitioner's representative, standing in the field. Winograd asked Redger why Maturino was allowed there. Winograd testified that Redger said words to the effect that the Teamsters could come on when they wanted to because they already had a contract. However, Redger did not state that Maturino was there on union business. Standing five to ten feet from Maturino, Winograd saw that he had leaflets but could not see what they said. Winograd left moments later and did not see what Maturino did with the leaflets. He was there a total of approximately five minutes.

Amaya testifies chat he also saw Maturino in the field He does not remember whether he had leaflets. After Winograd left, Maturino spoke with Redger for approximately five minutes, then left.

On cross-examination, Amaya was asked why he called Redger at all. Amaya first said that he called Redger only because Redger was his supervisor and he wanted help. He first stated that he had no instructions from Redger. He then admitted talking to Redger about what to do if union organizers entered the field a few days previous to this time. He also then admitted being instructed to tell organizers to leave and to call Redger if they did not.

There was no further testimony bearing on the question of a no-solicitation rule or discriminatory access. The facts in this matter are largely agreed to by both sides and bear directly on the allegations contained in Paragraph 15 of Intervenor's Objections.

B. CAPTIVE AUDIENCE SPEECHES AND RELATED CONDUCT (PARAGRAPH 16, 25)

It is agreed by the parties that Luis Zendejas was at all times pertinent hereto a crew boss employed by Employer. His immediate supervisor during the week of September 12 through September 17, 1975, was Mr. Amaya.

Raquel Ballones testified, and Employer Business records confirm, that she was a member of Zendejas' crew between September 12 and 17, 1975. She testified that during the week prior to the election, Zendejas told many workers to vote for Petitioner, "and don't forget" .On September 14 1973 less than 24 hours before the election, she testified that Zendejas went around the workers in the field with the Frank Mendoza, stipulated to be a representative of Petitioner, stating that all workers should vote for he Teamsters on election day. Mendoza also stated in Zendejas presence, that workers should sign a below legal tablet that he carried around with him or they would be fired. The yellow tablet did not consist of authorization cards. Neither Mendoza nor Zendejas approached her personally because of her Known UFW sympathies from prior encounters with them.

There was no testimony that employees were requires to attend any mass assembly. It may be noted, however, that the Zendejas speeches or campaigning were given on working time

under conditions in which the workers had no choice but to listen to his statements.

Witness Amaya testified that he was Mr. Zendejas ' immediate supervisor and often worked with him in the field. Although called by Employer, Amaya did not contradict witness Ballones' testimony with respect to this incident.

Witness Ballones further testified as to one other incident, which took place on election day. She stated that at approximately 10:00 a.m. on September 17 a bus came to pick up workers in the field in order to take them to vote. She stated that she was one of the first to board from her crew but sat near the front of the bus. She further stated that she saw and heard Mr. Zendejas standing by the door to the bus telling all who boarded to vote for the Teamsters and help the Teamsters. An ALRB agent was standing near the bus. However, witness Ballones believes that he did not understand Spanish. Mr. Zendejas did not use the word "Teamsters" but rather a slang word which an English-speaking Board agent would not understand.

Witness Amaya stated that he was present in the same field by the time that Ms. Ballones and her crew boarded the bus. As people were boarding, Amaya stated that he was standing at 15 feet from the bus. He agrees that Ballones was one of the first people on. He further testified that Zendejas was in the middle of those getting on the bus on its first trip out of two. In short, perhaps 20 people got on before he did. He further testified that he did not see Zendejas standing by the doer of the bus or urging workers to vote for the Teamsters.

There was no further testimony regarding this election

day incident. The testimony of Ballones and Amaya, while not flatly contradictory, requires some degree of choice based on the credibility of the witnesses. In this instance, Ballones would have been relatively closer to Zendejas than Amaya was. However, the key factor in the credibility of these two witnesses was the unusual and often perturbing inconsistent and selective memory of witness Amaya throughout his testimony, as a perusal of the transcript should indicate. Although such inconsistency does not necessarily negate the truth or accuracy of any specific facts testified to, it has inevitably lessened my confidence in the credibility of his testimony as a whole.

Witness Amaya did testify at great length, both on direct and cross-examination, regarding the status and duties of Mr. Zendejas. The purpose of the parties was apparently to prove or disprove the allegation that Mr. Zendejas was a "supervisor" under the meaning of Section 1140.4(j) of the Act, and, therefore, entitled or not entitled to vote in the election. See Report on Challenged Ballots, Exhibit 15. However, Mr. Zendejas' status is relevant to the charges in this part only insofar as it affects his status under Section 1140.4(c) of the Act as a person acting directly or indirectly "in the interest" of an employer. Given the fact that Section 1140.4(c) has at least as broad an application as Sections 2(2) and (13) of the National Labor Relations Act,[3] Otis L. Broyhill Furniture Co., 94 NLRB 1452

3. Section 1140.4(c) reflects the wording of Section 2(2) of the NLRA as originally enacted. Original Section 2(2) was amended and Section 2(13) added in 1947 with the express purpose of narrowing a finding of having "acted for the employer" to rules consistent with common law agency standards. The legislature's express decision to adopt the wording of the original Wagner Act could be construed as broadening the scope of the provision beyond that encompassed by the present NLRA.

(1951); National Paper Co., 102 NLRB 1569 (1953); NLRB v. Mississippi Prod. Inc., 213 F.2d 670 (5th Cir. 1954), Mr. Zendejas' supervisory status would be incidental to whether he acted "in the interest" of the Employer in this matter.

Mr. Amaya testified that Mr. Zendejas' principal task is to tell people how to pick and pack wine grapes. Zendejas assigns families or teams to rows at the outset of picking an area, tells the workers when to start and stop work, and inspects their work to assure adequate performance. Amaya has never checked the adequacy of Zendejas' performance, and states that he trusts Zendejas very much. Zendejas is with the workers the whole day. Amaya, his supervisor, is there sometimes but also checks irrigation equipment and placement, tractor drivers, and other administrative matters. Amaya testified that Zendejas does not hire, fire, transfer, suspend, lay off, or recall workers, nor does he make recommendations to do so, Amaya states that he has no authority to resolve grievances. On the other hand, Amaya has never resolved any grievance brought to him by or involving Zendejas.

Zendejas has been a crew boss for two picking seasons. His crew size varies from 30 to 35 voters. Including the 10 of his own family. Amaya further testified that Amaya did not recall approximately 20 workers to work on or about September 12. He stated that Zendejas might have told the people to return. (He also stated first that the other general foreman could not have recalled the workers to Amaya's crew, and then later stated that he might have done so.) In summary, the testimony clearly showed that Zendejas responsibly directs his crew in work to be

done, was ambiguous on hiring or recall authority, and indicated, a lack of authority to transfer, suspend, lay off, promote, discharge, reward, or discipline other employees. In general, the workers appeared to perform their tasks without much specific supervision. What day-to-day supervision existed was performed most often by Mr. Zendejas. Cf. Syufy Enterprises, 220 NLRB No. 113 (1975) . There was no further testimony as to Mr. Zendejas relation to Employer or any real or apparent authority granted by the Employer to Mr. Zendejas in this regard.

C. EMPLOYER AID TO PETITIONER TEAMSTERS (PARAGRAPHS 19, 28)

Testimony bearing en Employer support of Petitioner Teamsters by means of discriminatory access rules and Employer adjuration to workers to vote for the Teamsters are discussed in part above.

In addition to the incidents discussed previously Witness Ballones also rectified, and company records confirm that until two weeks before the election she worked for Employer under crew boss Juan Martinez. At that time, Frank Mendoza came into the fields and told the workers to vote for the Teamsters as discussed in subsection D. Indra Mendoza also threatened to have persons fired who did not join the union. The general Foreman of Employer in charge of Juan Martinez's crew, Jim Redger, was present in the hearing room throughout the course of this proceeding. Mr. Redger did not testify.

Alfred luerta was called as witness on behalf of Intervenor UFW; luerta testified, and Employer records confirm that he worked for crew boss Flora Mae Allmond during the week of the election. Huerta testified that on Monday, two days before

the election, Mendoza came to where the workers were working at the 9:30 a.m. break. He stayed for five minutes and passed out magazines with a photograph of the Teamsters' president on the front. Huerta further testified that on Tuesday, the day before the election, Mendoza came at lunchtime with three other Teamster representatives and stayed for five or ten minutes. He talked about the election "tomorrow" and urged workers to vote for the Teamsters. To the extent relevant, this testimony helps to establish the fact that Teamsters were granted access to Employer property for electioneering purposes, while Intervenor UFW was denied such access.

Huerta further testified that Mendoza did not ask him to sign anything, nor did he hear Mendoza threaten to fire anyone if they did not vote for the Teamsters. Because Huerta and Ballones were in separate crews, their testimony is not contradictory. Finally, Huerta's testimony was partially impeached by his statement, that he started work during this season with Employer on approximately September 15. It was stipulated by the parties that Employer's business records would show, if admitted into evidence, that Huerta was employed several months during the year for the employer and especially the employer during most of August and most of September. Nevertheless, Huerta's testimony regarding Mendoza was credible, was confirmed by Ballones' testimony in this regard, and was never refuted by any Employer witness. Nor was Mendoza, who lives in the Delano area, called to the stand by any party.

Ballones and' Huerta also both testified that they were required to sign Teamster authorization cards when they first

applied for work at Mid-State. Both stated that they were required to sign with the Teamsters Union in order to get work. Employer records confirmed that union fees were deducted from his check in January 1975, and no witness refuted testimony that union membership was required.

D. ALLEGED THREATS AND INTIMIDATION (PARAGRAPHS 20 and 29)

Witness Raquel Ballones testified that on two separate occasions, representatives of the Teamsters threatened to have workers fired who did not join the union. The first such incident was while she was working for Juan Martinez's crew approximately two weeks prior to the election. At that time, Mendoza said that if people did not join the union, "le van a correr." Ballones stated that this phrase--literally, "they will run you out"-- meant that people would be fired if they did not join. Mendoza did not physically menace people but did scare many workers with his threats to fire them. Ballones stated that other workers complained to her about these threats.

During the incident described in subsection B, supra, wherein Zendejas and Mendoza campaigned for the Teamsters a few days before the election, Ballones testified that Mendoza repeated his threats to have workers fired if they did not join the Teamsters. Such threats were evidently made in Zendejas' presence.

Witness Huerta stated that no threats were made to his crew.

See Seamprufe, Inc. (ILGWU), 82 NLRB 892 (1949), enf., 186 F.2d 671 (10th Cir. 1951), cert. denied 342 U.S. 813 (1951).

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E. ALLEGED EMPLOYER INTERROGATION OF WORKERS (PARAGRAPHS 21, 30)

Intervenor presented no testimony in direct support of these allegations.

It is conceivable that Zendejas' personal pitch to individual workers in support of the Teamsters could be construed as implied interrogation as well. However, any such inference seems too remote or improbable to draw from the testimony.

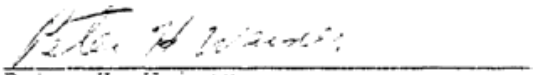
IV. CONCLUSION

In this proceeding, there was credible testimony on a number of incidents. It appears clear from the testimony that Employer utilized a discriminatory access rule before and after enactment of the ALRA. It would appear similarly clear that Employer's crew boss, Zendejas, urged workers to support Petitioner in the election. Testimony on alleged threats and interrogation seems less dispositive. There were few witnesses in this proceeding, and credibility was at times an issue. When the testimony of Intervenor's witnesses, however, it is of interest that various persons did not testify. Among these were Mr. Maturino of the Teamsters and Mr. Jim Redger of Employer, both of whom were present throughout the proceeding and should have had direct knowledge of some of the incidence about testimony was given. Luis Zendejas of Employer and Frank Mendoza of the Teamsters were not called to testify, although neither was alleged to be unavailable. Similarly, Mr. Ed Redger, the Ranch Superintendent, was present during part of the hearing, but was never called to testify.

Pursuant to 'my statutory and administrative authority, 28 I make no findings of fact herein nor recommendations to

the Board.

Respectfully submitted,



Peter H. Weiner

Hearing officer

Dated: February 5, 1976

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