

STATE OF CALIFORNIA
AGRICULTURAL LABOR RELATIONS BOARD

MARTORI BROTHERS DISTRIBUTING,)	
)	
Employer,)	Case No. 77-RC-1-E
)	
and)	4 ALRB No. 5
)	
UNITED FARM WORKERS OF 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 matter to a three-member panel.

On January 13, 1977, following a petition for certification filed by the United Farm Workers of America, AFL-CIO (UFW), an election was conducted among the agricultural employees of the Employer. The UFW obtained a majority of the valid ballots cast. The Employer filed timely objections, one of which was set for hearing.

Subsequent to the hearing, Investigative Hearing Examiner (IHE) Constance Carey issued her initial Decision in this matter, recommending that the objection be dismissed and that the UFW be certified as the exclusive collective bargaining representative of the Employer's agricultural employees in the State of California. The Employer filed timely exceptions and a supporting brief.

The Board has considered the objection, the record, and

the IHE's Decision in light of the exceptions and brief, and has decided to affirm the rulings, findings, and conclusions of the IHB and to adopt her recommendation.^{1/}

The sole issue before the IHE was whether actions of OFW organizers violated the terms of the "access rule," and if so whether the violations were of such character as to affect the free choice of the voters for or against union representation. K. K. Ito Farms, 2 ALRB Ho. 51 (1975). The Employer, having asserted the objection to the election, clearly had the burden of proof in this proceeding. For, unless it is demonstrated to the Board that there are sufficient grounds to refuse to do so, it is mandated to certify the results. Labor Code § 1156.3(c).

The access rule on its face applies only to organizational activity occurring on property owned by, or subject to the legal right of possession of, the Employer. 8 Cal. Admin. Code § 20900 (1976). A prerequisite, therefore, to the application of the rule is proof that the actions complained of occurred on such property. As found by the IHE, the Employer has failed to present sufficient evidence to establish that fact. As the IHE properly commented in her Decision, the record clearly shows that

^{1/} We do not adopt the IHE's inference that even if it were shown that the union organizers were on the Employer's property for more than one hour before the start of work there would be no violation of the access rule, because the workers, on a piece-rate system, were not paid by the Employer for this time. The access rule expresses by its terms the full extent of the accommodation between the Employer's proprietary interests and the organizational rights of the employees. That accommodation, simply stated, is that organizers may be on the Employer's property for only one hour before the start of work, and for no longer. The nature of the Employer's compensation system is irrelevant to the striking of this balance.

there was an obvious dispute and conflicting views concerning the Employer's right of control over the property where the organizers customarily met with the employees before work started. The Employer has clearly not presented evidence sufficient to resolve that conflict in its favor. We also agree with the IHE's conclusion that the UFW's conduct would not in any event constitute grounds for setting aside the election. Accordingly, the Employer's objection is, hereby dismissed, the election is upheld, and certification is granted.

CERTIFICATION OF REPRESENTATIVE

It is hereby certified that the United Farm Workers of America, AFL-CIO, having received a majority of the valid votes cast among the agricultural employees of the Employer, is, pursuant to Labor Code § 1156, the exclusive representative of all of the agricultural employees of Martori Brothers Distributing 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: January 27, 1978

GERALD A. BROWN, Chairman

ROBERT B. HDTCHINSON, Member

HERBERT A. PERRY, Member

STATE OF CALIFORNIA
AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of:

MARTORI BROS. DISTRIBUTING,

Employer,

Case No. 77-RC-1-E

and

UNITED FARM WORKERS OF AMERICA,
AFL-CIO,

Petitioner.

Robert P. Roy, Western Growers
Association, for Employer.

Tom Dalzell and Anita Morgan, for
the" United Farm Workers of America,
AFL-CIO.

DECISION

Statement of the Case

CONSTANCE CAREY, Investigative Hearing Examiner: This case was heard by me on August 9, 1977 in Brawley, California. The UFW won an election held for the employees of Martori Brothers on January 13, 1977. The employer filed timely objections, all but one of which were dismissed by the Executive Secretary on May 12, 1977. The Employer's Request for Review of the dismissed objections was denied by the Board. The remaining objection which was set for hearing was whether the United Farm Workers of America violated the access rule repeatedly by remaining in the fields in excess of the permitted time periods and during work time and by preventing employees from performing their work, and whether this conduct affected the outcome of the election.

Both parties were represented at the hearing and were given full opportunity to participate in the proceedings. Upon the entire record, and after consideration of the arguments made by the parties, I make the following findings of fact, conclusions, and recommendation.

Findings of Fact

I. General Background

Martori Brothers is a partnership involved in the growing and harvesting of lettuce in the Imperial Valley of California and in Arizona. During the months of December and January, 1977, the employer was harvesting lettuce on leased land in the Brawley area. The employer began its 1976-1977 harvesting operation in this area on December 8, 1976, working with three lettuce crews of approximately 35 workers each. The lettuce is harvested by a "trio", two of whom cut the lettuce while the third packs it in a carton. The cartons come to the fields broken down. They are opened and stapled together by a "stitcher". After they are filled, they are stapled shut by a "closer". Then the "loaders" place the full and closed cartons on a truck which follows the harvesting through the fields.

During the time from December 8, 1976 until the election on January 13, 1977, there was often frost in the fields in the early mornings. The workers were brought to the fields by bus from Brawley and Calexico or came by private car. Usually they arrived by 8:00 a.m. If there was no frost, they immediately began picking. Otherwise, it was necessary to wait until the ice melted which might not be until 10:00 a.m. or later.

Employer Steve Martori stated that the closers started work a few minutes after the trios while the loaders started up to 1/2-hour later. Employer witness Hershell Palmer and several UFW witnesses testified that the loaders would wait until the trios were about 1/4-

mile down the rows and the closers had a chance to complete their work. They agreed that sometimes this would be 1/2-hour after the others started working. Ideally, the stitchers began work early so that boxes were ready for the trios as soon as the frost melted on the lettuce.

Employee Ediberto Silva testified that many workers arrived by car at different times. The buses from Calexico usually left about 7:00 a.m. The witnesses indicated workers arrived anytime between 7:00 a.m. and 9:00 a.m., depending on frost conditions. Local workers would not arrive early on days there was frost but those coming from farther away would not know what frost conditions would be in Brawley. so they regularly arrived early. Workers were not paid for the time they spent waiting for work to begin. They waited on public roads or canal roads. As the mornings were cool, they built fires and gathered around them. Some played dice or slept in their cars.

There were three witnesses for the employer: Steve Martori, a partner in the business, Hershell Palmer, a loader, and Melvin Tuggle, a farm labor contractor who provided employees for Martori Brothers. The witnesses for the OFW were four farm workers, Ediberto Silva, Valdimer Perez, Luis Pargas, and Jesse Corona and organizer Maria Luisa Pacheco.

Martori and Tuggle testified that UFW organizers were regularly in the fields talking to employees while they were working during the pre-election period, while all DFW witnesses testified that UTW organizers were never in the fields while the workers were working. Martori said that several workers from one of the crews had complained to him that the organizers were bothering them while they were working. He did not positively identify these workers except to say they were members of the Martinez crew. In response, he told these workers there

was nothing the company could do about the problem and he explained the rule to them. Martori testified that some of the loaders also complained to him, saying that the organizers kept them from working. No worker witnesses corroborated this testimony in regard to complaints.

Although Martori said that the dates he gave were approximate, he testified concerning alleged access violations on six specific dates.

II. The Alleged Violations

A. December 8, 1976

December 8, 1976 was the first day of the employer's harvesting operation in Brawley for the season. Martori testified that there were three organizers in the fields handing out leaflets and campaigning among the three crews when he arrived just before 8:00 a.m. When he asked for their identification, they told him they had none. The work started at 8:00 or 8:30. The organizers left when Martori asked them to but returned to the fields when he left the area. Martori said-this conduct continued throughout the morning. All three organizers were male. Although Martori described one of them, he said he did not recall who they were.

Hershell Palmer also recalled these three organizers on December 8. He said he doesn't know their names but first met all three of them while working in Colorado. These organizers said if the employees did not join the union, they would not be able to work. Palmer responded that he didn't belong to the union but would work even if he had to fight.

UFW witness Ediberto Silva said he saw no UFW organizers in the fields on December 8. He had worked for several other growers and had participated in other UFW organizational drives. During that time he had become familiar with many UFW organizers and also knew some Teamster representatives. On December 8, he saw three Teamster

organizers, one of whom he recognized as a man named "Mingo" Enriquez. Employee Jesse Corona corroborated this testimony, saying that, he saw about three Teamster organizers in the Martori fields on the first day. The only one he knew by name was "Domingo". Although he did not see these men distributing cards or literature, he believes they probably were there for organizational purposes.

Pacheco said the UFW could not have been present on December 8 because they did not start organizing at Martori until after the Arakelian election which she believed to be about December 12. I note that that election was held on December 15. Pacheco identified the four OFW organizers who worked on the Martori campaign: herself, Michelle Giles, Rofaerto Gonzales and Joaquin Verdugo. She said that Arturo Rodriguez was a UFW coordinator. He did not work in the Martori campaign and went to the Martori fields once-only, on the day before the election. UFW organizers were all given badges with their names and the name of the union. She said she customarily wore her badge and also carried a union card which had her picture on it. B. December 14, 1976

The date of December 14 was given by Steve Martori as the time of further UFW access violations although he said he vaguely recalled the date. He used a declaration he had made on January 19, 1977 to refresh his memory. He said that he recorded conduct he thought violated the access provisions on a tape but that he later erased the tape. He said that UFW organizers Maria Pacheco, Michelle Giles and Arturo Rodriguez III were present in the field when the crews arrived about 7:00 a.m. and that they stayed for about half an hour after work began that day at 8:30 a.m. He also mentioned that his foreman, Melvin Tuggle, told him that an organizer returned in the afternoon and talked to the loaders. This testimony was corroborated in substance

by Melvin Tuggle who described seeing Maria Pacheco in the company fields one evening talking to his two sons and to Hershell Palmer. These three were loading lettuce at the time. Tuggle was unable to recall the date of this incident. Palmer's testimony was that Maria Pacheco spoke to him twice in the fields in January. He said that on the morning of January 7, while he was talking to Maria Pacheco, Martori told him to get to work and also told Pacheco to leave. At that time, the trios were about 1/4-mile down the row and the other loaders waited for him. According to him, the loaders started work about a half hour after the trios. He was talking to Pacheco about the possibility of her going to Yuma with him after work to talk to some workers there. She came to the field while he was working that afternoon to say she would not be going with him. Pacheco recalled talking to Palmer one morning after the trios had begun work. She remembered Martori asking her to leave. Although she did, she told him she had a right to be there until the loaders began work. She arranged with Palmer to drive him to Yuma after work that day. She remembered returning around 4:30 or 5:00 the same day to tell Palmer she would be unable to go to Yuma. The loaders were still working. She said she spoke to Palmer no more than five minutes when he was between two rows. Palmer thought this incident occurred January 7 and Pacheco did not give a date. However, when questioned in regard to December 14, she said that the organizers always left when work began and that Arturo Rodriguez could not have been there since he was only at the Martori property one time, and that was on the day before the election. Silva said the same thing.

C. December 20, 1976

After referring to his January 19 declaration, Steve Martori testified that he saw the same three UFW organizers in the fields whom

he had seen on December 14. He asked then to leave when work began but they stayed 15 minutes longer, Martori stated he knew the male organizer with the two women was Rodriguez because he saw his identification on election day. He said the organizers remained with the loaders after the loading began. Maria Pacheco denied staying in the fields after work began.

D. December 22, 1976

Martori said that on this date the two female organizers for the OFW arrived with the crews about 7:00 a.m. and remained for awhile after work began at 9:30. They were speaking with workers who lived in Arizona and were members of the Sandoval's crew. Employee Valdimar Persz who worked with Sandoval's crew from December 15 or 20 every day until the election, said he never saw Maria Pacheco or other UFW organizers -in the fields with workers while they were working. He defined the "fields" as the area within the canal ditches. Maria" Pacheco denied this incident in a general way by saying no UFW organizer was ever in the fields while employees were working.

E. December 23, 1976

Steve Martori testified again to seeing Maria Pacheco and Michelle Giles in the fields from 7:00 until the start of work. Then they talked to the loaders. Pacheco made the same general denial as above.

F. January 7, 1977

On this date, Steve Martori recalled that Maria Pacheco and Ediberto Silva were present in the fields all morning. When he -arrived he told them to leave. He and Silva had "words". He had arrived about 8:00 a.m. They were there at that time and were still there with representatives of the ALRB when he returned between 11:00 and 12:00. On this day, the trios worked until noon while the loaders

worked later. This was the day after Silva had been fired. Martori said that since Silva was not employed by the company on that day, he considered him to be a UFW organizer. Thus, he contends it was a violation of the access rule for Silva to enter the field to request reinstatement. January 7 was a Friday, and Silva did return to work for Martori early the following week.

Silva's testimony was that he was not sure whether he had been laid off or fired on the preceding day, so he went into the field to ask Martori whether he should join the other employees at work. Martori responded negatively, so Silva got off the property and waited for four or five hours on a public road for Board agents to arrive. The employer established that Silva had worked for about five employers within the past year and probably three of them had had elections occur while he worked for them. Silva said that he is always involved in organizing while employed as a farm worker. He had first worked for Martori Brothers in 1966 but left its employ in 1977 right after the election. On January 7 while waiting for the Board agents, he said he probably talked to some of the workers as they reached the end of the rows and turned back into the field. He said he walked along the edge of the field while talking to them.

Maria Pacheco remembered staying on the shoulder of the road throughout the morning of January 7. When Silva went into the field to ask whether he could work, she stayed out of the field.

Analysis and Conclusions

The employer testified that the UFW organizers were in the fields everyday. UFW organizer Pacheco and the UFW employee witnesses testified that organizers did not enter the fields, nor did they talk to employees while they were working.

This apparent discrepancy seems to me to be capable of

resolution. The employer defines "fields" as the land which was being harvested plus the access roads and irrigation ditches. Maria Pacheco testified that the organizers were told by the UFW legal department that the access roads and the irrigation ditches were public property. The union defined "fields" as only the lower areas where the lettuce was actually being harvested. The employer considered the organizers to be in its "fields" whenever they were on the access roads. There was no documentary evidence which showed whether the roads were public or private. There was no claim by the employer that under the terms of its lease, it had control over the access roads. If the organizers were on public roads, then there can be no violation of the access rule.^{1/} The access regulations of the ALRB define times when, organizers may enter an employer's property. If organizers are on public roads, the access rules would not apply.

Assuming, however, that the organizers were sometimes on private roads or on the edge of the fields, I still find no violation which would warrant setting aside this election.

The Board has held that violations of the access regulation by either an employer or a union are not an automatic ground for setting aside an election. Instead, where the access regulation has been violated, the conduct will be evaluated "to determine whether it is of such character to affect the employees' free choice of a collective bargaining representative." K.K. Ito Farms, 2 ALRB No. 51 (1976). K.K. Ito was followed by Tomooka Brothers, 2 ALRB No. 52 (1976) and Dessert Seed Company, Inc., 2 ALRB No. 53 (1976) which further set out the Board's policy in regard to access. In Tomooka,

^{1/} 8 Cal. Admin. Code §20900(1976)

access denial to a union by an employer was not considered grounds for overturning an election when the denial was not deemed to affect the outcome of the election. The Board found in Dessert Seed that violations of the regulation on six occasions were not sufficient ground for setting aside the election where the employer seemed to acquiesce to the organizers' presence twice and where three times the organizers' left the property immediately upon being asked.

In this case there are six dates when excess access allegedly occurred. There is a further incident involving organizer Maria Pacheco and workers Hershell Palmer which occurred sometime during the organizational campaign.

I find that the December 8, 1976 alleged violation did not involve UFW organizers. The employer's witnesses assumed the organizers were from the UFW but could not identify them, while two employees testifying for the UFW recognized them as Teamster representatives. I find these three men were Teamsters. Since the Teamsters were not on the ballot, their presence cannot be said to have had an effect on the outcome of the election.

The other five incidents of alleged violations (except those Involving Ediberto Silva and Hershell Palmer which are discussed later) occurred before work. Although the regulations allow organizers to be present for an hour before work, an hour at lunch time and an hour after work, the organizing at Martori Brothers occurred almost exclusively before work. There was no regular lunch break. On days when there was no ice in the fields, work was over by noon. When work was delayed because of ice, the work was not completed until late in the afternoon. There was no regular quitting time. Loaders worked an hour or more later than the trios in order to get all the boxes loaded. The organizers usually did not attempt to see the workers at the end

of the day since it could not be predetermined when that would be.

Organizers were present several mornings for more than one hour before work. It has not been proved that they were on land which was subject to Martori's control. But even if they were in the employer's fields, the amount of excess access taken was minimal and insufficient to warrant overturning the election. Martori testified that on several occasions the organizers left shortly after being requested to. On most mornings they were there for a short time after work began. During this time they were not talking with people who were working but with the loaders who did not regularly begin until about 1/2-hour after the trios.

I do not believe that the access regulation was violated because the organizers were present for more than one hour in the morning. §2900 (5) (3) (A) states:

"Organizers may enter the property of an employer for a total period of one hour before the start of work and one hour after the completion of work to meet and talk with employees in areas in which employees congregate before and after working."

In this case, there was no fixed time for work to begin. Neither the workers nor the organizers could predict accurately the time the ice on the lettuce would melt each day. The organizers arrived each morning "with the workers. Surely the workers did not enjoy waiting in the cold morning for work to begin. They were not paid for that time. No purpose would be served in this situation to send the organizers off after one hour when work did not begin some days for two or three hours more. The organizers were present only in the morning. Their presence could not disrupt work before work began. Some workers probably arrived only one hour before work, for if they lived nearby and knew that frost was on the lettuce, they would not need to arrive early.

Once or twice Maria Pacheco continued to talk to Hershell Palmer after the other loaders in his crew were ready to begin work. Palmer said that one time while he was talking to Pacheco, the other loaders called to him to start working and Martori also told him to begin working. There was seemingly no reason he could not begin whenever he wanted. The mere presence of an organizer willing to talk to him would not have prevented him from walking away and beginning work. Mr. Palmer was obviously not intimidated by Ms. Pacheco. He is a large, seemingly self-assured man. She is not a large woman.

Although the date was not established, the testimony is not in dispute that Pacheco went to see Palmer one afternoon before he was through working. She testified that she talked to him from the edge of a row. Although it is unclear whether she was actually on the employer's property, she did talk to Palmer while he was working. . Although this might be a technical violation, I find it to be minimal.". Pacheco did not know what time work would be stopping that day and she wanted to give Palmer the message she would be unable to take him to Yuraa at the end of work. The interruption was for a short time. There was testimony that three loaders can do the work if the fourth is unavailable, although, since it was piece work, they would be resentful if one person did not do his share. Mr. Palmer's confident appearance while he was testifying convinces me that he would not have felt intimidated by Ms. Pacheco.

The employer contends that there was an access violation on the day that Eddie Silva stayed all morning with the organizers waiting for Board agents. I find that Mr. Silva's entry into the field to ask Mr. Martori for reinstatement: to his job was not an access violation. Mr. Silva testified that he was uncertain as to

whether he was laid off or fired. The fact that he was not an employee on that day does not mean that he was then a union agent subject to the access rules. I find that his approach to Martori was as an employee. Pacheco and Silva both testified that they were on a public road that morning. The employer did not rebut this testimony. Therefore, there was no access violation.

Because I find that the employer did not meet the burden of proving that the conduct complained of occurred on private land, I recommend that this objection be dismissed. Even if each alleged violation were shown to have taken place on private land I would still recommend dismissal of the objection, because the conduct was no more serious than that in Dessert Seed, previously cited, where the Board dismissed the same objection. There was no showing that the alleged violations were of a nature to have affected the employees' free choice in the election. No other union was on the ballot so this is not a situation where one union had an access advantage over another.

Recommendation

Based on the findings of fact, analysis, and conclusion's, I recommend that the employer's objection be dismissed and that the United Farm Workers of America, AFL-CIO, be certified as the exclusive bargaining representative of all the agricultural employees of the employer in the State of California.

DATED: December 5, 1977

Respectfully submitted,



CONSTANCE CAREY
Investigative Hearing Examiner, ALRB