Oceanside, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

HARRY SINGH & SONS, Employer, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Petitioner.	)	Case No. 75-RC-47-R 4 ALRB No. 63

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 28, 1975, a representation election was held on November 3, 1975, among the agricultural employees of Harry Singh & Sons, the Employer herein. The Tally of Ballots showed the following results:

UFW	90
No Union	28
Challenged Ballots	23
Void Ballots	2
Total	143

The Employer timely filed objections, six of which were set for hearing. Subsequent to the hearing, Investigative Hearing Examiner (IHE) Jeffrey Fine issued his initial Decision in which he recommended that the objections be dismissed and that the UFW be

certified as collective bargaining representative of the Employer's agricultural employees.

The Employer timely filed exceptions to the IHE's Decision and a brief in support of its exceptions. The UFW filed a brief in opposition to the Employer's exceptions.

The Board has considered the record, 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 recommendation to dismiss the objections and to certify the UFW.

The Employer excepts to the IHE's finding that the Regional Director did not abuse his discretion in invoking the third presumption pursuant to 8 Cal. Admin. Code Section 20310 (e) (3) (1975), reenacted as 8 Cal. Admin. Code Section 20310 (e) (1) (C) (1976).[1/] We have said that "invocation of a particular presumption is appropriate only when the Employer's failure to submit timely and complete information has frustrated the determination of facts which relate to the presumption being invoked." Yoder Bros., Inc., 2 ALRB No. 4 (1976).

Respondent was required, by 8 Cal. Admin. Code Section 20310 (d)(2), to submit to the Regional Director a complete and accurate list of full names and current addresses of all the

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[1/]The regulation provides in pertinent part, "If an employer fails to comply with the requirements of subsection (a) through (d) above, and such failure frustrates the determination of particular facts, the regional director may invoke any or all of the following presumptions ... (c) that all persons who appear to vote, who are not challenged by any other party, and who provide adequate identification, are eligible voters."

employees on its payroll for the payroll period preceding the filing of the petition. The record establishes that the Employer did not maintain adequate payroll records[2/] of its daily employees, who comprised over two-thirds of its workforce.[3/] As the Employer did not maintain a complete and accurate payroll record of its daily employees, there was no basis for certitude in determining the voting eligibility of its employees.[4/] One of the main purposes of the voting eligibility list is to verify the identification of eligible voters. The presumption was properly invoked herein as the Employer's inadequate payroll record-keeping and its resultant failure to submit timely and complete data has frustrated and prevented such verification.

The Employer argues that the reasons for invoking the presumptions, as stated in the former Regional Director's letter to the Employer (Employer's Exhibit 7), are inadequate to support such

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[2/] Labor Code Section 1157.3 states, "Employer shall maintain accurate and current payroll lists containing the names and addresses of all their employees and shall make such lists available to the board upon request."

[3/] The Employer transported its daily employees each morning by bus and van from San Ysidro to its ranch. At the end of each day, the Employer would count the number of workers who rode in the bus or van and make out one check to the driver of the vehicle for the workers' combined wages. The driver would then cash the check in San Ysidro and disburse the wages to each employee. The Employer's sole record of these wage payments consisted of the stubs of the checks it had made out to its drivers.

[4/] The Employer attempted to remedy this defect on one occasion, after the petition was filed, by asking the drivers of vehicles who transported daily employees to the fields to compile a list of the employees who worked that day. This list, of course, does not include all employees who were employed during the relevant payroll period. It is also possible that some persons working on the day the list was compiled did not work on any day during the relevant payroll period and therefore would not be eligible to vote.

action and therefore evidence an abuse of discretion. We do not agree. The former Regional Director's letter gave the Employer written notification of which presumptions were to be invoked in the election and adequate justification therefor. The letter stated, inter alia, that the eligibility presumption was being invoked because the names of several employees who were employed during the pay period did not appear on the list and several names included on the list were not on the Employer's payroll records.

We find the reasons set forth in the former Regional Director's letter to be adequate in themselves to justify invocation of the presumption and we do not rely for this finding on the Regional Director's testimony based on his examination of the Regional Office file or any other arguably privileged material.

As we noted in Yoder, supra, the presumptions are not a penalty. Rather they are calculated to insure that the employees' exercise of their voting rights under the Act will not be delayed or inhibited by an employer's nonfeasance, e.g. failure, to provide information and/or because of its inadequate record-keeping procedures. In the circumstances herein, we agree with the IHE that the Regional Director did not abuse his discretion by invoking the third presumption.[5/]

[5/] To prevail in its objection to the Regional Director's invocation of the presumption, the Employer must show that the invocation constituted an abuse of discretion and resulted in prejudice. Yoder, supra. Since the Employer has not established the first of these elements, we need not consider the second. However, even assuming, arguendo, that the Employer met its burden of establishing abuse of discretion, the record does not support a finding that invocation of the presumption permitted nonemployees to vote or otherwise resulted in prejudice to any party.

On the basis of the above findings and conclusions, and the record as a hole, 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 the agricultural employees of Harry Singh & Sons 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: September 19, 1978

RONALD L. RUIZ, Member

ROBERT B. HUTCHINSON, Member

JOHN P. McCARTHY, Member

CASE SUMMARY

Harry Singh & Sons

4 ALRB No. 63
75-RC-47-R

IHE DECISION

After an election won by the UFW on November 3, 1975, the Employer filed timely exceptions, the following six of which were set for hearing: (1) whether the Regional Director abused his discretion in invoking the presumption pursuant to 8 Cal. Admin. Code Section 20310 (e) (3) (1975), reenacted as 8 Cal. Admin. Code Section 20310 (e) (1) (c) (1976) that all persons who appear to vote, who are not challenged by any other party and who provide adequate identification, are eligible voters; (2) whether the operation of the presumption set forth in 8 Cal. Admin. Code Section 20310 (e) (3) (1975), reenacted as 8 Cal. Admin. Code Section 20310 (e)(1)(C)(1976) permitted nonemployees to vote in the election; (3) whether the atmosphere of the new voting site was so intimidating that persons who had agreed to act as the Employer's observers refused out of fear; (4) whether the Employer was improperly denied the right to use his designated observer, a nonsupervisory employee who was familiar with many of the employees; (5) whether the Employer's challenge of the observers of The United Farm Workers of America, AFL-CIO (hereinafter the "UFW") was ignored; and (6) whether the UFW agents and supporters threatened and intimidated employees in and around the polling area and created an atmosphere which was not conducive to a fair and impartial election.

Addressing Respondent's contention that the Regional Director abused his discretion in invoking the eligibility presumption, the IHE found the Regional Director's decision to be a correct one. The IHE also concluded that the Regional Director's failure to state the best -reasons for invoking the presumption did not undermine the correctness of the decision but rather was a harmless error. Moreover, the IHE found that Labor Code Section 1157.3 placed an obligation on the Employer to keep accurate records and that having failed to do so it was difficult to credit Respondent's assertion that it was denied due process because it would have cured any defect in the eligibility list had it been informed of the inaccuracies.

As to Respondent's argument that the presumption operated so as to permit nonemployees to vote in the election, the IHE concluded that while there was some evidence that noneligible employees or nonempleyees may

have gone to the election site, Respondent had full opportunity to challenge their votes.

With regard to the Employer's third exception, the IHE found that the record did not establish that a threat had been made or that the Union was behind such a threat, only that the employee believed that such a threat was made. Silva, an employee, testified that she was told by a girlfriend that she would be jumped if she acted as an Employer's observer. Relying on Kawano Farms, 3 ALRB No. 25 (1977), the IHE concluded that a pervasive atmosphere of fear did not exist and that this incident was insufficient to invalidate the election.

The IHE found that Respondent had not been prejudiced nor the outcome of the election effected by the ruling of a Board agent denying Respondent the right to use as an observer a nonsupervisory employee challenged by the Union to be a supervisor.

The IHE concluded that there was no evidence to support a finding that the UFW observers were employees.

With regard to Respondent's sixth exception, the IHE found that prior to the election there were several bonfires, singing, dancing and talking among employees and that the employees quieted down when asked to do so by a Board agent. The IHE also found that there was no evidence that UFW organizers or agents engaged in any activity that could be regarded as threatening or intimidating. The IHE thus concluded that the atmosphere created did not interfere with employees' right to vote freely.

BOARD DECISION

The Board adopted the IHE's recommendation that the objections be dismissed and the UFW be certified. However, the Board augmented the IHE's decision by finding that the former Regional Director's letter provided the Employer with notice of which presumptions were being invoked in the election and adequate justification therefor. The former Regional Director invoked the presumption because the names of several employees who were employed during the payroll period did not appear on the list and several names included on the list were not on the Employer's payroll record.

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of:

HARRY SINGH & SONS,

Employer,

and

UNITED FARM WORKERS OF AMERICA, AFL-CIO,

Petitioner.

Case No. 75-RC-47-R

Richard A. Paul, Esq., Gray, Cary, Ames and Frye, for the Employer.

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

DECISION

STATEMENT OF THE CASE

JEFFREY FINE, Investigative Hearing Examiner: This case was heard before me on July 25, 27, 28, and 29, 1977 in Oceanside, California. The employer filed timely objections to the election which was held on November 3, 1975.[1/] In its order dated May 20, 1977 the Executive Secretary of the Board set the following objections for hearing.

[1/] The Tally shows UFW 90, No Union 28, Challenged Ballots 23, Void Ballots 2. I take notice of the official Master File kept in the Executive Secretary's office, available for inspection by parties which includes the tally petition and other documents.

1. Whether the regional director abused his discretion in invoking the presumption pursuant to 8 Cal. Admin. Code §20310(e) (3) (1975) , re-enacted as 8 Cal. Admin. Code §20310(e) (1)(C)(1976) that all persons who appear to vote, who are not challenged by any other party and who provide adequate identification, are eligible voters;

2. Whether the operation of the presumption set forth in 8 Cal. Admin. Code §20310(e)(3)(1975), re-enacted as 8 Cal. Admin. Code §20310(e)(1)(C)(1976) permitted non-employees to vote in the election;

3. Whether the atmosphere of the new voting site was so intimidating that persons who had agreed to act as employer's observers refused out of fear;

4. Whether the employer was improperly denied the right to use his designated observer, a non-supervisory employee who was familiar with many of the employees;

5. Whether the employer's challenge of the observers of the United Farm Workers of America, AFL-CIO, (hereafter the "UFW") was ignored; and

6. Whether the UFW agents and supporters threatened and intimidated employees in and around the polling area and created an atmosphere which was not conducive to a fair and impartial election.

All parties were represented at the hearing and were given a full opportunity to participate in the proceedings. Both parties called numerous witnesses and both submitted post

hearing briefs. Upon the entire record, and after consideration of the arguments made by the parties, I make the following findings of fact, conclusions, and recommendations.

FINDINGS OF FACT

I. Jurisdiction

Neither the employer nor the UFW challenged the Board's jurisdiction at the hearing. Accordingly, I find that Harry Singh & Sons is an agricultural employer within the meaning of Labor Code §1140.4 (c) and the United Farm Workers of America, AFL-CIO (UFW) is a labor organization within the. meaning of Labor Code §1140.4(f) and that an election was conducted pursuant to Labor Code §1156.3 among the employer's employees.

II. General Background

Harry Singh & Sons, a sole proprietorship owned by Harry Singh, is in the business of growing and shipping tomatoes. The employer leases the land it farms, (approximately 225 acres,) from the United States Marine Corps at Camp Pendleton.

There are two harvests each year. During the fall harvest period (October - December) approximately 170 acres are harvested in fields located west of Interstate Highway 5, between 1-5 and the ocean. During the summer harvest period (June - August) approximately 45 acres are harvested in fields east of 1-5. Peak of season generally occurs in November. This pattern was followed in 1975.

Harry Singh & Sons has two payrolls for the two types of labor force that are employed. There are workers who commute daily from San Ysidro on a 44 passenger bus and 15 passenger van provided by the employer. Some daily commuters drive their own cars to work. Daily commuters are paid daily.

Gene Singh testified that the employer's practice was to count the number of daily employees and write a check to the bus driver and/or van driver, as the case may be. The drivers would then cash the check in San Ysidro and pay the workers in cash.

There are also employees who live in or near Oceanside. These locals are paid weekly. Both locals and commuters work in the shed and in the fields.

A petition was filed with the ALRB Riverside Regional Office on October 28, 1975. Harry Singh was personally served with the petition on October 27, 1975.

OBJECTIONS TO THE ELECTION

I. Whether the regional director abused his discretion in invoking the presumption that all persons who appear to vote and who are not challenged by any other party and who provide adequate identification, are eligible voters.

Upon learning that the petition had been served, Gene Singh contacted his attorney, Norman Vetter. This occurred either on October 27, 1975 (all dates refer to 1975 unless otherwise indicated) according to Singh or on October 23 according to Vetter.

Vetter, who had previously represented Kawano Farms in an election matter, testified that he had some knowledge of the Agricultural Labor Relations Act (Act or ALRA) which had only recently been put in effect. Both Singh and Vetter agree that they discussed the. requirements imposed by 8 Cal. Admin. Code §20310(1975) (all reference is to the 1975 regulations unless otherwise indicated). Vetter told Singh to get a list of all employees.

Singh admitted that prior to October 27 he did not keep a list of daily employees. He testified that on October 27, he told his drivers to get the names of all daily commuters, their addresses and social security numbers. Singh admitted that if a person did not work on October 27 (or whatever day the drivers asked for names) that name would not appear on the list. In spite of the fact that he had some difficulty getting names, Singh apparently never went on the buses to personally ask for the list but merely told the drivers to get the information. Two witnesses (Ester Silva and Juan Moreno Guzman) testified that they gave addresses that were different than the addresses attributed to them on the list. This suggests a certain lack of care on Singh's part.

In contrast, Singh personally contacted local workers; however, with regard to commuters who did not use Singh & Sons vehicles, there is no testimony that Gene Singh ever asked them personally for their names or in any other way requested them. Singh also said that he never verified the names on the list with workers. The lists, employer's exhibit 1 and 2 (hereafter

E.X. 1,2), were given to Vetter on October 30. The lists were typed and alphabetized by Vetter and included with other information as part of the employer's 48 hour response, and picked up on October 30 by a Board agent.

In its 48 hour response, the employer alleged that the petition was untimely filed because the number of employees was less than 50 percent of peak. On October 31, the Board agent Cesario Hernandez called Vetter and asked to see the 1974 records which would help substantiate the employer's assertion. These records were made available to Board agents Jerry Faustinos (agent in charge) and Cesario Hernandez. Hernandez inspected the records that[2/] afternoon at about 2:00 p.m. in Vetter's office. At that time, Vetter was also given a memo from the General Counsel (Walter Kintz) interpreting §20310. (E.X. 6).

Vetter said that Hernandez inspected the records and told him that, as best he could determine, peak was less than the 325 which the employer had claimed. (E.X. 5). Singh then explained that they weren't sure whether the period Hernandez examined was the peak period. Hernandez asked for additional information to be delivered to the regional office on November 1, at noon. He also asked for a declaration regarding the absence of addresses for certain employees.

Singh, who was present during this meeting, confirmed Vetter's testimony. Most questions concerned peak, the Board

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2/ Faustinos testified that Hernandez inspected the records because he was more experienced in these matters although Faustinos was actually the agent in charge.

agents requested additional information regarding peak and also a declaration from Singh concerning addresses. Both Vetter and Singh maintain that no questions were raised with regard to the accuracy of the employee list.[3/]

After the meeting, Vetter asked Singh to re-check the peak information and particularly those employees whose addresses were missing. On November 1, Vetter met with Singh and prepared the declarations requested by Hernandez. (E.X. 3,4).

Both Singh and Vetter believed they substantially complied with §20310 and with the General Counsel's memo. They claim they had no notice that the list was inaccurate and therefore no opportunity to remedy any defects.

On November 1, Vetter took the declarations requested by Hernandez to Riverside. He arrived about 11:45 a.m. Hernandez was not there and despite attempts, Vetter did not reach him. After lunch, Vetter saw Douglas Griffith, the regional director. According to Vetter, the first thing Griffith said was that he was invoking the presumptions. There was no other conversation.

Douglas Griffith, who is no longer employed by the ALRB, was able to review the Board file and testified that his

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3/ 8 Cal. Admin. Code §20310(d)(2) requires that the employer submit within 48 hours a "complete and accurate list limited to the complete and full names and addresses of all employees...." The employer attempts to distinguish between "complete" and "accurate" arguing that accuracy goes to whether the list gives the names of all eligible employees and "complete" goes to whether the names are accompanied by addresses. A better interpretation is that "accurate" and "complete" should ire read together and ultimately refer to the utility and reliability of the list.

recollection was refreshed by this review.[4/] After receiving the employer's 48 hour response, he sent out Board agents to determine if the response was sufficient. Orally and in writing, the Board agents informed Griffith that the employer's list was inaccurate, that they could not verify two pages of names as employees working at Harry Singh, and that non-employees were on the list. Griffith then discussed this case with the General Counsel and the General Counsel agreed with Griffith that it was appropriate to invoke all three presumptions. Griffith pointed out that he made the decision to invoke presumptions after he evaluated the Board agents' reports and his discussion with the General Counsel only confirmed his decision.

Griffith said that he was told on Friday, October 30, that Vetter was coming with additional information: a declaration explaining that Harry Singh Sr., was incapacitated by an accident. Although not clear about what else Vetter might be bringing, Griffith maintains that he was never informed that Vetter was going to bring information which would cause him to

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4/ Griffith testified that arrangements were made for him to review the file by UFW attorney E. Michael Heumann III. Griffith was not allowed to remove the file from the presence of a Board agent nor. was he allowed to take notes. The parties did not see the file.

After Griffith testified that he had refreshed his recollection, Mr. Paul moved for production of the Board file pursuant to Evidence Code §771. This motion was denied on the grounds that the Board file was privileged and confidential, although Mr. Paul argued that the Board had waived any such privilege and that the hearing examiner should not assert any privilege for the Board. Mr. Paul then moved that Griffith's testimony be stricken. This motion was also denied.

change his opinion about the correctness of invoking the presumptions. Griffith recalls meeting with Vetter on November 1, but denies he preemptorily invoked the presumptions. In Griffith's opinion, the new material was not pertinent to the inaccurate list.

Vetter was orally informed that the presumptions would be invoked on November 1, 1975. At the pre-election conference on November 3, he was informed by letter that the presumptions would be invoked. Among other things, this letter (E.X. 7) states that the eligibility presumption (all persons who appear to vote and who are not challenged by any other party and who provide adequate identification are eligible to vote) was being invoked because "several employees who were employed during the pay period did not appear on the list" and "several names that were on the list did not appear on the employer's payroll records."

LEGAL ANALYSIS

The employer argues that the regional director abused his discretion by invoking the presumptions. There are numerous facets to this argument. First, the regional director decided to invoke the presumptions prior to receiving the requested additional information from Vetter and also told Vetter the presumptions were being invoked prior to his considering this additional information.

Second, at no time was there any indication that the list submitted by Singh was "inaccurate" although the employer seems to concede that it may have been incomplete.

Third, because the employer was net notified of any inaccuracies it was deprived of any opportunity to correct or cure these defects.

Fourth, the evidence considered should be limited to the regional director's written reasons for invoking the presumptions. The employer objects to the legal sufficiency of the findings, contending that not only are the reasons given by the regional director wrong, but they imply compliance rather that non-compliance. Therefore, the argument goes, if the regional director based his conclusion on the reasons stated, he must have acted arbitrarily since he reached a conclusion that is senseless in light of the reasons given. If the writing, which is the best evidence, is ignored and Griffith's testimony is accepted, the Board will in effect be sanctioning deliberate misstatement.

Fifth, the employer substantially complied because it acted in accord with the General Counsel's memo. It supplied declarations explaining why deficiencies existed.

The regional director drew a legal conclusion (that the presumptions should be invoked) on the basis of facts supplied (or not supplied) by the employer. If the conclusion is correct on the basis of facts before the regional director, the Board is not limited on review to his stated reasons in upholding his decision.

The parties have stipulated that certain employer records were seen and reviewed in the course of the Board's investigation and these records constituted all relevant 1975 documents.[5/] On the basis of these same records, I find the decision to invoke the eligibility presumption to be correct. Griffith's decision to invoke, based on the same evidence, could not therefore have been an abuse of discretion.[6/] Griffith's failure to state the best reasons for invoking the resumptions do not undermine the correctness of his decision, but rather should be viewed as harmless error so long as the employer cannot show he was prejudiced by this decision.

Invocation or presumptions is a discretionary act.[7/] An "abuse of discretion exists only when agency action exceeds the bound of reason considering the circumstances before it."

5/ UFW exhibits(U.X.) 1-4 are the employer's records examined by Board agents to determine whether the employer complied with §20310 and whether the employer was at 50 percent of peak. These exhibits also form the basis of the lists prepared by the employer U.X. 1 are check stubs from 10/18 - 10/28. U.X. 2 is the payroll sheet of the two weeks immediately preceding the payroll period showing the work hours and pay of six employees not all of whom are eligible. U.X. 3 consists of payroll ledgers and U.X. 4 consists of names of packing shed workers.

6/ A comparison of these exhibits with the list provided show that 13 names are on the list but are not in the payroll records; 29 names are in the records but are not on the list; 90 daily employees are listed but there are no records for them. The lists indicate a total of 148 names.

7/ Section 20310 (e) of the regulations state that "failure to effect timely compliance with these requirements [to provide specified information within 48 hours] may give rise to the following presumption" (Emphasis added). In addition to the discretionary language of the regulations, the Board has interpreted invocation of any or all presumptions as discretionary. Yoder Bros., Inc., 2 ALRB No. 4 (1976).

See Ancerson Union High School District v. Schreider, 56 Cal. App. 3d 453 (1976).

A review of the regional director's decision is a review of the Board's decision because under Labor Code §1142(b) the regional director is a delegate of the Board. When courts review the actions of an administrative agency, they have consistently held that "if the decision is right, the judgment or order will be affirmed regardless of the correctness of the grounds upon which the decision was reached." Board of Administration v. Superior Court, 50 Cal. App. 3d 316, 319 (1975), When courts review inferior courts they also apply this same rule. Board of Administration, supra and cases cited therein. It seems entirely appropriate that when this agency reviews its own decision, that it apply the same principle that a court would apply in reviewing the action of an inferior court or the action of an administrative agency.

Labor Code §1157.3 puts an obligation on the employer to keep complete and accurate employment records and to make such records available for inspection by the Board. Harry Singh & Sons may have cooperated in supplying what records they had but they could not comply with Labor Code §1157.3 because they did not have the records regarding daily workers. In light of this, the employer's bald assertion that it was denied due process because, had it known the list was inaccurate, it would have cured any defect, is difficult to credit. Additionally, the regulations are specific in requiring a response within 48 hours.

Nothing requires the regional director to extend this deadline in the face of non-compliance.

In Yoder Bros. Inc., 2 ALRB No. 4 (1976), the UFW filed a petition objecting to the election, alleging that the employer failed to provide adequate lists. The Board concluded that where an employer failed to exercise due diligence in obtaining and supplying the necessary information so that the utility of the lists was substantially impaired, the employer's conduct can be grounds for setting aside the election. Where the deficiencies are due to the gross negligence or bad faith of the employer, the election may be set aside upon a lesser showing of actual prejudice by the union. Here, the employer has provided a defective list, the union has won, and the employer objects. Although this is the reverse of Yoder, the conclusion that an employer must exercise due diligence remains intact. The record supports a finding that the employer did not exercise due diligence in acquiring the names and addresses of daily employees.

Merely because the employer submitted declarations explaining why deficiencies existed does not make a list complete and accurate. The employer's position, taken to an extreme, suggests that no list need be supplied so long as there is a declaration explaining why there is no list. As the Board has stressed, a list is necessary to determine showing of interest, peak of season, and eligibility, Yoder, supra; therefore,

providing declarations in accord with the General Counsel's memo does not magically correct a list.[8/]

The General Counsel's memo (E.X. 6) is an interpretation of the regulations and does not have the force of regulations. Failure to follow this interpretation does not automatically result in setting aside the election. Furthermore, the General Counsel's guidelines cannot fairly be read to mean that in all circumstances supplying an explanatory declaration forecloses a regional director's power to invoke presumptions. The major problem with the lists submitted by the employer is the unverified names but the General Counsel's memo refers to a declaration only when names are not accompanied by addresses. Therefore, consistent with the guidelines, it was appropriate to invoke the presumptions. Finally Griffith testified that he consulted with the General Counsel and the General Counsel agreed that it was appropriate to invoke the presumptions. Surely the General Counsel is the best interpreter of his own memo.

In sum, I conclude that Griffith did not abuse his discretion by invoking the presumptions. The information before him revealed a list of doubtful utility. I do not find that the regional director, in this case, need be limited to the reason set forth in E.X. 7 because the decision was correct even

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8/ Such declarations, which presumably explain why deficiencies exist, may be useful in assessing due diligence, bad faith or gross negligence.

if the reasons were not compelling. I do not believe the regional director ignored or did not follow the guidelines provided by the General Counsel. I feel it would be unfair to set aside this election because the employer provided a list so deficient that it prompted the regional director to exercise his discretion. (See §20365 (b).)

II. Whether the operation of the presumption, that all persons who appear to vote, who are not challenged by any other party and who provide adequate identification are eligible [8 Cal. Admin. Code §20310(e)(3)(1975), re-enacted as 8 Cal. Admin. Code §20310(3) (1) (C) (1976)], permitted non-employees to vote in the election.

Ester Silva testified that she has been employed at Harry Singh & Sons for 12 years. In 1975 she lived in Tijuana, and commuted daily on the employer's bus. Many of the daily workers are "steadies" and she worked with the same crew of approximately 60 people every day. Generally the bus passengers made up one crew. Evidently, she know many employees and would have been a good observer.

On the morning of the election/ Mrs. Silva went to the bus lot at the usual time in San Ysidro intending to board the bus. However, the bus was full. Mrs. Silva explained that she sat in the same seat every day and in this sense had a particular seat on the bus. She also heard a woman (Minnie Ybarra) using a megaphone who was inviting people to come on the bus, telling them that anyone could vote. Mrs. Silva, unable to ride on the bus, got a ride from a friend.

Upon arriving at the voting site, she saw a lot of people singing and dancing whom she had never seen before. She also noticed quite a few people she knew but hadn't seen at Harry Singh & Sons in the last two weeks.

Mrs. Silva had been asked by Gene Singh to act as an observer; however, at the election site, she told Gene Singh that she heard she would be jumped if she acted as an observer. Consequently, she refused to be an observer in spite of Board agent Hernandez' reassurances.

She recognized Ramon Gomez and Velia (Ascencion Marquez), UFW observers, who were seated at the voting table. She said both had been employed at Harry Singh but had not been employed by Singh for at least a month prior to the election. Mrs. Silva voted but said she was not asked for identification, not required to show any identification, nor was anyone in line near her asked for or required to show identification.

Leonard Murillo had been employed at Harry Singh & Sons, on and off, for approximately 8 years. Murillo was an observer for the employer. Gene Singh had asked him to act as an observer about 3 a.m., the morning of the election. Murillo overslept and when he arrived at the election site only about 25 people remained in the voting area. A Board agent asked him who he was and gave him a list. Murillo stood behind Julio Favela, near the ballot box. Murillo testified that he didn't recognize two people and challenged them. They voted challenced ballots. Murillo voted and wasn't asked for

identification and he didn't see the Board agents ask for identification from anybody else.

Julio Favela was employed about a year at Harry Singh & Sons in 1975, and was an observer for the employer. Favela was stationed about four feet away from the ballot box at the table near the box. He was near two UFW observers, one of whom was Ramon, whom he had seen before. The other he didn't recognize. He noted that there were a few people in line he hadn't seen before. Favela testified that Board agents spoke to each voter but he couldn't remember if they asked for identification and didn't remember if they received any papers. Favela testified unambiguously that when he didn't recognize a voter he told the Board agent. He assumed the agent asked the voter whether he was an employee of Harry Singh. As a result of his challenges, some voters cast challenged ballots.

Maria Nena Martinez essentially confirmed Ester Silva's testimony. Although she arrived late at the San Ysidro bus area, she heard a woman invite people to the election. This woman didn't say who was eligible to vote, she just said the people should go and vote. The bus was already filled.

When she voted she was not asked to present identification, She recognized Ramon Gomez, saw him at the election and commented that it had already been awhile since he had been working.

Minnie Ybarra testified that in 1975 she was the director of the UFW service center in San Ysidro. She admitted that she used the loudspeaker and addressed employees at the San Ysidro bus lot. According to her, she translated for the

field office director, Scott Washburn, and said "any worker who worked the previous week is eligible to vote." After people were on the bus, Ms. Ybarra boarded it briefly. She translated for about 15 minutes to one half hour.

After Washburn finished speaking, she walked around a lot and got ready to go to the election site. During the voting she remained outside the ranch.

Daniel Soliz Guzman, an observer for the UFW, testified that he was a helper of Pastor, the foreman. He knew Ramon Gomez, and Ascencion Marquez because both worked in Pastor's crew. According to Soliz, they were still at work in November and December of 1975.

Daniel Soliz Guzman personally observed about 120 voters from where he stood behind the table. After one group voted, another group of about 25 to 30 came to vote. Soliz knew about 4 of these people and the rest voted challenged ballets. Except for these, no one came up to vote that he didn't recognize.

Pastor's crew was mostly made up of bus passengers combined with the van passengers. Thus, Soliz was in a position to know the bulk of commuters.

Juan Moreno Guzman started working for Harry Singh in 1964 and commuted daily on the bus. According to him, Minnie Ybarra, whom he knows, said that "everybody who has two weeks working had the right to vote." This he understood to mean two weeks prior to election day.

Moreno also knew Ramon and said that he saw Ramon working at Harry Singh the week before the election. After he voted, he saw some people, a second group who were mostly unknown to him. Pastor was with this group.

Magdelino Lopez also testified that Ramon Gomez was working at Harry Singh while he was there. In addition, he said that after one group had finished voting, Pastor pulled out people who had been hiding in a ditch and brought them to vote.

Jerry Faustinos was the Board agent in charge of the election at Harry Singh & Sons. He testified that when observers from either party contended that a prospective voter was not eligible, he would question observers from both parties. Only if all observers agreed that an individual was eligible, would he allow that person to vote unchallenged. If agreement could not be reached, the voter would vote a challenged ballot. Faustinos also indicated that he would ask for identification if an observer challenged anybody, and that he kept a list of who was challenged and by whom. Faustinos mentioned that there was a group of voters who stood out in his mind because they were dressed inappropriately for work. This group came in a bunch toward the end of the election, and generally were challenged by the UFW as non-employees.

Faustinos talked to all observers prior to the election. He said an obvious question was to ask if they were employees of Harry Singh & Sons although he did not specifically remember asking this question.

LEGAL ANALYSIS

The Act makes it abundantly clear that only agricultural employees of the employer are eligible to vote in a representative election. Labor Code §1156 et.seq. Non-employees do not share the same interests as employees and consequently the inclusion of non-employees undermines the integrity of an election.

The employer alleges that the operation of the eligibility presumption permitted non-employees to vote.

The thrust of the employer evidence regarding whether Board agents asked for identification is that no one was asked or had to show identification. A card or paper is not necessary.[9/] In Toste Farms, 1 ALRB No. 16 (1975), the Board held that "(r)ecognition of an employee by an observer may, at the discretion of a Board agent, constitute adequate identification." (p.3). I credit the testimony of Jerry Faustinos who said that he instructed observers as to their role, and only allowed people to vote if no observer challenged them.

Thus, the testimony of Ester Silva, Murillo, and Martinez, is not particularly useful. They very well may not have been asked to produce identification because everyone agreed that they were employees. Favela's testimony suggests that Board agents seriously inquired as to employee status whenever

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9/ Usually an employee's identification is matched with his or her name on the list. Here, however, the list, if used, had marginal utility. The importance of an I.D. card is diminished and recognition is enhanced.

such a question was raised and this tends to confirm that the Board agents acted properly.

I find that Minnie Ybarra may have encouraged non-eligible employees or non-employees to go to Harry Singh and attempt to vote, but I do not find any evidence that non-employees voted. Neither Ybarra's own statement as to what she said nor Juan Moreno Guzman's statement is a correct statement of eligibility. Consequently, it is possible that some individuals thought they were eligible when in fact they weren't. However, all parties had an opportunity to challenge any prospective voter and apparently the employer's observers made challenges.

Ester Silva may have been unable to ride the bus because her seat was taken by non-eligible prospective voters. It is also possible that there were more eligible voters than daily employees. Testimony suggests some turnover, although the bulk of daily employees were steadies.

Nothing on the record indicates that Ramon Gomez or Velia (Ascencion Marquez) actually voted. Even assuming they did, there is substantial evidence that they were eligible because they had worked for Harry Singh & Sons during the eligibility period prior to the election. I credit the testimony of Daniel Soliz Guzman because he worked in the same crew that Ramon and Ascencion worked in. Gene Singh testified that he was frequently out in the fields and knew many employees, however,

his attention was spread over larger groups. Additionally, Faustinos stressed that he talked at length with prospective observers. Julio Favela testified at some length about the questions the. Board agents asked him when he was designated an observer. Vetter mentioned that, at the election, he challenged Gomez' right to be an observer on the basis that he wasn't an employee but that the Board agents ignored this challenge. Faustinos doesn't remember this at all. Nothing would have prevented Vetter from instructing employer observers to challenge Gomez when he voted. Apparently no challenge was made.

While some evidence suggests that non-eligible employees or non-employees may have gone to the site, the employer had an opportunity to challenge anyone who appeared questionable to them. In essence, the employer is seeking to challenge after the election. In NLRB v. A.J. Tower, 329 U.S. 324, 19 LRSM 2128, (1946), the United States Supreme Court upheld the NLRB's policy of prohibiting post election challenges concluding that this policy "gives desirable and necessary finality to elections, yet affords parties a reasonable period in which to challenge the eligibility of any voter." (p. 2132). The ALRB has adopted the same rule citing as authority NLRB v. A.J. Tower, supra. Hemet Wholesale, 2 ALRB No. 24 (1976) p.10. In circumstances where the employer had full opportunity to challenge voters and failed to challenge them, Board policy, amply supported by precedent, prohibits post election challenges.

Finally, I fail to understand the employer's contention that the operation of the presumption of eligibility permitted non-employees to vote. The language of the presumption suggests ("all who appear to vote, who are not challenged by any other party...") that an employer does not have a right to challenge voters when it fails to supply a substantially complete and accurate list and the regional director invokes this presumption. Where the employer has forfeited this right, it could be argued that the operation of the presumption may permit non-employees to vote. However, the Board agents in this election allowed the employer to make challenges.[10/]

III. Whether the atmosphere of the new voting site was so intimidating that persons who had agreed to act as employer's observers refused out of fear.

Initially, the election site was to be at the Civil Aeronautics (CA) Building located on the land leased by Harry Singh & Sons. The notice and direction of election indicates the CA Building as the site.

Jerry Faustinos testified that the weather, the morning of the election, was cold and very foggy and he couldn't find the scheduled site. When he arrived at the parking area, where the election was actually held, Vetter and Singh and many people were already there. He decided to have the election at the new site.

10/ Jerry Faustinos testified that, as he remembered, only the peak presumption had been invoked. This may explain why challenges were allowed.

All the witnesses are in substantial agreement as to what occurred at the site. Several fires were going, there were two, possibly three, people playing guitars and there was some singing. Vetter complained about this "rally" and the Board agents told the crowd to quiet down. They immediately did so. No evidence suggests Board agents lost control at any time, unlike Perez Packing, 2 ALRB No. 13 (1976).[11/] Faustinos recalled that he did not regard this activity at the site as unusual.

LEGAL ANALYSIS

The strongest evidence of coercion is Ester Silva's testimony that she was told by her girlfriend, Leecha, that she would be jumped if she acted as the employer's observer. While Mrs. Silva may have heard this at the election site and felt fearful, it is not clear that the atmosphere of the election site, as distinct from this news, contributed to Mrs. Silva's fears. Additionally, Board agent Hernandez tried to reassure Mrs. Silva and at least made some effort to minimize the effect of this. There is no evidence that others knew of this "threat" or heard Leecha tell Mrs. Silva about it or heard Hernandez try to reassure her. There is no evidence that such a threat was made, or that the union was behind such a threat. The only evidence is that Mrs. Silva believed such a threat was made.

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ll/ The record disclosed that some voters may have been Intoxicated but nothing shows Board agents allowed alcoholic beverages in or near the polling area as in Perez Packing, supra.

To set aside an election on this evidence would be to allow rumor to rule.

Assuming a threat was made, the Board has held that threats by non-parties, when they do not appear to stem from a union policy of threatening employees, when there is no showing that they created a pervasive atmosphere of fear, and when few employees have been directly threatened, will generally be insufficient to set aside an election. Kawano Farms, 3 ALRB No. 25 (1977). The record does not disclose a pervasive atmosphere of fear and in my judgment, this incident, though regrettable, is not sufficient to invalidate an election. It should be pointed out that Mrs. Silva did vote, and the employer was able to select other observers.

IV. Whether the employer was improperly denied the right to use his designated observer, a non-supervisory employee who was familiar with many of the employees.

Neither parties named observers at the pre-election conference, but Gene Singh admitted that the union indicated they would challenge as a supervisor, Euphemio Valasquez (Cartas), the bus driver. The employer named Valasquez as an observer, and at the election site the UFW objected. Board agent Faustinos, after exploring the basis for the challenge, listening to Valasquez, and taking declarations, ruled that Valasquez could not act as an observer.

The employer's witness, Ester Silva, testified that Cartas decided who got to go on the bus, that she saw Cartas

choose, and that Cartas would tell those who did not get on the bus that he would give them a chance another day. Juan Moreno Guzman described Cartas stopping at the entrance and saying, "you, you, you" to prospective employees. Gene Singh denied that Cartas decided who got on the bus. He said that he and his brother frequently went to San Ysidro and chose, and when he wasn't there, workers, through a process of self-selection, boarded the bus. It is possible that Cartas chose only those that Singh previously picked, although I think a more reasonable inference is that Singh told Cartas how many people he needed and Cartas picked who rode. Gene Singh admitted that getting on the bus was tantamount to getting hired for the day.

The issue is not whether Cartas was a supervisor but whether the Board agent made an incorrect and prejudicial decision in disallowing the employer's choice.

Section 20350(b) clearly states that observers must be non-supervisory employees. The obvious reason behind this provision is to avoid intimidation. This regulation is similar to those of the NLSB. The NLRB has also concluded that having an observer is not an absolute right but is subject to such limitations as are prescribed by the Board. Burrows and Sanbom, Inc. 24 LRRM 1228 (1949). This principle is also embodied in the NLRB's rules and regulations. (See Morris, Developing Labor Law p. 191).

Thus, the Board agent must weigh the limited right of an employer to an observer against the sensible policy of excluding supervisors from being observers. There is a colorable claim that Valasquez was a supervisor since by choosing who got on the bus, he was effectively hiring.

In Yamada Bros., 1 ALRB No. 13 (1975), the Board considered and dismissed the employer's objection that it was denied the right to use a designated observer.

> "The Board agent in charge of an election is responsible for determining the qualifications of observers. Ordinarily, his decision will not be disturbed. In this case, the Board agent's determination that Vargus was a supervisor was supported by evidence introduced at the hearing." Yamada Bros., supra at p.4.

The employer argues that the Board agent abused his discretion because he inadequately investigated the charge. Faustinos asked the UFW person who made the challenge what the basis for the challenge was. He took a declaration. He asked Valasquez if he was a supervisor. He took a declaration from Valasquez. Faustinos did not ask either Norman Vetter or Gene Singh about Valasquez' status.

While ideally, the investigation could have been more thorough, Faustinos conducted a reasonable inquiry under the pressure of a pending election which was already off to a late start. Additionally, the employer was on notice at the pre-election conference (testimony of Gene Singh) that Cartas would be challenged and in spite of this, named him as an observer. The employer can hardly claim surprise that Valasquez was challenged.

The employer was not denied an opportunity to have observers and in fact did have them. The employer's claim that it was prejudiced is not supported by the evidence but only by the assertion that Cartas would have been a better observer. In Missakian Vineyards, 3 ALEB No. 3 (1977), the Board agent disqualified as an observer a payroll clerk who apparently would have been a proper observer. Quoting with approval Yamada, supra, the Board also noted that the employer "has not shown that he was prejudiced by the disqualification of the payroll clerk, nor that the disqualification affected the result of the election." (p. 3} Singh, likewise, has not shown prejudice or affect on the outcome of the election.

V. Whether the employer's challenge of the observer of the United Farm Workers, AFL-CIO, was ignored.

Norman Vetter testified that, at the election site, he complained to Cesario Hernandez or Jerry Faustinos and another Board agent that the UFW's observers were not employees. Nothing was done. Gene Singh confirmed this but Jerry Faustinos did not recall it.

LEGAL ANALYSIS

Non-employee status is a valid objection to the designation of an observer. However, there is evidence to support a finding that Ramon Gomez and Ascencion Marquez were employees, and I so find. Gene Singh did not keep such scrupulous and meticulous track of who worked for him every day that his

word on the matter is compelling. Furthermore, Ester Silva's testimony that she didn't see Gomez on the bus is not dispositive, because there is testimony that some people drove to work in their own cars.

The employer's objection may also be cast in terms of the appearance of Board agent bias. In Coachella Growers, Inc., 2 ALRB No. 17 (1976) the Board established the standard for overturning an election on the basis of Board agent bias. To constitute grounds for setting an election aside, Board agent bias or an appearance of bias must be shown to have affected the conduct of the election itself, and to have impaired the balloting's validity as a measure of employee choice. If this may be considered an example of bias, nothing on the record indicates it was observed by voters or it influenced them in any way. Its only effect could have been to make the UFW's observers less efficient since they would have less familiarity with the workers. The employer's observers were not inhibited in any way from making challenges, and the number of challenges made (assuming such challenges were wrongfully made because the union's observers were not employees and did not know the workforce) were not so many so as to affect the outcome of the election. It is impossible to determine if, as a result of the use of non-employee observers, challenges were not cast that should have been cast. In any case the employer's observers were in a position to make challenges on behalf of and in the interest of the employer.

In short, I do not find that the UFW s observers were not employees, that the Board agents engaged in bias or the appearance of bias or that any appearance of bias affected the outcome of the election, or that the employer was prejudiced by the selection of the UFW's observers.

VI. Whether UFW agents and supporters threatened and intimidated employees in and around the polling area and created an atmosphere which was not conducive to a fair and impartial election.

The evidence supporting this allegation is the same as that for allegation III. The evidence is that just prior to the election at the election site some employees were having a "rally" that intimidated other employees and that Ester Silva was intimidated.

There is no evidence on the record that UFW organizers or agents engaged in any activity that could be regarded as threatening or intimidating. The acts of union supporters cannot be attributed to the union itself, absent any showing that such threats stem from a union policy. D'Arrigo Brothers, 3 ALRB No. 37 (1977). The ALBB has also held, consistent with NLEB precedent, that threats made by non-parties will be accorded less weight in determining their effect on the outcome of the election than ones made by parties. Takara International, 3 ALRB So. 24 (1977), Kawano Farms, 3 ALRB No. 25 (1977).

The evidence shows that there were several bonfires, and that there was singing, dancing and talking among employees immediately prior to 'the election. When Board agent Faustinos told people to quiet down they complied in short order. While there may have been an opportunity for threats and intimidation, it is not inherent in the situation as described. Similarly the alleged threat to Ester Silva is not enough to set aside this election. (See discussion allegation III.) With the exception of the alleged threat to Ester Silva there is no evidence of any threatening statements. Even if there were such statements they may not have created a pervasive atmosphere of fear and intimidation. See D'Arrigo Brothers of California, 3 ALRB No. 37 (1977). In that case neither persons waiting in line who yelled pro-union slogans (not alleged here) nor a "crap" game among those waiting was found to affect the outcome of election. The facts in this case are less substantial than those in D'Arrigo.

In general the ALRB has rejected the application of per se rules in the agricultural context. In several cases the Board has questioned the applicability of "laboratory standards" and rejected the Milchem rule. Superior Farming Co., 3 ALRB No. 35 (1977). The sole test is whether the acts complained of created an atmosphere in which employees were unable to freely vote. Harden Farms, 2 ALRB No. 30 (1976). I do not find such an atmosphere in the election at Harry Singh & Sons.

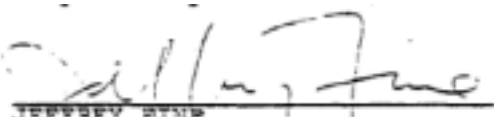
CONCLUSION AND RECOMMENDATION

I do not find the regional director abused his discretion in invoking the presumption pursuant to 8 Cal. Admin. Code §20310 (e) (3). I conclude the evidence does not support the assertion that non-employees were permitted to vote by the operation of this presumption. I do not find the atmosphere of the voting site was so intimidating that one of the employer's observers refused to act as an observer, or that UFW agents and supporters threatened and intimidated employees in and around the polling area and created an atmosphere of fear. I find that the Board agent was correct in rejecting Euphemio Valasquez, the employer's designated observer. Finally, I find that even if the employer's challenge of the UFW's[1] observers was ignored, that this had no discernible effect on the election and a decision to allow the UFW to use its designated observers would not have been improper under the circumstances.

Therefore, I recommend that the United Farm Workers of America, AFL-CIO, be certified as the bargaining representative of the employees of Harry Singh & Sons.

DATED: February 8, 1978

Respectfully submitted,



JEFFREY FINE
Investigative Hearing Examiner