

STATE OF CALIFORNIA
AGRICULTURAL LABOR RELATIONS BOARD

TRIPLE E PRODUCE CORP.,)	
Employer,)	Case No. 75-RC-49-S
)	
and)	4 ALRB No. 20
)	
UNITED FARM WORKERS OF AMERICA,)	
AFL-CIO,)	
)	
Petitioner.)	
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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 United Farm Workers of America, AFL-CIO (UFW), on October 17, 1975, a secret ballot election was conducted among the agricultural employees of the Employer on October 24, 1975. The tally of ballots furnished the parties on that date showed the following results :

UFW	131
No Union	46
Void Ballots	1
Challenged Ballots ...	66

The Employer timely filed a number of objections to the election, all but two of which were dismissed by either the Regional Director of the Sacramento Region or the Executive Secretary. On April 25 and 26, 1977, Investigative Hearing Examiner (IHE) Constance

Carey conducted a hearing on the two remaining objections and thereafter issued a decision recommending that the objections be dismissed and that the UFW be certified as the exclusive collective bargaining representative of the employees involved. The Employer subsequently filed exceptions and a brief and the UFW filed a statement in opposition to the Employer's exceptions and cross-exceptions of its own.

The Board has considered the objections, the record and the IHE's Decision in light of the exceptions, cross-exceptions, and the briefs, and has decided to affirm the rulings, findings, and conclusions of the IHE, as modified herein, and to adopt her recommendations.

The only objections before the IEE were those alleging violations of the access rule by UFW organizers. Although the Employer is now urging that we also consider the effect of alleged threats of job loss made by the organizers, these allegations were not the subject of any objection filed by the Employer within the five-day period specified by Labor Code § 1156.3(c). See also 8 Cal. Admin. Code §§ 20365 (a) and (d) (1975). The allegations are therefore untimely both under the statute and the regulation implementing it and will not be considered by the Board. Cf. Harden Farms of California, Inc., 2 ALRB No. 30 (1976); Skyline Farms, Inc., 2 ALRB No. 40 (1976). Consequently, we decline to adopt the IHE's decision to address the issue and her substantive analysis.

The Employer excepts to the IHE's denial of its request for continuance, made at the hearing. Our review of the record

shows that the IHE's ruling was a proper exercise of her discretion and it will not be disturbed.

The Employer's witness under subpoena, a former Board Agent, was unable to attend on the date specified, and the Employer made its request for continuance at the hearing. The offer made regarding the materiality of the witness' testimony was solely that the testimony "may be" of a critical nature. However, one Board Agent had already testified, and the Employer conceded that it desired to question the absent witness about substantially the same events covered in that testimony. On the basis of this record, the IHE could properly have concluded that the Employer had not met its burden of showing that the "... facts expected to be proved by the absent witness cannot otherwise be proved." Ferrari v. Mambressetti, 70 Cal App. 2d 492, 493 (1945). We therefore affirm the IHE's decision to deny the requested continuance.

The IHE found that the UFW did have an excessive number of organizers at the Employer's ranches on the day before, and the day of, the election. She additionally found that, but for a brief delay in the movement of tomato trucks, there was no disruption of work occasioned by the organizers' activity. Finally, she determined that the evidence was insufficient to support a finding that organizers had spoken with employees while they were working. The IHE ultimately concluded that the access violations found were not of the character to have adversely affected the employees' free choice of a collective bargaining representative. See K. K. Ito, 2 ALRB No. 51 (1976).

Although we affirm the IHE's ultimate conclusion, we do

not adopt her complete rationale. We reject, for the reasons in Martori Brothers Distributing, 4 ALRB No. 5 (1978), her finding that the access rule was not violated where organizers stayed with the workers for more than one hour before work began when the commencement of work was delayed due to bad weather. As to the public or private nature of the roads where the organizers were located, although the record appears inadequate to support the Employer's claim that it had exclusive right of control over these roadways, we need not rely upon that failure of proof. Even if the roadways were property of the Employer, the record does not establish that the "excess access" taken was of the character which would warrant setting aside the election.

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

CERTIFICATE OF REPRESENTATIVE

It is hereby certified that a majority of the valid ballots have been cast for the United Farm Workers of America, AFL-CIO, and that, pursuant to Labor Code § 1156, the said labor organization is the exclusive representative of all of the agricultural employees of Triple E Produce Corp. in the State of California, for the purpose of collective bargaining, as defined in Labor Code § 1155.2(a), concerning employees' wages, working hours, and other terms and conditions of employment.

DATED: April 13, 1978

GERALD A. BROWN, Chairman

ROBERT B. HUTCHINSON, Member

HERBERT A. PERRY, Member

TRIPLE E PRODUCE CO.

Case No. 75-RC-49-S

IHE DECISION

After an election won by the UFW, a hearing was held on two objections alleging that UFW organizers had violated the access rule on the day before, and the day of, the election by being present in excessive numbers and during work time at Employer's two ranch sites.

The IHE found that an excessive number of organizers were present at one work site on the day before the election, and at both sites the day of the election. The IHE found that there was insufficient evidence that the organizers had spoken with workers during work time. The IHE ultimately concluded that as judged by the Board's standards in the Dessert Seed and K. K. Ito cases, the excess access was not of the character to have interfered with the Employee's free choice for or against a bargaining representative. The IHE recommended that both objections be dismissed and the UFW be certified.

BOARD DECISION

The Board adopted the IHE's recommendation that the objections be dismissed and the UFW be certified. However, it declined to adopt the IHE's decision to treat an issue not set for hearing and her analysis of the issue. As the Employer's objection that the UFW organizers made certain threats of job loss to workers had not been filed within the 5 day period set forth in L.C. § 1156.3 (c) and §§ 20365(a) and (d) (1975) of the Regulations, it was not properly before the Board. Citing *Harden Farms*, 2 ALRB No. 30 (1976); *Skyline Farms, Inc.*, 2 ALRB" No. 40 (1976).

The Board also expressly declined to adopt the IHE's conclusion that the access rule is not violated when organizers stay with the workers for more than one hour before work where work is delayed due to bad weather. Citing *Martori Bros. Distributing*, 4 ALRB No. 5(1978).

Finally, the Board upheld as a proper exercise of discretion the IHE's decision to deny the Employer's request for continuance, because on the facts of the case, the Employer had failed to show that the facts expected to be proved by the absent witness could not otherwise be proved. *Ferrari v. Mambressetti*, 70 Cal. App. 2d 492, 493 (1945).

STATE OF CALIFORNIA
AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of:

TRIPLE E PRODUCE CORPORATION,

Employer, and

Case No. 75-RC-49-S

UNITED FARM WORKERS OF
AMERICA, AFL-CIO,

Petitioner.

James J. Meyers, Jr., Littler, Mendelson.
Fastiff & Tichy, for the Employer.

Linton Joaquin and Curt Ullman, for the United
Farm Workers of America, AFL-CIO.

DECISION

STATEMENT OF THE CASE

CONSTANCE CAREY, Investigative Hearing Examiner: This case was heard before me in Stockton, California, on April 25 and 26, 1977. The employer filed 24 objections to the election which was held at Triple E Produce on October 24, 1975. Five of these were dismissed by the Sacramento Regional Director on December 22, 1975. The executive secretary reviewed the remaining objections and dismissed 17 of them on January 18, 1977. Two objections were set for hearing.

Both parties were represented at the hearing and given full opportunity to participate in the proceedings. Each presented oral argument on the record at the conclusion of the taking of evidence. The employer filed a brief with me at the close of the hearing.

Upon the entire record, including my observation of the

demeanor of the witnesses, I make the following findings of facts, conclusions and recommendation.

FINDINGS OF FACT

I. The Objections

The two objections set for hearing were:

1. Whether UFW organizers were present at the Paulson and McCloud Ranches in excessive numbers on election day and the McCloud Ranch on the day prior to the election.

2. Whether UFW organizers were present on election day at the Paulson and McCloud Ranches while the employees were working and on the day prior to the election at the McCloud Ranch while employees were working.

If either or both violations of the access rule were proven, the issue was whether they affected the results of the election by depriving employees of their free choice of a bargaining representative.^{1/}

II. Continuance Request

The employer argued throughout the hearing that a continuance was required to enable it to receive the testimony of Board agent Lu Perez.^{2/} Mr. Perez was served with a subpoena on

1/The UFW received 131 votes, no union 46 votes. There were 66 " non-determinative challenged ballots and one void ballot.

2/ Mr. Meyers argued that an unfair labor practice hearing scheduled for February 1, 1977 was not held on that date. He alleged that the general counsel with concurrence by the union requested a continuance which the employer opposed. Although he said he does not know the disposition of this request, he noted that the hearing was not held on the scheduled date and the complaint was withdrawn ten days later. The clear implication of Mr. Meyers' argument was that a continuance was granted to the general counsel but not to the employer. As Mr. Meyers should know, the order denying the motion for continuance was signed January 26, 1977 and served on his law firm by certified mail on that date. The return receipt is dated January 27/ 1977. The motion to withdraw the complaint was served in the same manner on January 31, 1977.

Friday, April 22. He was in touch with James Meyers, the employer's attorney, during the weekend. Meyers said Perez indicated a willingness to testify at a future time but stated he would be unable to appear on April 25 due to previously scheduled state business. He now works for another state agency.

The continuance request was denied. Mike Vargas, another Board agent involved in the election, testified in regard to organizers present at the election sites. That would have been the scope of Perez's testimony. Meyers said he hoped that Perez would remember more than Vargas did. He also said he hoped Perez would be able to testify in regard to alleged complaints of the employer to the Board agents in regard to the numbers of organizers present before the polls opened. Since Meyers was unable to affirm what Perez's testimony would be, the need for a continuance was not established. Also, Meyers was present at the election and allegedly complained to the Board agents himself. He chose not to testify, although he had first hand knowledge of this matter.

III. Paulson Ranch

Several witnesses testified for the employer in regard to UFW activity on the Paulson Ranch on election day.^{3/} The workers began arriving at 8:00 a.m. although work did not begin that day until 10:00 a.m. These workers were employed through labor contractor,

3/The brief submitted by the employer at the end of the hearing states there were 75 employees present at the Paulson Ranch the day before the election. It also states "... the record testimony herein establishes there were 16-18 UFW organizers on the Paulson Ranch on the day prior to the election." This is contrary to uncontradicted testimony that no employees worked at Paulson Ranch the day before the election. It is also irrelevant since outside the scope of the hearing which was concerned with UFW access at McCloud and Paulson Ranches on election day but only McCloud Ranch on the day before the election.

Alphonso De Dios, who regularly provided a crew of 80 workers for Triple E. It was a cold morning so workers either waited in their cars or gathered around a make shift bonfire. Workers parked on a private ranch road adjacent to the tomato fields.

Shortly after the workers began arriving, they were joined by three or four cars with 10-12 UPW organizers. These cars parked off the road, the organizers got out and leafletted workers and talked with them. Employees Evarado Lopez and Raquel Herrera, as well as foreman Baldo De La Rosa, testified for the employer. Each stated that the organizers did not enter the fields and did not talk with employees after they began work.

UFW organizer Rebecca Gonzales said that Triple E Produce was organized out of the Stockton UFW office. She said that there were never more than nine employees in that office so there would not have been more than nine organizers present at Triple E at any time. Organizer Reuben Serna testified similarly that the Stockton office had around eight employees. Both Serna and the UFW observer said there were only about four or five organizers at each of the Triple E voting sites.

The testimony is in conflict as to the number of organizers at Paulson Ranch on election day. Company witnesses testified to anywhere from 10-14 organizers and the UFW to no more than four or five. However, union witnesses testified to the number of organizers present immediately prior to the election whereas the employer's witnesses spoke of the number of organizers present early that morning.

Although the three witnesses for the employer (Lopez, Herrera, and De La Rosa) each said employees were afraid to vote,

they agreed that all employees at the Paulson Ranch did in fact vote. De La Rosa and Herrera said the employees were afraid to vote because the organizers told them that if they didn't vote for the union they would be replaced. IV. McCloud Ranch - Day Before the Election

The early morning October weather at McCloud Ranch was chilly. As they did at Paulson Ranch on election day, workers arrived early and waited in their cars for work to begin. Workers arrived early to be sure of having a job. Triple E relied on labor contractor Al Sanchez to provide workers for the McCloud Ranch harvest. Testimony varied as to the number of workers on that day but it was somewhere between 80 and 100.

The UFW offered no specific testimony in regard to the number of organizers at McCloud Ranch on the day before the election but relied on the fact that only eight or nine persons worked in the Stockton office to refute the testimony of employer witnesses. A supervisor, a picker and a field manager testified for Triple E. Their estimates of the numbers of organizers again ranged from 10-14. The organizers stayed from two to four hours. Field manager Ray Wright saw organizers in the fields but does not know whether they talked to workers. He saw two organizers near a truck where pickers took their tomatoes to be checked.

Contractor Supervisor Figueroa drove his family to work that day. He remained with his family in the car until work began. Then he left. One or two union people ^{4/} came to the car while they waited. The union people told him to vote for the union to get

4/This witness said that he didn't know what a union organizer was, He spoke of "union people."

more benefits. They also said to his family that they would lose their jobs if they didn't go with the union and that union people would get the jobs. He said the union people stayed there for two or three hours that day. He could not know this from his own experience, however, as he was there for an hour or less.

Picker Manuel Mungia remembered being told by the union people that if he did not vote for the union, he would be replaced. He said he feared for his job although the union did not state who would replace him.

V. McCloud Ranch - Election Day

The testimony was confused as to when the UFW arrived at McCloud Ranch on election day. Supervisor Figueroa and picker Mungia said that the union was present when they arrived about 9:00 a.m. Field manager, Ray Wright, remembered that he arrived just before 10:00 and that the union arrived after him. All agreed that picking began about 10:00 or 10:30. Wright remembered there were about 90-100 workers that day. The employer witnesses said there were between ten and fourteen organizers present at the site. The union testimony was similar to that in regard to the Paulson site as far as the number of organizers on election day was concerned.

Ray Wright said organizer cars blocked access to the field by the tomato trucks. He asked that they be removed but the organizers responded that the employees were not yet working. Their slowness at removing their cars held up the start of work for about 15 minutes. Wright left after work began.

Supervisor Figueroa said the union people told him the workers would not have a job if they didn't vote for the union. He

remembered the union people saying the employees needed the union to keep their jobs and to get benefits.

Employer witnesses noted many workers left without voting. Manuel Mungia, a picker, said he did not vote. The reason he did not vote was that he had finished work and did not want to bother; he was not interested. Mungia said the union people stayed in the field on election day for two hours talking to the workers. His was the only testimony regarding work time access by the union.

When Wright returned to McCloud to bring the Board agents to the election site, he saw organizers talking to workers after the picking was stopped for the election. Organizers were talking to employees waiting for the polls to open.

FACTUAL RESOLUTIONS

I find that there were ten organizers or more at all three sites. Mr. Vargas, the supervisor, specifically remembered counting the 14 organizers at the McCloud Ranch on election day. All other employer witnesses consistently testified to seeing from ten to fourteen organizers at each site. The testimony of the DPW was not sufficient to rebut the employer's testimony. Mr. Serna, an organizer, credibly testified that there were only four or five organizers at each election site. This testimony was corroborated by observer Jose Lopez and Board agent Mike Vargas. The testimony of the UFW witnesses and the Board agent is only in regard to election day and only in regard to the polling sites near the time of the election. Thus the employer's testimony stands unrebutted as to the numbers of organizers at McCloud Ranch on the day prior to the election and at both ranches on election day before the time of the election.

Ms. Gonzales conceded that the UFW has volunteers as well as paid organizers. Perhaps it was volunteers who swelled the number of organizers beyond the normal complement from the Stockton office.

All witnesses agreed that no organizers talked with workers at Paulson Ranch on election day after the work began.

There was insufficient evidence to support a finding that organizers talked with employees while they were working at McCloud Ranch on the day before the election. However, organizers did talk with workers after they stopped working while they waited for voting to start on election day.

CONCLUSIONS OF LAW

The Board has ruled that excess access on the part of a union will not be grounds in itself for overturning an election. K.K. Ito, 2 ALRB No. 51 (1976), Dessert Seed, 2 ALRB No. 53 (1976). An election will be set aside only if it is shown that the excess access in some way deprived voters of their free choice of a bargaining agent.

Here, access in excess of that allowed under 8 Cal. Admin, Code §20900 was shown both on the day before the election and on election day. There were from 10-14 organizers present among 80-100 workers. For 80 workers the law allows six organizers while for 100 workers, seven organizers are permissible.

The organizers were also at the McCloud Ranch on the day before the election and at the Paulson Ranch on election day for more than one hour before the start of work. The regulations give organizers only one hour of access before work.^{5/} The harvesting

^{5/} 8 Cal. Admin. Code §20900(e) (3)(A)(1976).

at Triple E did not start in the mornings if it was extremely cold. The workers arrived as much as two to three hours before harvesting started since they could not be sure when picking would begin and did not want to take a chance of being replaced by other pickers. The union usually arrived at the same time workers arrived. The organizers could not know in advance what time work would begin, either. The purpose of the access regulations is to assure workers of the opportunity to learn about unions.^{6/} The one hour limit on the presence of organizers before work would normally encompass the full time workers would be present. In the situation where neither workers nor organizers can know ahead of time when work is to begin, there seems no purpose in requiring organizers to leave before picking actually starts.

The organizers claimed to be on public roads. The employer stated that the roads on which organizers congregated were private access roads. The employer did not produce the records which allegedly sustained its position that its lease gave it control of these roads. Because of the conclusion that organizers may remain with employees until work begins when the work day starts later than normal because of weather conditions, it is not necessary to determine whether the access roads are public or private.

At Triple E the testimony reflected that the union usually left when the work began. Hay Wright stated that on one occasion, the start of work was delayed because organizer cars kept tomato trucks from the fields. The organizers moved their cars when work began. Disruption, if any, was slight because the tomatoes are taken to the trucks in buckets after they are picked. Picking could

6/ Tex-Cal Land Management, Inc., 3 ALRB No. 14 (1977).

begin, therefore, before the trucks reach the fields. One minor disruption of work due to excess access is insufficient reason to overturn an election.
7/

As to the charge that organizers were present while employees were working, the evidence is weak. There were some union people in the fields on election day before the polls opened. No interference with work was shown. The Board has previously determined that campaigning by a union before the opening of the polls is not ground for setting aside an election, even when the campaigning occurs within the polling area.^{8/}

The employer attempted to prove that the organizers intimidated workers. There was testimony that workers were afraid to vote and that many workers left the McCloud Ranch on election day without voting. The only worker who said he did not vote said that he did not want to be bothered. The testimony did not establish that any workers failed to vote because they were afraid. There was a fourth polling place in the city of Stockton. Perhaps some of the workers who left the McCloud Ranch voted in Stockton after work. The record does not establish whether the workers who left work early voted later or not.

The "threats" of loss of work if the employees did not support the union are not of a nature to affect employees' free choice. A reasonable interpretation of this statement is that the union would seek a security clause if it won the election.^{9/} There

7/ Dessert seed Company, Inc., supra.

8/ P.P. Murphy s 'Sons, 3 ALRB No. 26 (1977).

9/ Patterson Farms, Inc., 2 ALRB No. 59 (1976).

was testimony that the organizers spoke of union security.

There is no evidence that the excess access taken by the UFW affected the free choice of the voters.

RECOMMENDATION

Based on the findings of fact and conclusions of law, 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.

DATED: August 23, 1977

Respectfully submitted,

Constance Carey

CONSTANCE CAREY
Investigative Hearing Examiner