

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

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| RON NUNN FARMS, |) | |
| |) | |
| Employer, |) | Case No. 75-RC-42-S |
| |) | |
| and |) | |
| |) | |
| UNITED FARM WORKERS OF |) | 4 ALRB No. 31 |
| AMERICA, AFL-CIO, |) | |
| |) | |
| Petitioner. |) | |
| |) | |

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 proceeding to a three-member panel.

Following a Petition for Certification filed by the United Farm Workers of America, AFL-CIO (UFW) on October 10, 1975,^{1/} a representation election was held on October 20, 1975, among the agricultural employees of Ron Nunn Farms, the Employer herein. The tally of ballots showed that there were:

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|-------------------------------------|-----|
| UFW | 105 |
| No Union | 71 |
| Unresolved Challenged Ballots | 14 |
| Void Ballot | 1 |

^{1/} The Employer argues that the petition was actually filed earlier than October 10. The Investigative Hearing Examiner found that the petition was filed on October 10, and we note that the regulation in effect at that time, Section 20310(b)(1975), states that a "petition will not be deemed filed until supported by the proof of service." Service herein was effected on October 10, 1975, and the proof of service bears that date. Therefore, any earlier filing would not have been effective before October 10.

The Employer filed timely objections, five of which were set for hearing. Subsequent to the hearing, Investigative Hearing Examiner (IHE) Jeffrey Fine issued his initial Decision recommending that the objections be dismissed and that the election be upheld. The Employer timely filed more than 300 exceptions to the IHE's Decision and a supporting brief. The UFW filed a single cross-exception and a statement in opposition to the Employer's exceptions,^{2/} to which the Employer filed a response.

The Board has considered the objections, the record,^{3/} and the IHE's Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings and conclusions of the IHE as augmented herein, and to adopt his recommendations, dismiss the objections and to uphold the election.

The major issue at the hearing was whether the Employer was prejudiced because the election was held on the tenth day following the filing of the petition. The Employer excepted to the fact that the IHE did not determine the actual number of eligible voters. We find it unnecessary to do so, as our conclusion would be the same whether we accept the figure estimated by the UFW or by

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^{2/} The UFW has moved to dismiss the Employer's exceptions for failure to conform to Section 20370 (g) (1976) of the regulations. As we consider there was substantial compliance with the regulation, the motion is hereby denied.

^{3/} On October 27, 1977, the Employer moved to reopen the record to include two additional documents. As these documents contain evidence similar to other evidence properly ruled irrelevant by the IHE, we deny this motion.

the Employer.^{4/}

The IHE concluded that only six employees were shown to be disenfranchised by the late holding of the election. The Employer argues that employee Vicki Garcia was also disenfranchised by the late holding of the election, citing uncontradicted testimony that she left before the election. However, the fact that seven employees may have been disenfranchised by the late holding of the balloting herein is an insufficient reason to set it aside, as seven votes could not have affected the outcome of the election. The record does not establish that any other eligible voters were disenfranchised because of the timing of the election. The purpose of the seven-day requirement is to assure the largest possible turnout of eligible voters. Where the turnout is as high as it was in this election, the purpose of the Act would not be served by setting the election aside without evidence that a number of employees sufficient to affect the results were disenfranchised by the timing of the election. Klein Ranch, 1 ALRB No. 18 (1975).

The Employer attempted to introduce evidence showing that farm workers often leave the area where they have been working after the harvest has been concluded. There is no question here that the election was held two days after the end of the tomato harvest. However, the evidence is persuasive that many of the tomato workers whom the Employer claims were disenfranchised

^{4/}According to the UFW's figures, the turnout was 80 percent (191 out of 239 eligible employees) while the Employer figures the turnout was 76 percent (190 out of 250 eligible employees).

actually remained in the area and voted in the election.

The Employer's argument that there was inadequate notice of the election is not persuasive. The UFW notified tomato workers all through the weekend before the election and, as noted by the UFW's exception, the Employer also notified tomato workers of the election. Several of the timekeepers on the tomato machines testified to being called by their supervisor and asked to notify all the workers on their machines. They also testified that the UFW handed out unofficial notices of the time of the election before the tomato harvest ended.

The record herein does not establish that lettuce workers or general laborers were disenfranchised by the date chosen for the election. The Employer has shown that some of these workers did not work on election day, but has not shown that they did not vote. The lettuce workers and general laborers worked beyond October 20. Absent specific supporting evidence, it would be mere speculation to assume that employees did not vote in the election if they were not working that date and that they would have voted had the election been held within seven days after the effective filing date.

No reason for the late holding of the election was elicited at the hearing.^{5/} The IHE found that the Board Agent mistakenly thought he had an agreement from the parties to hold the

^{5/}The Employer's theory that the Board Agent in charge of the election was acting in concert with the UFW to delay the election in order to enable the union to obtain sufficient authorization cards to meet the Act's showing of interest requirement is unsupported by the record. Although the Board Agent testified at the hearing, the Employer did not question him as to the reason for the delay.

election on Saturday, October 18, the last day of the tomato harvest, and eight days after the filing of the petition. However, the Employer's lettuce workers were not working on that day. Under the circumstances, it was reasonable to set the election for October 20 when the lettuce crews would be working, while making sure that the tomato crews received notice. There is substantial evidence, in the record and in the tally of ballots, that the notice given was adequate.

The Employer contends that the Board could not have decided on the time for the election before the pre-election conference held on the afternoon of October 19. We find that the parties were informed on October 18 that the election would be held on October 20. It is not improper for a Board Agent to determine the time and place of an election before the pre-election conference, especially when, as in this case, this determination facilitates notice both to the parties and to the employees.

On the basis of the above findings and conclusions, and the record as a whole, 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 Ron Nunn Farms in Contra Costa County for the purposes of collective bargaining, as defined in Labor Code Section 1155.2(a),

concerning employees' wages, working hours and other terms and conditions of employment.

Dated: May 25, 1978

GERALD A. BROWN, Chairman

RONALD L. RUIZ, Member

HERBERT A. PERRY, Member

CASE SUMMARY

Ron Nunn Farms (UFW)

4 ALRB No. 31

Case No. 75-RC-42-S

IHE DECISION

After an election won by the UFW, a hearing was held on five Employer objections: (1) whether failure to hold the election within seven days from the filing of a petition for certification prejudiced the Employer; (2) whether the Board failed to give adequate notice of the election to eligible employees; (3) whether the Board did not decide on the unit and time and place of the election in sufficient time to effectively inform the voters; (4) whether the UFW intimidated workers to vote for the UFW or not at all; and (5) whether an employee recklessly drove in the fields while drunk and created a disturbance which affected the outcome of the election.

The petition was served and filed on October 10, 1975, the tomato harvest was completed on Saturday, October 18, and the election was held on Monday, October 20. The IHE found that the Employer did not prove a substantial number of employees were disenfranchised by holding the election after the seven-day period. No list of actual voters was available, but there was approximately an 80 percent turnout based on the number of employees on the eligibility list. Notice was found to be adequate. The IHE found that intimidation by the UFW during solicitation of authorization cards was not proven and that an alleged intimidating phone call was received after the election, so could not have affected the results of the election. The employee's disruptive driving during the election was not proven to have an effect on the election.

BOARD DECISION

The Employer filed more than 300 exceptions. The Board affirmed the rulings, findings and conclusions of the IHE, adopting his recommendations. The Board found that when turnout is as high as here, no purpose would be served in setting aside the election for failure to hold it within seven days without showing that a number of employees, sufficient to affect the election results, were disenfranchised. Evidence as to general migratory patterns of farm workers was properly ruled irrelevant.

Objections dismissed. Election upheld.
Certification granted.

This summary is furnished for information only and is not an official statement of the Board.

STATE OF CALIFORNIA
AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of:

RON NUNN FARMS,

Employer,

Case No. 75-RC-42-S

and

UNITED FARM WORKERS OF
AMERICA, AFL-CIO,

Petitioner.

Alan S. Levins, Naomi Young, Littler
Mendelson, Fastiff & Tichy for the
Employer.

E. Michael Heumann III for the
United Farm Workers of America,
AFL-CIO.

DECISION

JEFFREY FINE, Investigative Hearing Examiner: This case was heard before me in Stockton, California, on April 19 through 22, 1977 and May 2 through 5, 1977.

An election was held at Ron Nunn Farms in Brentwood, California on October 20, 1975. The tally shows:

| | |
|---------------------|-----|
| United Farm Workers | 105 |
| No Union | 71 |
| Challenged Ballots | 14 |
| Void Ballots | 1 |
| Total Ballots Cast | 191 |

The employer timely filed objections to this election.

Ultimately the following issues were set for hearing.

1. Whether the holding of the election in violation of Labor Code Section 1156.3(a) (failure to hold an election within

seven days from the filing of a petition for certification) prejudiced the employer;

2. Whether the Board failed to give adequate notice of the election to eligible employees;

3. Whether the Board did not decide on the unit and time and place of the election in sufficient time to properly and effectively inform the voters regarding that information;

4. Whether the United Farm Workers of America, AFL-CIO, intimidated employees to either vote for the United Farm Workers of America or not vote at all. The evidence heard may include conduct which, independently of its relationship to a showing of interest, is of such a nature as to constitute a basis for setting aside the election; and

5. Whether an employee recklessly drove in the fields while drunk and created a disturbance which affected the outcome of the election.

All parties were given full opportunity to participate in the hearing. Upon the entire record, including my observation of the demeanor of the witnesses, and after consideration of all available evidence, I make the following findings of fact, conclusions, and recommendations.

JURISDICTION

The employer argues that the Board lacks jurisdiction in this case although the employer did not claim, present evidence, or seriously contest in any way the conclusion that Ron Nunn is an agricultural employer within the meaning of the Agricultural Labor Relations Act (Act). I find on the basis of the entire record that Ron Nunn Farm is an agricultural employer.

The apparent basis for the employer's assertion that the Board lacks subject matter jurisdiction is the fact that the election was held on October 20, 1975 at least 10 days after the filing of the petition in contravention of Labor Code Section 1156.3(a). The Board has held in Klein Ranch, 1 ALRB No. 18 (1975) that holding an election more than seven days after a petition has been filed does not rob it of jurisdiction and accordingly I find that the Board retains jurisdiction. (See also Jack or Marion Radovich, Jake J. Cesare & Sons v. ALRB, 5 Civ. No. 3073, July 2, 1977.) I further find that the United Farm Workers of America, AFL-CIO, is a labor organization within the Act.

STATEMENT OF THE CASE

Petition Filed October 10, 1975

There is some confusion as to exactly when the petition for an election was filed. Reuben Serna handed Ron Nunn a copy of the petition at approximately 3:00 p.m. on Friday, October 10, 1975, and told Nunn that the original would be filed the same day in Sacramento.^{1/} (Testimony of Ron Nunn)

Nunn testified that his impression was that the petition had not yet been filed but would be filed right away. A copy of the petition handed to Nunn (Employer's Exhibit 1) is not dated. The petition which was filed in Sacramento is date stamped "October 01, 1975" but "10-10-75" is written above the "date filed" line.^{2/} Reuben Serna declares, in the proof of service accompanying the petition

^{1/} It was stipulated during the hearing that Serna was an organizer for the UFA' during October 1975. Serna did not testify at the hearing,

^{2/} Since the date stamp reads "Oct 01, 1975" it is possible that the person who set the stamp, looking at the stamp, reversed and upside down, misread "01" as "10."

sent to Sacramento (Employer's Exhibit 3) that on October 10, 1975 he served a "true and correct" copy of the attached petition on the employer. The English version of a letter from the then Regional Director, Apolinar Aguilar, informing Nunn that a petition had been filed indicates the petition was filed on October 10, 1975. The Spanish version of the same letter indicates that the petition was filed on October 1, 1975. (Employer's Exhibit 2.) The employer also points out that the petition handed to Nunn differs slightly from the petition filed with the Board, and this suggests they were not prepared at the same time, and the petition filed in Sacramento could have been filed earlier than the one handed to Nunn.^{3/}

The preponderance of evidence favors finding that the petition was filed on October 10, 1975. Nunn testified that Serna told him on October 10, when he was handed the petition, that the petition would be filed that day in Sacramento. Serna's declaration supports this. The English version of the letter sent by Apolinar Aguilar again confirms this. The date written on the petition shows that it was filed on October 10, 1975. Frank Lemus, the Board agent in charge of the Nunn election, testified that he first found out a petition had been filed in Ron Nunn Farms on October 14, 1975. Had the petition been filed on October 1 or October 7, it is likely Lemus would have known before October 14 that a petition had been filed. The available evidence strongly supports finding that the petition was filed on October 10, 1975, and accordingly I so find.

^{3/} The employer argues that because the petitions are slightly different, Serna did not as he declares serve a "true and correct" copy on Ron Nunn. This issue was raised as an objection but was dismissed by the Executive Secretary. The discrepancies are minor and inconsequential. Additionally, 8 Cal. Admin. Code Section 20305(b) (1976) states that a "petition shall be liberally construed to avoid dismissal.

Precise Number of Eligible Employees is Unknown

Nunn testified that he read "Form 116," which accompanied the petition handed to him, and compiled and had available a list of employees by Sunday, October 12, 1975.^{4/} "Form 116" in Nunn's mind required him to include every employee in the applicable payroll period. Therefore, under Nunn's direction a list including all employees was prepared. The list (UFW Exhibit 2) purportedly contains 253 names, but number 157 was erroneously omitted so that it in fact contains only 252 names.

The employer admitted that seven (7) individuals on the list were supervisors.^{5/} Frank Lemus concluded at the pre-election conference that six (6) individuals were not eligible to vote.^{6/}

^{4/} Form 116 states in relevant part that:

(d) Upon service of the petition ... the employer so served shall be under an immediate obligation to provide to the Board or its designated agent the following information:

(2) A complete and accurate list limited to the complete and full names and addresses of all employees in the bargaining unit ... appearing on the payroll applicable to the payroll period immediately preceding the filing of the petition.

(e) The requirements set forth above shall be satisfied by making such information available within any county in which the unit sought by the petition is located, not more than 48 hours after the filing of the petition.

^{5/} No. 57: Juan Del Real; No. 116: Nosario Lopez; No. 211: Frank Ruelas; No. 215: Julia Ruiz; No. 222: Jose Santa Cruz; No. 249: Martin Vitale.

Additionally, Nunn testified that No. 33, Francisco Ceja, sometimes acted as a supervisor.

^{6/} No. 109: Fay Killingsworth; No. 192: Allison Rodriguez; No. 223: Mary Scoggins; No. 252: Colleen Vess; No. 252: Gina Barajas; No. 253 Magdalia Olan. The employer also argues that Mariana Mendoza who was not on the list should be considered eligible to vote on the basis of Rod McLellan Co., 3 ALRB No. 6 (1977).

Because of the manner in which the list was prepared, the Board agent's determination regarding the eligibility of certain employees, and evolving Board precedent it is difficult to ascertain the exact number of eligible employees. The UFW argues that 191 of 239 eligible employees voted for a turnout of approximately 80 percent, while the employer argues that 190 out of 256 eligible employees voted for a turnout of 76 percent.^{7/}

Reason for Delay

Although the list was available by Sunday, October 12, Lemus did not actually obtain the list until Wednesday evening, October 15. As Nunn recalls, Lemus first phoned him on Tuesday, October 14. At the time Lemus phoned, around 4:30 p.m., Nunn wasn't in the office and Lemus left a message. Nunn claims that he returned Lemus' call about 5:30 p.m. During the conversation, Lemus asked Nunn to bring the documents to Sacramento or Stockton. Nunn explained briefly that rain the previous week delayed the harvest and that Heinz, a tomato processor, had informed him they wouldn't accept tomatoes after the 15th. Consequently, he was rushing to finish the harvest and no one was free to deliver the documents. Lemus maintains that Nunn did not return his call on Tuesday. On Wednesday, Lemus called and again Nunn was out. Nunn, however, did return this call. The substance of this conversation was as recounted above, and arrangements were made by the Board agent to pick up the documents at Ron Nunn Farms at approximately 6:30 p.m. that evening.

^{7/} The difference in the number of voters is accounted for by the inclusion of one void ballot in UFW's figures and the exclusion of that ballot in the employer's figures.

Lemus arrived at Nunn Farms at approximately 6:30 p.m., and met with Nunn for about 15-20 minutes. The meeting began outside Nunn's office and after about 5-10 minutes moved inside. Lemus got the list and Nunn showed Lemus the letter from Heinz (Employer's Exhibit 5). He also told Lemus that he received verbal notice from Ragu, another processor, that they would not accept tomatoes after the 18th.

Shirley Nunn joined the meeting after the first five or ten minutes. She testified that she, Nunn and Lemus discussed the imminent end of harvest, the Heinz letter, and that there was no anticipated change in employment between the time the list was made and the estimated end of harvest. The evidence supports a finding that Lemus knew Nunn's tomato harvest in all likelihood would end Saturday, October 18, 1975.^{8/}

During this October 15 meeting, Lemus testified that he talked with Nunn about a date for holding the election. Conversation with regard to a date took place towards the end of the meeting. Lemus asked Nunn if it was okay to hold an election on Saturday. Nunn said, "Yeah-but I wish we didn't have to hold one." According to Lemus this was the entire extent of the conversation regarding a specific date.

Lemus went on to say that later that day around 11:00-11:30 p.m. he spoke with Jan Peterson, (UFW coordinator in the Tracy area and in charge of coordinating the Nunn election) and told her that the employer had agreed to a Saturday election date. This date was agreeable to the UFW.

^{8/} The parties at the hearing entered into a stipulation that in fact, the tomato harvest ended on October 18, 1975.

Lemus later sent a mailgram dated October 17 to both parties confirming his "separate telephone and personal conversations with you on October 15, 1975, and the agreement from each of you to conduct the election for 75-RC-42-S on Saturday, October 18, 1975, hour and location to be determined." (Employer Exhibit 6.)

The Nunns vigorously dispute the making of any agreement and deny any conversation regarding a date for the election. Ron Nunn claims he told Lemus he was not in a position to discuss a date for an election. Nunn questioned whether the union had obtained a showing of interest, and Lemus said he would call back later that evening.^{9/} Nunn next heard from Lemus on October 17, via the mail-gram. Shirley Nunn who was present at the end of the October 15 meeting when this conversation took place also claims no such agreement was made. Shirley Nunn testified that when she received the mailgram in the evening of October 17, she was surprised and totally unclear as to what agreement was made. Nunn who was out of town on October 17 had the same reaction when he saw the mailgram the morning of October 18. Even if a conversation regarding an agreement to hold the election on Saturday took place and Lemus' account is correct, it is straining to conclude that an agreement was made. Rather, at most, Nunn was bowing to the inevitability of an election. Because I do not find an agreement was made, I do not believe it is accurate to conclude that Nunn broke an agreement forcing the election to be held at a later date. Rather at this point the delay

^{9/} Not believing that the union had a sufficient showing of interest the employer maintains it would be inconsistent to agree to hold an election. Testimony indicates that at the October 15 meeting between Nunn and Lemus, Nunn gave Lemus copies of employees' signatures in order that Lemus check for authorization card forgeries. Lemus testified that when he next spoke to Nunn on October 18, he mentioned there was a showing of interest.

occurred because Nunn and Lemus were under intense pressure. Nunn fanned land within a ten mile diameter around Brentwood. Therefore, he was not always immediately available. During the week prior to the filing of the petition, rain had delayed harvesting. During the week after the petition had been filed, Nunn was under notice that Heinz and Ragu would not accept tomatoes after October 18.

Lemus, on the other hand, testified that during this time he was either assisting or in charge of many elections taking place within the Sacramento region, a large geographic area. He felt the regional office was understaffed. Under these circumstances it is not surprising that pre-election arrangements did not run smoothly.

On the evening of October 17, 1975, Ron Nunn, went to Stockton on business. ^{10/} The mailgram arrived that evening and Shirley Nunn told Ron Nunn about it. Lemus called Nunn Farms at approximately 4:00 p.m., although Lemus did not remember with whom he spoke. He did mention that the showing of interest was adequate and an election would be held. The Nunns deny being called. In any case, Lemus called again around 7:00 p.m. and spoke with Shirley Nunn. Lemus was informed that Ron was in Stockton. Shirley was told that the showing of interest was adequate and the election would be held and that Lemus needed to talk with someone about arrangements for the election. Lemus was informed that only Ron could talk about those matters. Nunn, himself, testified that he considered the election extremely important and did not and would not delegate authority to make decisions. For matters to be resolved Lemus had to deal with Ron Nunn.

^{10/} Nunn testified that the meeting was originally scheduled earlier, but that by October 17, he had concluded that as it was the end of the seven day period and the harvest could be completed on October 18, he could go to Stockton.

Lemus phoned from a phone booth Saturday morning, October 18, before noon and spoke to Nunn's daughter. Lemus left his phone number and asked that Ron return his call. Again Nunn wasn't available. After waiting 15 minutes Lemus left and drove to Brentwood, arriving about 1:30 p.m.

Lemus claims that he was in the fields looking for Nunn. He didn't find Nunn but spoke with Martin Vitale, Nunn's business manager. Lemus' version is that Vitale said he didn't know where Ron Nunn was and there was no need to talk to him. Vitale testified that Lemus said there would be a pre-election conference and Ron was to be there. Vitale then radioed the house and spoke with Shirley. Shirley came and brought some material with her from the Western Tomato Growers Association explaining the ALRA. Shirley Nunn testified quite forthrightly that she believed an election could not be held since seven days had elapsed. In any case there was no pre-election conference in spite of Lemus' desire to have one immediately. Lemus testified he continued looking for Nunn and went to his office. Again he spoke with Shirley. Shirley did not mention this conversation in her testimony. She did testify that Lemus and Board agent Maria Khan came to the house at about 4:30 p.m., had a short conversation in which Shirley again said she didn't think an election could be held because of the seven day requirement and became quite upset when told that the law could be challenged. Lemus testified to this also.

From Ron Nunn's testimony it seems clear that he didn't see Lemus until about 5:30 that evening just as the end of the season party was beginning. Lemus wanted an immediate pre-election conference but Nunn insisted that he had a right to counsel.

On the basis of the facts recited above I conclude the following:

(1) Nunn was pressed by harvest demands. He was frequently not immediately available. However, only he had the authority to make commitments regarding the election; (2) Nunn was not amenable to making election arrangements since he doubted the union's showing of interest; (3) Neither Ron Nunn nor Shirley Nunn felt an election could be held beyond seven days after filing a petition; (4) Lemus mistakenly assumed Nunn had agreed to an election on October 18, 1975; and (5) There was only limited conversation between Lemus and Nunn prior to the expiration of the seven day period.

Reasons for Choosing October 20 as Election Date and Efforts to Notify Workers

Before speaking to Nunn, Lemus and Maria Khan, a Board agent assisting Lemus, had been busy talking to workers trying to determine a good time to hold the election. Lemus testified that he spoke with about 20 workers who told him that many lettuce workers were away over the weekend and that even though the tomato harvest ended that day, only 6 or 7 tomato workers would be leaving right after the harvest. The employer, mischaracterize this testimony completely in its brief. (Employer's brief, pps. 23-24) They picture Lemus talking to 20 or so employees out of whom 6 or 7 told him they would be leaving and in spite of this disastrous information he decided to hold the election on Monday, October 10. It is clear from Lemus' testimony that he was doing more than asking individuals about their after harvest plans but was trying to get a general picture and the picture he got was that with the exception of 6 or 7 people everybody would be available to vote that Monday.

Lemus' testimony is that in determining the appropriateness of the October 20 date for the election, he weighed three factors:

(1) the lettuce workers were not working Saturday or Sunday;
(2) many lettuce workers had left for Mexico for the weekend but would return by Monday; and (3) only 6 or 7 tomato workers would be leaving prior to October 20, 1975. Based on this information, Lemus told employees that the election would be held on October 20. Lemus does not recall whether he told Nunn this.

Lemus further testified that once the decision had been made to hold the election October 20, he and Maria Khan split up; started at opposite ends of the tomato machines which were lined up in a row; walked towards one another and passed each other continually talking to employees or groups of employees notifying them that the election would be on Monday. After making one complete pass, Lemus and Khan mingled with the employees and in Lemus' words "saturated them with information."^{12/}

The next contact Lemus had with Nunn was at the pre-election conference which took place October 19, 1975, around 4:30 p.m. Nunn, his attorney Charlie Stoll, business manager Martin Vitale were present along with Reuben Serna, Jan Peterson and Jim Drake. Some employee observers were also present. Lemus had already concluded that the tomato workers should vote from 3-6 p.m., and at the pre-election conference determined that the lettuce workers should vote from 9-11 a.m. Lemus testified that UFW #5, the notice and direction of

^{11/} Ron Nunn testified that frequently many lettuce workers went to Mexicali over the weekend. In any one weekend 15-25 percent could go. Over the entire harvest period almost every lettuce worker would have visited Mexicali at one time or another.

^{12/} On rebuttal, the employer presented 4 witnesses who testified that they were present at the harvest party and did not see or speak to any Board agent. However, the employer, in an effort to show that Lemus knew the harvest ended on October 18, 1975, introduced a picture of Lemus at the harvest party. Clearly, Lemus was at the party. (See Employer's Exhibit 13.)

election, was prepared by him, and the written changes were made by him. Some of the lettuce workers were present at the pre-election conference so that they had notice of the election. Lemus testified that he asked those lettuce workers present at the pre-election conference whether the others would know about the election and was told they would, that they would contact the returning lettuce workers and they wanted the election to take place during working hours so that employees would be present. Notice of the Election was Adequate

The employer objects that because the date, time and place of election were not decided until after the seven day period, employees were denied effective notice. The argument is in two parts. First, because the tomato harvest ended prior to the pre-election conference, and prior to the official notice and direction of election, employees who left after the harvest were not given notice. For this argument to be compelling, one must conclude that a significant number of employees left immediately after the harvest and prior to the election. (See discussion, infra.) Second, testimony revealed that many lettuce workers either were away for the weekend, or didn't work that weekend. Therefore, a notice and direction of election • issued Sunday after the pre-election conference would not inform them of the impending election.

In Ron Nunn's declaration which accompanied the objection petition in this case, he referred to a UFW flyer handed out approximately October 18, 1975, which indicated that the election would be held on October 20, 1975. In his testimony Nunn agreed that UFW #1 was the document he was referring to in his declaration. The employer's witness, Maria Villalobos, testified that she found out through UFW flyers, while still harvesting, that the election would

be held October 20. Thus, the evidence shows that at least informal notice was circulated as early as October 18.

This finding is consistent with testimony from Frank Lemus. By October 18, he had concluded that October 20, 1975 was the best time to have the election and informed employees of this. Lemus also testified that UFW organizers were present when Lemus circulated among the employees. Maria De Jesus Vega testified she was asked to be an observer 2-3 days before the election and at that time was told the election would be October 20, 1975. Jan Peterson testified that UFW and employer representatives began telling employees on October 18 of the election on October 20. By October 18, information as to the date of the election was available to all parties and at least partially disseminated to employees. The evidence supports a finding that informal notice was given to some employees as early as October 18, 2 days prior to the election and I so find.

The lettuce workers also received adequate notice. The election was held during working hours on a working day. In this context, and generally, it is important to point out that voter turnout was quite high. If, as the employer asserts, tomato workers had already left the area, then the bulk of voters must have been lettuce workers. Therefore, actual notice must have been adequate. In Jack or Marion Radovich, 2 ALRB No. 12 (1976), the Board noted that they look "not merely at the amount of lapsed time between the notice and direction of election, but also on what effect, if any, the time lapse had on voters." No evidence shows nor did the employer object in its objection petition that lettuce workers were disenfranchised.

If late notice had any prejudicial effect, it must be because tomato workers left the Brentwood area after the tomato

harvest but prior to the election. The employer has been able to show that only a few employees left prior to the election.

IV.

THE EMPLOYER HAS NOT PROVED THAT A SUBSTANTIAL NUMBER OF EMPLOYEES WERE DISENFRANCHISED BY HOLDING AN ELECTION 10 DAYS AFTER THE FILING OF A PETITION.^{13/}

The employer's evidence raises the possibility that 22 individuals were disenfranchised by holding the election outside the seven day period. These 22 people are:

| | |
|---------------------|-----------------------------------|
| Lupe Aginaga | (1) |
| Salvador Beltram | (16) |
| Catalina Cortez | (48) |
| Eva O. Cortez | (49) |
| Juana M. Cortez | (51) |
| Josefina Del Real | (56) |
| Elvira De Ordaz | (60) |
| Patricia Esquivel | (68) |
| Genero Garcia | (77) |
| Vicky Garcia | (80) |
| Carmen Gonzales | (82) |
| Elisa Gonzales | (83) |
| Samuel Gonzales | (89) |
| Nabor Jiminez | (107) |
| Janie Martinez | (127) |
| Francisco Maya | (135) |
| Rafael Maya | (136) |
| Alisia Oseguera | (162) |
| Maria Oseguera | (164) |
| Teodolinda Oseguera | (167) |
| Mariana Mendoza | (not on the list) |
| Eva Ortiz | (inadvertently left off. list) |

^{13/}Neither party has nor do the Board's files contain the list of people who voted.

Lupe Aginaga

In its brief, the employer argues that UFW observer, Maria De Jesus Vega testified that Lupe Aginaga who worked on the tomato crew through and including October 18, 1975 did not vote in the election but would have been available if the election were held on October 17. Vega actually testified that she wasn't sure she knew Aginaga and didn't know if Aginaga voted in the election. There is no evidence only speculation with regard to Aginaga and therefore, with regard to this individual, the employer has not met its burden of producing evidence.

Salvador Beltram

Felipe Ortiz testified on the basis of personal knowledge that he knew Beltram in 1975, that he lived next door to him during October 1975, that Beltram told him he was leaving for Mexico because work was about to end and that he saw Beltram at about 6:00 p.m., on October 19, 1975, in the car about to leave.

Ortiz testified that Beltram was a tractor driver. This is confirmed on Beltram's time card. The last entry on the time card indicates that Beltram worked 12 hours on October 19, 1975. (Joint Exhibit 7-C.)

Though it seems unlikely Beltram would leave immediately after working a 12 hour shift, the evidence supports finding Beltram did leave prior to the pre-election conference and distribution of the notice and direction of election. I so find.

Catalina Cortez

Julia Ruiz, a supervisor, testified that she remembers being told by floorlady Ramona Villa/ before the election, that Catalina Cortez left for Mexico. Supervisor Nosario Lopez, testified that he thought Catalina Cortez left for Mexico on October 18, 1975.

Rosa Hurtado who personally knows Catalina Cortez and who was living with her at the time, testified that Ms. Cortez received a phone call from an aunt informing her that her grandmother was sick. Hurtado also indicated that she did not discuss the election with Ms. Cortez before she left. Although the evidence is scanty and in the form of uncorroborated hearsay, nothing contradicts it. (It does not appear that Catalina Cortez decided to leave because the tomato harvest ended.) I can make no finding of fact with regard to Catalina Cortez since any such finding would be based on uncorroborated hearsay. (8 Cal. Admin. Code Section 20370(c)(1976).)

Eva O. Cortez, Juana Cortez and Elvira De Ordaz

Employer witness Julia Ruiz testified that she was told by floorlady Martha Michel that Elvira De Ordaz (also known as Elvira Cortez) left for Mexico on October 18, 1975,^{14/} with her daughter (Eva Cortez and niece Juana). On cross-examination, Ruiz testified that she did not have first-hand knowledge that Elvira De Ordaz left on the 18th but knew she must have left before the election because she said she was going to leave.

Martha Michel, a floorlady on the same tomato machine that Elvira Cortez De Ordaz worked on, testified that Elvira Cortez De . Ordaz told her after work had ended on Friday, October 17, 1975, that she wasn't going to return to work the next day because she had to pack in order to leave for Mexico. Elvira Cortez told Michel that her daughter, Eva Cortez and her niece Juana Cortez could work. The employer's records indicate that Elvira C. De Ordaz did not work on

^{14/} Elvira De Ordaz testified that her full name is Elvira Cortez De Ordaz and is known variously as Elvira Cortez or Elvira De Ordaz. (See also Joint Exhibit #2 where the name Elvira C. De Ordaz appears.)

Saturday, October 18, but Juana Cortez and Eva Cortez worked 11 hours that day. (Joint Exhibit 2.) The employer has at best shown that Elvira De Ordaz said she was leaving for Mexico, and this was the reason she did not work on October 18. None of the employer's witnesses actually saw Elvira De Ordaz leave.

UFW observers Maria De Jesus Vega and Alegria Orosco testified that they remembered Elvira and Eva Ordaz voting in the election. Ms. Vega also testified that after the tomato harvest she and about 20 other Nunn employees, including Elvira De Ordaz and Eva Cortez, worked for Interharvest, Inc., in Brentwood. According to Ms. Vega, some began work on October 20 and others on October 21, 1975. Work at Interharvest ended on October 24. Those who started on October 20, received permission from the Interharvest tomato machine floorlady to leave in time so that they could vote in the Nunn election. Guadalupe Martinez testified that when she began working for Interharvest after the Nunn harvest, Eva Cortez and Elvira De Ordaz were already working for Interharvest.

The employer introduced as Employer's Exhibit 18 a com-
entitled Seniority List-Interharvest, Inc. ^{15/} This printout
document shows that Elvira C. De Ordaz, and Eva Cortez were hired on October 20, 1975 and Juana Cortez was hired on October 21, 1975, and worked in the tomato harvest. The evidence overwhelmingly supports a finding that the three named individuals did not leave the area prior to the election at Nunn Farms. Additionally, Jan Peterson testified that Elvira De Ordaz voted a challenged ballot at the election because her name was out of alphabetical order on the list and

^{15/} The employer introduced this document through James Walton, the production manager for Interharvest, Inc. for the last 18 years. He confirmed that the Interharvest operations referred to are in Brentwood and that the Interharvest tomato harvest for 1975 ended on October 23.

when her name was found on the list (#60) the challenge was resolved. Alegria Orosco stated that she saw Juana Cortez vote. Rosa Hurtado, who also worked at Interharvest with the others, testified that she and Juana went together to vote in the election. The preponderance of evidence favors finding that Elvira De Ordaz, Eva Cortez and Juana Cortez were not disenfranchised by holding the election on October 20, 1975, and I so find.

Josefina Del Real

Julia Ruiz testified that when she checked the tomato machine crews, she was told by the floorlady that Josefina Del Real was absent. She further testified that Ms. Del Real's last day of work was near the 18th. Nasario Lopez testified that he thought Ms. Del Real left prior to the election.

Josefina Del Real testified that she was working "in the nuts" at the time of the election. Hector Martinez explained that Ms. Del Real was working in the walnut shed, and he drove her to the election site, saw her go into the voting area and enter the booth. Maria De Jesus Vega testified that she knows Ms. Real and saw her vote on October 20. Alegria Orosco testified that she has known Ms. Del Real for 11 years and saw her vote in the election. I find that Josefina Del Real was not disenfranchised by holding the election on October 20, 1975.

Patricia Esquivel

The employer has presented contradictory evidence with regard to this individual. On one hand, Shirley Nunn testified that on October 19 Patricia Esquivel called seeking to have her check forwarded. From this Mrs. Nunn concluded that Patricia had left or was intending to leave soon.

On the other hand, Martha Michel testified that Patricia Esquivel phoned her after the election on October 20, 1975. According to Ms. Michel, Esquivel said she was offered \$500.00 by the union to file a charge against Supervisor Julia Ruiz. ^{16/} Shirley Nunn's testimony does not establish that Ms. Esquivel left before October 20. The other testimony favors concluding that Esquivel did not leave prior to the election and I so conclude.

Genero Garcia and Nabor Jiminez

Both these men worked as irrigators for Ron Nunn on October 20, 1975. The employer argues that because arrangements for water have to be made at least a day or two in advance and because irrigators must be present when the water is released, the lack of notice as to the time and place of the election foreclosed making plans to have these workers vote. Nasario Lopez told them that they should vote at 5:00 p.m., but they couldn't because the water came around 4:00 p.m.

Neither irrigator worked in tomatoes and the end of the tomato harvest did not affect them with regard to availability of work after October 18. There is no indication that the employer sought to make arrangements at the pre-election conference for these men to vote even though everyone agrees that the water must have been ordered by the time of the pre-election conference which was attended by Nunn and his business manager, Vitale. Jiminez testified that he could have voted prior to the time that the water came, i.e., in the morning with the lettuce workers. Since both these men were working on October 20, 1975 at Ron Nunn Farms, these men were not disenfranchised by the late holding of the election.

^{16/} The alleged bribe was raised as an objection but dismissed by the Executive Secretary. It is relevant to show that Patricia Esquivel did not leave the area prior to the election.

Vicky Garcia

Nunn testified that he personally knew that Vicky Garcia left the Brentwood area before the election. He did not indicate the basis for his knowledge. The employer's records show that she worked 11 hours on October 18. The employer's observer, Rosario Barajos, testified that she heard on October 18, that Vicky Garcia was leaving for Mexico. However, Barajos admitted that she did not know Vicky Garcia personally, and in fact first heard of her the day the tomato harvest ended. She also indicated that she did not remember checking Garcia's name off the voting list. The employer's evidence is based either on hearsay or an inference that because Barajos does not remember checking off Garcia's name she must have left for Mexico. At best, the employer has shown only that Garcia did not vote. The reason she did not vote, if indeed she did not vote, remains unknown. I conclude the employer has not met its burden with regard to Vicky Garcia.

Carmen Gonzales and Elisa Gonzales

Supervisor Nasario Lopez stated that he did not think Elisa Gonzales worked the last day of the tomato harvest. Lopez did not know when she left but knew that she did leave.

Supervisor Julia Ruiz testified that Elisa Gonzales last worked on October 17, 1975 and left for Mexico that day. She got a ride with her family. Ruiz said that she knew this because a message was left with Martha Michel to this effect. Ruiz later corrected herself and indicated that her information about Elisa and Carmen Gonzales came from Maria. Villalobos not Martha Michel. On cross, Ruiz admitted that she didn't know if in fact Elisa Gonzales left for Mexico but thought so because Ms. Villalobos told her Elisa was intending to have within a day.

UFW observers, Maria De Jesus Vega and Alegria Orosco, testified that they remember seeing Elisa Gonzales and her daughter Carmen vote. Both Elisa and Carmen appear on Employer's Exhibit 18, which indicates they were hired by Interharvest on October 20. Eva O. Cortez testified that they saw Elisa and Carmen vote. Elvira De Ordaz testified that she, Elisa and Carmen went to vote as a group together. Finally, Lupe Martinez testified that she went out to Mexico on November 5, 1975, with the Elisa Gonzales family which included Elisa and Carmen. The employer has not met its burden to present convincing evidence that Elisa and Carmen Gonzales were disenfranchised. I find they were not disenfranchised.

Samuel Gonzales

Martin Vitale testified that Samuel Gonzales went to Mexico but he didn't know whether Mr. Gonzales left before or after the election. Gonzales' time card indicates he worked 8 hours on the day of the election leading to the irresistible conclusion that he was in Brentwood during the election and consequently not disenfranchised

Janie Martinez

Julia Ruiz testified that Janie Martinez stopped working during the last week of the tomato harvest. She indicated that Mrs. Villalobos told her that Ms. Martinez left with her sister for Antioch. Antioch is approximately 10 miles from Brentwood.

Salome Quintanella, A UFW organizer, testified that he saw Ms. Martinez at the voting site. ^{17/} Hector Martinez testified that

^{17/} Quintanella testified that in October 1975 he was employed at Fibreboard, Inc., but assisted the union in organizing at Ron Nunn, that he visited employees at their homes and visited them in the fields, and that he assisted Reuben Serna.

both his daughters, Janie and Carolina, were at the election. Both Quintanella and Martinez were standing at a "gate" about 800 feet from the election site. Alegria Orosco remembers seeing Janie Martinez vote.

The employer argues that the credibility of Hector Martinez is seriously put in question because Carolina is not on the eligibility list and she would not therefore be at the election. Carolina is not on the list Nunn prepared (UFW Exhibit 2), nor does she appear on other employee records. However, even not crediting the testimony of Mr. Martinez, I find the evidence in its totality supports concluding that Ms. Martinez was in the Brentwood area on October 20 and consequently was not disenfranchised.

Francisco Maya and Rafael Maya

Both testified that they left together for Mexico on October 17, 1975. Their last day of work was October 16, 1975. Francisco worked in tomatoes but Rafael cleaned lettuce machines. Francisco stated that they knew work would end soon and decided to make plans to leave. Rafael testified that generally in other years, neither he nor his brother stay until the end of harvest.

Rafael testified that he and his brother decided to leave around October 10, even before Nunn received word from his processors. Both testified they would have stayed if they had known of the election. I conclude that the Mayas were denied the opportunity to vote due to the late scheduling of the election.

Maria, Teodolinda, Alisia Oseguera

Maria Oseguera testified that she left Brentwood on October 18, 1975, and when she left she was not aware that an election would be held on October 20, 1975. Teodolinda Oseguera testified similarly and added that she, Maria and Alisia Oseguera left together

at approximately 10:00 p.m. These three worked 8 hours on October 18, although with respect to Alisia, the rest of her crew worked 11 hours, and with respect to Maria and Teodolinda, their crew (Vess) worked 10 hours. (Joint Exhibit 2.) It appears, therefore, that the three Osegueras left work several hours before the end of the harvest party and prior to the time when Lemus was circulating among employees informing them of election days.

No testimony seriously rebuts the conclusion that Maria, Teodolinda and Alisia Oseguera left prior to the election. I find they left October 18, 1975, and were disenfranchised.

Mariana Mendoza

Testimony indicated that Mariana Mendoza was not on the eligibility list. It appears that Mrs. Mendoza stopped working in late September in order to have a child. Because she was not on the list, and did not work in the appropriate pay period, Frank Lemus concluded she was not eligible to vote even though she appeared at the voting site. The employer argues that under Rod McLellan, Inc., 3 ALRB No. 6 (1977), Mrs. Mendoza should have been allowed to vote. Without deciding this issue it is clear that Mrs. Mendoza's ability to vote was not in any way affected by the late holding of the election. All testimony indicates she was present on October 20, 1975. She was therefore not disenfranchised because the election was held on October 20, 1975. She may have been disenfranchised according to standards of later decisions.

Eva Ortiz

Although Eva Ortiz was not on the eligibility list, the parties stipulated that she was inadvertently left off the list and eligible to vote. Dolores Torres testified that Eva Ortiz said good-bye to her. However, this was after the election. There is

not a scintilla of evidence adduced to conclude that Eva Ortiz was disenfranchised by holding the election on October 20, 1975.

The employer maintains that workers leave immediately after the end of the harvest, and that the hearing officer should take notice of this fact of agricultural life. Such a conclusion cuts too broadly. The inquiry should rather be what Ron Nunn employees did after the tomato harvest of October 18, 1975. ^{18/} Much of the employer's own evidence (particularly Employer's Exhibit 18) seriously undermines its contention that employees left immediately after the end of the harvest. Employees leave after the end of harvest but take up to two or three weeks to leave.^{19/}

Nunn's crew lists (Joint Exhibit 1) indicate that for the week ending October 8, 1975, i.e., the relevant payroll period, 93 people worked on the tomato machines. The tomato crew lists for the week ending October 22, 1975 show 89 people worked. With the exception of the four additional people all those whose names appeared in the earlier list appeared in the later list. Thus, there was minimal change among the tomato crew between the applicable payroll period and the end of harvest. There is no evidence why 4 people left Nunn's employ.

The October 22 crew list shows that Josefina Del Real and Elvira C. De Ordaz worked October 17, but did not work October 18.

^{18/} The employer on numerous occasions attempted to introduce evidence as to the migratory nature of California farm labor. Because the issue is whether Ron Nunn tomato workers left between October 18 and 20, such, evidence of workers in general, is not sufficiently probative to be admitted. California Evidence Code Section 352.

^{19/} For example, Maria De Jesus Vega testified the employees frequently stay a while in order to claim unemployment insurance.

The same record shows Janie Martinez, Catalina Cortez and Elisa Gonzales last worked on October 13, 1975. These 6 stopped work prior to October 18, 1975, but it is impossible to conclude from the records that those who did not work on October 18, or several days prior to the 18th, left the area before the election and did not vote. Testimony strongly supports finding that Janie Martinez, Elisa Gonzales, Josefina Del Real were not disenfranchised by holding the election on October 20, 1975. The contradictions between the testimony and what could be inferred from the records demand that extreme caution be used in drawing such inferences from the records.

In addition to people who worked on the tomato machines, many were employed as general laborers and frequently worked in tomatoes, and could have been prejudiced by holding an election after the tomato harvest. Joint Exhibit 7 shows the last day worked, of the following general laborers, who sometimes worked in tomatoes. ^{20/}

| <u>Name</u> | <u>Last Day Worked</u> |
|------------------------|---------------------------|
| 1. Richard Alaya | 10-22 |
| 2. Nicholas Alcalar | 10-22 |
| 3. Salvador Beltram | 10-19 |
| 4. Victoriano Castillo | 10-22 |
| 5. Javier Ceja | 10-23 |
| 6. Francisco Ceja | 10-22 |
| 7. Francisco Ceja, Jr. | 10-22 |
| 8. Jesus Ceja | 10-22 |
| 9. E. Chavez | 10-22 |
| 10. Ramon Chavez | 10-22 |
| 11. Ignacio Delgadillo | 10-22 |
| 12. Conrado Diaz | 10-8 |
| 13. Samuel Gonzales | 10-22 |
| 14. Cruz Lopez | 10-21 (didn't work 10-20) |

^{20/} From the employer's records it is difficult at times to tell which general laborers worked in tomatoes. The following appear to be all those general laborers who clearly worked in tomatoes.

| Name | Last Day <u>Worked</u> |
|--------------------------------|-----------------------------------|
| 15. Ed Lopez | 10-18 |
| 16. Abel Lozano | 10-22 |
| 17. Gustavo Marquez | 10-22 (didn't work 10-20) |
| 18. Francisco Maya | 10-16 |
| 19. Rodrigo Medina | 10-20 |
| 20. Miguel Mendoza | 10-22 |
| 21. Jesus Mantes | 10-22 |
| 22. Daniel Pantoja | 10-22 (didn't work 10-19,20,21) |
| 23. Antonio Orejel | 10-22 (didn't work 10-19,20,21) |
| 24. Saul Prado | 10-22 |
| 25. Jaime Prado | 10-22 |
| 26. Felipe Ortiz Ramos | 10-22 |
| 27. Manuel Salinas | 10-22 |
| 28. Jose (last name illegible) | 10-22 (didn't, work 10-19, 10-20) |
| 29. Jesus Torres | 10-19 |
| 30. Fernando Torres | 10-22 |

From this group, one could infer that at most 4 left prior to the election. However, Conrado Diaz left before the petition was filed.

These records of course do not show and cast no light on whether people remained in the area even if they no longer worked for Nunn.^{21/}

The records reveal that Nunn had about 130 employees engaged in tomatoes. ^{22/} Nunn testified that approximately 180 of 260 employees were directly involved in the tomato harvest. Nsario Lopez, field foreman, testified that 150 or more were working in tomatoes. The employer has shown only that Salvador Beltram, Francisco Maya, Rafael Maya, Alisia Oseguera, Maria Oseguera, and Teodolinda Oseguera left, and might otherwise have voted had the election been earlier. Regarding Rafael Maya, his departure does not seem related to the end of the tomato harvest.

^{21/} Ed Lopez worked in November for Nunn. Conrado Diaz gives his address as Antioch which is close to Brentwood. This again raises questions regarding conclusions that can be drawn from the employer's business records.

^{22/} The records frequently do not indicate what type of labor the Individual did.

EVIDENCE OF INTIMIDATIO

The employer argues that intimidation which occurred as a result of UFW efforts to seek authorization cards warrants setting aside the election.^{23/}

Testimony revealed that the UFW effort to organize Ron Nunn began in early October 1975. Jan Peterson, the UFW area coordinator, indicated that she first got involved in the election 1 or 2 weeks before October 20, but some organizers were working on the election before she began. Peterson also indicated that organizing activity increased as the election time drew near. This was possible because some elections in the Stockton area had concluded and organizers were free to help out in the Nunn election. This explanation is more sensible than the one advanced by the employer which is that the UFW was frantic to acquire sufficient authorization cards. In addition, Peterson testified that it was not unusual to solicit authorization cards for organizational purposes even when an election had been scheduled and thus implicitly a determination had been made by the regional director that a sufficient showing of interest existed.

Maria Villalobos indicated that she was frequently visited at home by UFW organizers. She remembers an incident on October 19, 1975, when she was visited at home by 2 UFW organizers. She knew they were organizers because they said they were. They told her that they needed her signature—that everyone had signed except her. They allegedly said that if she didn't sign, she would lose her job since Ron Nunn was going to lose. Mrs. Villalobos refused to sign.

^{23/} The employer advances the theory that delay in this election was caused by agreement between the UFW and Lemus in order to facilitate the UFW's obtaining a showing of interest. An inquiry into the reasons for delay is proper but showing of interest not reviewable. At some point it must have been clear to the employer that a determination as to adequacy of showing of interest had been made since plans for an election were proceeding.

Around 4:00 p.m. that same day, Alegria Orosco and another woman came to Mrs. Villalobos' house and again urged her to sign a card.^{24/} They supposedly told Mrs. Villalobos that she had to sign or otherwise she would lose her job.

On cross-examination, the UFW confronted the witness with her declaration which stated that on Sunday, October 19, 3 people came 'to her house in the morning and 2 people came that afternoon. Mrs. Villalobos said that her testimony was correct but, in any case, different people came in the morning than in the afternoon. In assessing credibility, it is interesting to note that although Mrs. Villalobos testified that the organizers were in her house for 2 hours she could only give the most vague and incomplete description of them, with the exception of Orosco, whom she knew.

Regarding the afternoon incident, Mrs. Villalobos testified that Alegria Orosco told her she "was going" to lose her job if she didn't sign. But she also said that Alegria told her that people who don't join the union can no longer work if the company has a contract with the union. The possibility of job loss was discussed for approximately one-half hour and Mrs. Villalobos asked questions about this. The evidence points to a conclusion that Alegria Orosco, was explaining the consequences of a union security clause.

The conversations that took place on October 19, were not the first. Mrs. Villalobos remembers one incident when UFW organizers who arrived at approximately 9:00 p.m. did not leave until midnight.

^{24/} The employer maintains that Alegria Orosco was a UFW organizer Because she actively solicited authorization cards and acted as the UFW's observer. Orosco denies she solicited an authorization card from Villalobos. Because I conclude that Orosco's activity did not affect the outcome of the election, I have no need to resolve whether Orosco is in fact an organizer.

This took place during the week before the election. Mrs. Villalobos said that this made her angry.

Alegria Orosco testified that she did indeed go to Maria Villalobos' house one afternoon before the election at approximately 4:30 p.m. She denied asking Mrs. Villalobos to sign an authorization card, and denied ever telling her that she could be fired if she didn't sign a card or didn't join the union. At other times, Orosco indicated she had asked other employees to sign authorization cards.

Mrs. Villalobos was either confused or unforthcoming during much of the UFW's cross-examination. She didn't remember what the organizers looked like, even though she insisted they made her angry because they stayed so long and were so insistent. In addition, I do not believe Mrs. Villalobos was intimidated. The picture portrayed is that of an employee who became irritated and angry because she was hassled by the union. Mrs. Villalobos admitted that she engaged in lengthy discussion with Alegria Orosco regarding possibilities of losing her job, that Ms. Orosco told her that under a union contract she couldn't work unless she was a member of the union. I do not find she was threatened or intimidated.

Ramona Villa who was employed as a floorlady in the tomato harvest at Ron Nunn Farms in October 1975 testified that she was threatened by union organizer Salome Quintanella if she refused to sign an authorization card. She testified that about a week before the election at about 9:30 a.m., an organizer who she ultimately identified as Quintanella, showed her a card and asked her to sign it. He said if she didn't sign it, she could be fired. This was the only time this was said.

The employer in its brief claims that "Quintinella (sic) threatened her with loss of employment. Specifically, Quintinella

told her that she would be dismissed from her job, if she did not sign the authorization card." (Employer's brief p. 60.) The actual testimony which was elicited word for word a second time on cross-examination, was that "if I didn't sign it I could be dismissed from my work," which I characterize to be more conditional than the employer has characterized it. Quintanella testified that he had known Ramona Villa for 5-7 years. He encountered her the last time he went to Ron Nunn fields to organize in October 1975. This was three or four days before the election, at lunch time. Quintanella said that Villa spoke to him before he spoke to her and she asked why Mr. Martinez and Mr. Gutierrez hadn't shown up. By this Quintanella understood Villa to be asking where these two other UFW organizers were. This was all he said to Villa. He didn't ask her to sign an authorization card but he did talk to other workers. He had cards with him and some signed and some refused.

The employer in its brief, argues that Quintanella should not be believed because he gave no explanation why he did not ask Villa to sign a card. The employer seems to be arguing that since the union was in desperate need of cards in order to obtain a showing of interest, it is incredible that Quintanella did not ask Villa to sign. The fact that Quintanella did not ask under the employer's theory, shows that he cannot be believed and not that the union did not need cards or that Quintanella who knew Villa decided that it was more profitable to speak with other employees.

The reluctance of Villa to specify that Quintanella was the organizer she was referring to with regard to this incident, the necessity of an extensive and probing cross-examination to bring out this point leads me to trust Quintanella¹'s version of the event over Villa's. However, even if I did not credit Quintanella's

testimony, I am not convinced that the employer met its burden of adducing evidence that she was intimidated or threatened by Quintanella.

Intimidation in the Polling Area

As further evidence of intimidation, the employer cites the testimony of Rosario Barajos. She was employed at Ron Nunn in October 1975, and acted as an employer observer. While seated at the table checking off names of employees, she noticed a list which stuck out from under the master list which the observers were using. When she attempted to look at this list, Alegria Orosco took the list away and said she was not supposed to see it. The employer argues that the union was obviously compiling a list. ^{25/}

On the basis of this slight evidence, it is speculative to conclude that the union was compiling a list of employees.

The employer argues that testimony of Martha Michel concerning a phone call she received from Patricia Esquivel in which Esquivel allegedly told Michel that she had been offered money to file a charge against supervisor Julia Ruiz is yet another example of intimidation. No evidence was adduced that anyone was aware of this bribe attempt prior to the election. Michel's own testimony places Esquivel's phone call after the election. There is no logical way in which this incident could have affected the outcome of the election.

Finally, the employer regarded alleged UFW violations of the access rule as operating to intimidate and coerce employees and prevent them from exercising their free choice. Violations of access

^{25/} As further evidence on this point, the employer refers in its Brief to the testimony of Dolores Torres. (See pps. 75-77.) However, when the UFW objected to a question by Ms. Young with regard to whether Dolores Torres saw union representatives when she drove to the polling site, the question was withdrawn and not pursued, prior to a ruling.

are not per se intimidating. (K.K. Ito Farms, 2 ALRB No. 51 (1976).)

Additionally, the Executive Secretary dismissed access violation objections. However, access violations could be accompanied by conduct which is intimidating.

Both UFW and employer witnesses confirm an increase in organizational activity in the week preceding the election. Nunn indicated, and his records confirm, that tomato machines were operating 10 or 11 hours a day during this week.

Except for possibly one occasion, Maria Villalobos did not testify to access violation. On one occasion she claimed that Quintanella spoke to her during a morning breakfast break whereas Quintanella remembers the incident taking place during the noon lunch break. Under either version, UFW organizers did not interfere with the work. Therefore, there was no harm to the employer, and there was insufficient evidence of intimidation which affected employee free choice.

Martha Michel indicated that UFW organizers distributed literature sometimes during working hours and sometimes during lunch breaks. She recounts no incident where such distribution was accompanied by intimidation.

THE ACTIVITIES OF STEVE GARCIA

The facts are not in dispute. Rosario Barajos, who served as observer for Ron Nunn from 3:00 to 5:00 p.m., on October 20, testified that Steve Garcia driving a car or pickup arrived at the polling site between approximately 4:00 and 4:15 p.m. He threw dirt on those around and seated at the table by driving fast back and forth in the field near the voting table. Barajos suggested that Garcia engaged in this activity for approximately one-half hour although she wasn't sure about this. During the half hour, Garcia drove past

two or three times. Barajos indicated that she was afraid once and quickly got up, pushing the chairs over. While this was happening, no employees voted, although Barajos indicated that employees voted before Garcia arrived.^{26/} Barajos said that although the election stopped, she couldn't say whether it stopped on account of Garcia, or there just wasn't anyone there to vote. People voted after Garcia left.

The union observers, Maria De Jesus Vega and Alegria Orosco, also testified to the Garcia incident. Mr. Garcia drove close by the poll several times and Ms. Vega heard him say something in Spanish. Ms. Vega recalls Garcia challenging Lemus to a fight. Orosco testified that she heard Garcia say something in Spanish and English to Lemus.

Employees voted before and after the incident but not during the half-hour or so that Garcia disrupted the election. It is not clear how many people observed the incident, and hence could have been affected. There is no evidence that Garcia was acting on behalf of any party. There is no evidence that people who were in line or had obtained ballots but not yet voted, if any, left the area. The incident took place late in the day, after the bulk of employees voted. Once Garcia left the area, employees continued to vote suggesting that there was no intimidation. Barajos, herself, stated that she did not think people did not vote because of Garcia. I find on the basis of the facts presented at the hearing that Garcia's disruptive activity does not warrant setting aside the election because the effect of that activity remains unproved.

^{26/} The employer, in its brief, incorrectly states that Barajos testified that prior to the time Garcia arrived, many employees had come to the table to be identified and to receive ballots. She testified that employees were voting before Garcia arrived.

LAW

The Board has considered whether an election should be overturned because it was held more than seven days after the petition for certification was filed.

"The holding of a representation election more than seven days after the filing of a petition for certification does not invalidate an election in the absence of some showing that persons or parties were prejudiced by the delay. Klein Ranch, 1 ALRB No. 18 (1975). A central question in establishing that prejudice is whether or not the purpose of the seven-day requirement—to effectuate this Board's policy of maximizing the franchise to agricultural employees was frustrated. Klein Ranch, supra. We have upheld elections where this policy was enhanced by the delay because in the period between the seventh day and the day of the election, additional eligible voters returned to work. J. J. Crossetti Co., Inc., 2 ALRB No. 1 (1976), and where there was a high voter turnout, Jake J. Cesare & Sons, 2 ALRB No. 6 (1976). We have overturned elections where this policy was frustrated because the late election prevented otherwise eligible workers from voting. Ace Tomato Co., Inc., 2 ALRB No. 20 (1976); Mapes Produce Company, 2 ALRB No. 54 (1976). In both Mapes and Ace, we concluded that had the election been held within seven days, a significant number of additional workers might have voted.^{27/}

In Waller Flower Seed Company, 1 ALRB No. 27 (1975), the Board stated that "In Klein and subsequent cases we focused our attention on the prejudice actually suffered by any of the parties to the election and the impact on the election itself which resulted from the failure to set the election for a date within seven days of the filing of the Petition for Certification." Supra, at p. 2. (Emphasis added) In Waller Flower Seed, the Board went on to say that as the only evidence of impact of the election itself was that two eligible voters did not vote and "since the number of voters

^{27/} Vista Verde Farms, 3 ALRB No. 14 (1977). Footnote omitted.

who were even arguably disenfranchised by the delay could not have affected the election outcome." The Board refused to set aside the election.

In determining whether to set aside an election that was held after the seven-day statutory period, the Board looks to prejudice or impact on the election itself which resulted from delay.

FACTORS WHICH THE BOARD CONSIDERS

A. Clearly one factor the Board has considered in determining the potential prejudicial effect of a late held election is actual voter participation. In J.J. Crosetti Co., Inc., 2 ALRB No. 1 (1976), the Board noted that voter participation was greater than 80 percent and this "was in line with and perhaps higher than the average for other elections conducted during the same period." At p. 4. The Crosetti election took place in the Salinas area on September 10, 1975.

In Ace Tomato, 2 ALRB No. 20 (1976) the Board inferred a causal connection between a late election and low voter turnout. "(H)olding an election after the seven-day statutory period may explain the unusually low voter turnout." At p. 2. In Ace Tomato, only 91 of at least 298 eligible employees voted, a turnout of roughly one-third. Voter turnout is a significant factor when assessing the prejudicial effect of an election held after the statutory seven-day period.

In this election the turnout was quite high. Using figures most favorable to the employer, 191 of 256 eligible employees voted. I do not agree with the employer that a turnout of 76 percent can be deemed "dismal." (Employer's brief p. 32.) In cases where the

Board has been persuaded by low voter turnout among other factors, such turnout has hovered around 40-50 percent.^{28/}

B. Another factor the Board has considered in determining whether a late held election should be set aside is whether "the evidence indicates that a significant number of additional voters might have cast their ballots." Mapes Produce Co., 2 ALRB No. 54 (1976) at p. 9. While the phrase "significant number" has not been defined with numerical precision, the context of Mapes helps define its meaning. The Board found that two crews, a family of 15 and one additional voter, had left prior to the election but after the seventh day. In Mapes, the election was scheduled for September 12, 1975, nine days after the Petition for Certification was filed. By September 6, however, the harvesting had been completed and workers began leaving the area. The election was not scheduled until six days after the harvest.

It was stipulated that the Ron Nunn tomato harvest ended October 18, 1975. The election was held two days after the tomato harvest but before the lettuce harvest was completed, unlike Mapes. Additionally, the employer has shown that 6 individuals left prior to the election. This is considerably less than in Mapes.

The tally in Mapes showed Teamsters 72, UFW 50, No Union 2, and challenged ballots 25. The regional director recommended that 12 challenges be overruled and 13 be sustained. The UFW excepted arguing that all the challenges be sustained. Since there was no disagreement that at least 13 challenges be sustained the Board so ruled. Therefore, the amended tally showed Teamsters 72, UFW 50, No Union 2, and challenged ballots 12.

28/ Ace Tomato, 2 ALRB No. 20 (1976); Mapes Produce Co., 2 ALRB No. 54 (1976); Vista Verde Farms, 3 ALRB No. 19 (1977).

This is the context that must be looked to when the Board speaks of "significant numbers of additional workers." When two crews, a family of 15 and one additional worker left, the results of the election could have changed, unlike Waller Flower Seed. A party does not have to prove a mathematical certainty that the result would have changed, but only that there is a realistic possibility of a different result. In Mapes it appears that the number of people who left prior to the election were greater than the difference between Teamster and UFW votes.

Ace Tomato, supra, stands for the same proposition. Because so few people voted (one-third) the Board concluded that the result may have been different if the election had been timely held and disenfranchised voters been able to vote. The number of arguably disenfranchised voters is only significant if there is a reasonable possibility that they affect the outcome of the election. To determine whether a significant number of eligible workers were disenfranchised at Ron Nunn, the objecting party must show that a realistic possibility existed that the outcome would have been different. The employer has failed to do this.

The employer recognizes that it must make this argument, but has failed to make much of a case. In its brief (pps. 32-33), the employer argues that if the seven people who were not permitted to vote by Board agent Lemus, were counted and added to the challenged ballots and all these were put in the No Union's column, the tally would show UFW 105 and No Union 92. Thus, the employer would need 13 votes. The employer argues that the employer

"despite numerous handicaps, including, but not limited to, the fact that most of the employees who were employed on both the lettuce and tomato harvests in 1975 are not in the area at the

present time, has certainly shown, despite those obstacles, that at least 13 people did not vote in the election due to the timing of it." Employer's brief, p. 33.

Five interdependent assumptions have to be made for the employer to argue that disenfranchisement affected the election. First, all challenges must be overruled; second, such challenges must be counted for no union; third, the seven who didn't vote must be considered eligible; fourth, these votes must also go for no union; and fifth, in spite of the fact that the employer showed only 6 people were disenfranchised, we must assume that if there were 6, there must be at least 13. ^{29/}

Because of the assumptions that are implicit in the employer's argument, and on the basis of the facts adduced at the hearing, I do not believe that a reasonable possibility existed that the outcome of the election would have been changed had the 6 people who were disenfranchised voted.

INTIMIDATION

The incidents of alleged intimidation presented by the employer do not amount to physical threats in the commonly understood sense of this term. No one testified that they were in fear of imminent physical danger. Maria Villalobos testified that organizers visited her home in the morning and in the afternoon on October 19, 1975. On both occasions she was told that if she did not sign a card she would lose her job. She also testified to one time when organizers arrived at her house about 9:00 p.m. and stayed until midnight.

^{29/} I have found that Salvador Beltram, Francisco Maya, Rafael Maya, Maria Oseguera, Teodolinda Oseguera and Alisia Oseguera were disenfranchised.

Ramona Villa testified that she was told by Sal Quintanella, a volunteer UFW organizer, that if she did not sign a card she would lose her job.

Martha Michel said that before the election, Ruben Serna visited her more than once and insistently asked her to sign a card. Serna told her that he wanted to open our eyes and that we (the employees) were enriching the employer. This, and Serna's insistence, made her angry and she left.

In Patterson Farms, 2 ALRB No. 59 (1976) the Board engaged in a lengthy discussion of cases where union organizers allegedly told employees that if they did not vote for the union they would be laid off or out of work or there were rumors to this effect. Citing NLRB precedent, the Board concluded that employees often are able to evaluate such talk as campaign propaganda. Furthermore, the Board noted that such alleged economic reprisals were not within the union's power to carry out. Finally, the Board noted that in Patterson Farms, such comments did not dissuade people from going to the polls and voting. There is no evidence that employees were dissuaded from going to the polls. As mentioned before, turnout was high, and Villalobos, Villa and Michel voted. The UFW had no power to lay off people. Mrs. Villalobos, herself, testified that she discussed the "layoff" matter with Alegria Orosco at considerable length and seemed to understand that Orosco was referring to a union security clause. Villalobos testimony on this point is not crystal clear as to what she understood, but the evidence is clear that there was considerable discussion about this, and the fact that under a union contract one would have to join a union in order to continue working. It should be pointed out that Mrs. Villalobos, Villa and Michel would not and did not sign a card, in spite of union efforts.

With regard to Mrs. Villalobos and Mrs. Villa, statements, by union organizers regarding job loss might not be threats at all but, as suggested above, references to the union's intention to negotiate a union security clause in its contracts which is permitted by Labor Code Section 1153(c).

In sum, if such conversations are considered threats or intimidation, the requisite atmosphere of confusion and fear which would affect the free choice of voters is not apparent. Even if one disregards the specifics of the various conversations testified to and instead relies on activities surrounding such conversations, the evidence does not reveal that an atmosphere of fear and intimidation was created.^{30/} On the other hand, the employer has not convincingly established that such comments regarding layoffs are threats and not references to attempted inclusion of union security clauses in any negotiated contract.

The access violations cited by the employer did not have an intimidating effect.^{31/} In K.K. Ito and Sons, 2 ALRB No. 51 (1976) the ALRB stated that "allegations or violations of the access regulations by either an employer or a labor organization will be assessed in each case to determine whether it is of such a character as to affect the employee's free choice of a collective bargaining

^{30/} The employer argues that because the union was desperate to gain sufficient showing of interest their efforts were all the more intimidating. But with Villalobos, it is clear the union and employer already knew an election was scheduled and implicitly the showing of interest issue was resolved.

^{31/} Access violations objected to by the employer in its objections petition were dismissed by the Executive Secretary. However, evidence of such violations was admitted to allow the employer to show that events surrounding such access violations created an intimidating atmosphere.

representative." At p. 7. ^{32/} Thus, an access violation itself is not grounds for setting aside an election. Only if the access violation was of "such a character as to affect employee free choice" should an election be set aside. The evidence presented by the employer does not forge a link between access violations and conduct surrounding that violation which could affect the results of an election.

THE STEVE GARCIA INCIDENT

The activities of Steve Garcia do not warrant setting aside the election. First, Garcia was not a party or agent of a party to the election. The ALRB has followed NLRB precedent in according threats made by non-parties less weight than threats made by parties in determining their effect on the outcome of an election. Takara International, 3 ALRB No. 24 (1977). Second, while clearly disruptive, the evidence shows that the Board agents attempted to deal with the problem, unlike Perez Packing, 2 ALRB No. 13 (1976). This activity was not condoned in any way. Finally, there were few people in or near the voting area while Garcia drove back and forth. Many people had already voted and their votes were of course unaffected. People voted after the incident. No evidence was presented that people were inhibited from voting as a result of Garcia's activity. Applying the non-party standard, the disruption to the election by Steve Garcia was contained and had minimal impact.

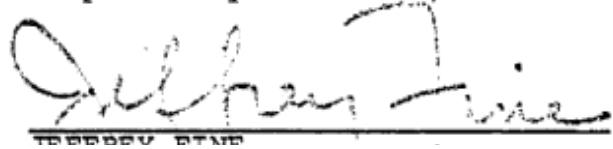
^{32/} One must also recognize the context in which alleged violations took place. Nunn testified that tomato crews were working 10 or 11 .hour shifts, and thus not finishing work till long after the crews normally quit for the day.

CONCLUSION

Although the election was held beyond the seven-day statutory period, I do not find that a significant number of additional workers would have voted had the election been held earlier. Therefore, on this basis, I cannot recommend that the election be set aside. I do not find that the instances of alleged intimidation warrant setting aside the election. In sum, I conclude that the objections taken separately and as a whole do not contain evidence sufficient to overturn this election.

DATED: August 24, 1977

Respectfully submitted,

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~~JEFFREY FINE~~

JEFFREY FINE
Investigative Hearing Examiner