STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

DUNLAP NURSERY, Employer, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Petitioner.	)	Case No. 77-RC-2-C 4 ALRB No. 9

DECISION AND CERTIFICATION OF REPRESENTATIVE

Pursuant to the provisions of Labor Code Section 1146, the Agricultural Labor Relations Board has delegated its authority in this matter to a three-member panel.

Following a petition for certification filed by the United Farm Workers of America, AFL-CIO (UFW), on March 18, 1977, a representation election was conducted on March 24, 1977 among the agricultural employees of Dunlap Nursery. The tally of ballots showed that the result was 12 votes for the UFW and two votes for no union.

The Employer filed timely objections to the election in which it contended that its good faith reliance on representations by an ALRB attorney to the effect that this Board is obligated to follow the NLRB's so-called 24-hour rule [1/] dissuaded it from presenting a planned address to

[1/] The NLRB's 24-hour rule, or Peerless Plywood rule, forbids speeches to a massed assembly of employees on company time within 24 hours before the start of a representation election. Peerless Plywood Company, 107 NLRB 427, 33 LRRM 1151 (1953).

workers just prior to the commencement of balloting. This omission, it asserted, precluded workers from hearing the Employer's position and thus affected their free choice at the polls.

Following a hearing limited to an examination of these issues Investigative Hearing Examiner (IHE) Thomas Sobel issued the attached Decision in this proceeding on December 5, 1977. Thereafter, the Employer filed exceptions and a supporting brief.

The Board has considered the objections, the record and the IHE's Decision in light of the Employer's exceptions and brief [2/] and hereby affirms the rulings, findings and conclusions of the IHE, and adopts his recommendation.

We agree with the IHE's finding that the Employer, after receiving the independent advice of its own counsel, had sufficient time, about one hour, to present its speech as planned, but elected not to do so. We note that in his petition to set aside the election, Employer's counsel admitted that he was aware, at the time he advised the Employer, that this Board had not found the Peerless Plywood rule applicable to elections under the ALRA. In these circumstances, it cannot be found that the allegedly incorrect information previously provided by a Board attorney precluded the Employer from giving the planned 15-minute speech to its employees.

[2/] In its brief, the Employer requested correction of what it termed a "factual error" *of* the IHE in commenting on a statement in the UFW's brief that the Employer's counsel had represented the Employer in Borgia Farms, 2 ALRB No. 32 (1976). We accept counsel's statement that he has never represented Borgia Farms, but such correction does not affect the rationale or basis for our findings and conclusions herein.

Accordingly, 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 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 Dunlap Nursery, for the purposes of collective bargaining, as defined in Labor Code Section 1155.2(a), concerning employees' wages, hours of work and other terms and conditions of employment.

Dated: February 23, 1978

GERALD A. BROWN, Chairman

RONALD L. RUIZ, Member

ROBERT B. HUTCHINSON, Member

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of: DUNLAP NURSERY, Employer, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Petitioner.	Case No. 77-RC-2-C

Charles Field, Best, Best & Krieger for Employer.

Ellen Greenstone for United Farm Workers of America, AFL-CIO.

DECISION

THOMAS SOBEL, Investigative Hearing Examiner: This case was heard by me in Coachella, California on September 8, 1977. By order dated June 30, 1977, the Executive Secretary set for hearing the following issues:

> (1) That an attorney for the Board told employer that there existed a "24-hour rule" and this alleged statement effectively precluded employer from campaigning; and
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> (2) Whether such conduct as is alleged is sufficient ground for the Board to refuse to certify the election.

On July 14, 1977, Union requested reconsideration of the Executive Secretary's Order .setting the objection for hearing which request was granted on July 29, 1977. Pursuant to applicable regulations, Employer responded to the Board's granting reconsideration and,

on August 31, 1977, after further consideration of the arguments of both parties, the Board ordered the hearing to proceed as scheduled. At the hearing all parties were present and were given full opportunity to participate including the opportunity to present oral argument at the conclusion of the hearing. Upon the entire record, including my observation of the demeanor of witnesses, and after consideration of all the arguments made by the parties, I make the following findings of fact and conclusions of law:

FINDINGS OF FACT

The facts in this case are not in serious dispute although how they are to be characterized is. United Farm Workers' of America (Union) filed a Petition for Certification on March 18, 1977 for the employees of Dunlap Nursery. Election was held on March 24, 1977 at 3:30 in the afternoon. The result was 12 votes for the petitioner and 2 votes for no-union.

Prior to the election, the Employer and his counsel, Thomas Slovak, decided that, because of the size of the unit and the short period in which to campaign, the most effective campaign would consist of a hand-out and a speech to be given shortly before the election. The idea of using a hand-out was eliminated sometime later and the employer chose instead to rely on a single pre-election speech as the entirety of its campaign. It was planned that this speech be given shortly after the lunch break on the day of the election. Mario Lugo, the manager of Dunlap Nursery, testified that he started to prepare his speech at approximately 11:00 a.m. on the day of the election. Shortly before then he had requested his field foreman, Ervin Tatum, to assemble the workers after the lunch break for the purpose of hearing the speech he was going to prepare. Mr. Tatum

testified that he informed the employees of the meeting and was waiting for them in the shop area when he was approached by someone whom he recognized as a UFW supporter, a Senor Medina, who asked him whether he was aware that the company couldn't hold a meeting within 24 hours of an election.

Mr. Tatum conveyed Mr. Medina's query to Mr. Lugo who was at that time still working on his speech. This was at approximately 12:30 in the afternoon. Mr. Lugo and Mr. Slovak had had a number of discussions at which campaign strategy had been discussed and Mr. Lugo had received a packet of campaign materials prepared by Mr. Slovak's firm for its clients and in neither these discussions nor in the materials furnished him, had Mr. Lugo ever heard of a "24-hour" rule. In order to determine whether Sr. Medina was correct, he attempted to call Mr. Slovak who was unavailable, being at that time on his way to the valley from his office in Riverside. Upon being advised that Mr. Slovak was unavailable, he asked to speak to the only other member of the firm with whom he had any prior dealing, Mr. Field, who, he also was advised, was also unavailable. Not knowing whom else to talk to, Mr. Lugo then called the ALRB. Mr. Lugo testified that he called the only Board agent he was personally familiar with, Ben Romo, in order to ask him if there were such a ^24-hour" rule. Mr. Romo transferred him to David Zuniga. Instead of giving Mr. Lugo a definitive answer over the phone, Mr. Zuniga told Mr. Lugo to wait for him at the nursery office and that he

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1/ Some of the narrative is derived from the sworn declarations submitted with the objections petition. The parties agreed on the record that the declarations would be used as evidence subject to the right of the parties to. examine on any portion of them.

would be over shortly, which in fact *he* was, arriving sometime around 12:45, accompanied by Board attorney Gary Williams.

Mr. Williams testified that around 1:00 in the afternoon he was asked by David Zuniga to accompany him to the nursery in order to answer some questions. When he first spoke to Mr. Lugo at the nursery he had the impression that what Mr. Lugo was asking him was what sorts of things the employer could say in a speech to his employees. Mr. Williams testified that he generally outlined what an employer should avoid or could safely say. It was only in response to a further question of Mr. Lugo's to the effect that he had already understood the sorts of things he could say from his own counsel, but that what he wanted to know was whether he could give a speech at all within 24 hours of the election,[2/] that Mr. Williams gave any advice about such a rule.

Mr. Williams testified that on the mention of the "24-hour rule" he recalled that there was an NLRB rule of that type and he then called the ALRB office and spoke to another Board attorney in order to check on the applicability of such a rule to the ALRA. He spoke to Octavio Aguilar who, after consulting a standard labor law handbook, informed him that there was such a rule, the Peerless Plywood Rule.[3/] Upon being advised by Mr. Aguilar of the rule, Mr. Williams said he told Mr. Lugo that there was such an NLRB rule, and that this Board is directed to follow applicable NLRB precedent. Mr. Williams also

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[2/] Mr. Lugo placed this original conversation over the phone rather than on nursery grounds. Inasmuch as there is substantial agreement as to the conversation itself, it is not necessary to resolve this difference.

[3/] 107 NLRB 427. The rule "prohibits unions and employers from making election speeches on company time to massed assemblies of employees within 24 hours before the time scheduled for an election." California Coastal Farms, 2 ALRB 26, p.5.

testified that he recalled advising Mr. Lugo that if he gave such a speech he was only running the risk of having the Board overturn the election if the union lost. In response to the question whether he told Mr. Lugo not to give the speech, Mr. Williams said that he had not. In response to the question whether he had advised Mr. Lugo that the ALRB had such a 24-hour rule, Mr. Williams said no.

In his declaration, the substance of which he separately verified at the time of giving testimony, Mr. Lugo stated the following: "I told the ALRB agents I would obey their instructions and they left my office. I was so concerned about my talking to the workers being an unfair labor practice, I did not approach my workers to ask one of them to be the employer's second election observer.*** *I* was afraid that if I was seen talking to a worker that the UFW would file an unfair labor practice charge alleging I had violated the "24-hour" rule." At the hearing Mr. Lugo explained that he has a great deal of respect for the police and that because he thinks of the ALRB as the police he was very careful not to violate what he understood to be their instructions. Mr. Lugo, therefore, did nothing to implement the single-step strategy that had been worked out between him and his counsel. At approximately 2:00 p.m. Mr. Slovak arrived at the ALRB office to conduct some business; with Mr. Romo. While there he called Mr. Lugo and was informed by him. that he had been advised by Mr. Williams that there was a "24-hour" rule. Mr. Williams testified that when he returned to his office he found Mr. Slovak conversing with another Board attorney about his having gone out to the nursery unsolicited, which discussion was ended for the time when the Board secretary said that Mr. Lugo had called and had solicited his advice. In order to clarify what happened, Mr. Slovak left the ALRB office and went to the nursery

to find out from Mr. Lugo under what circumstances Mr. Williams had proffered an opinion about the Peerless Rule. Mr. Slovak admitted that, while he argued with Mr. Williams concerning the ALRB's rejection of such a rule in the agricultural setting,[4/] he made no effort to clarify the matter by resort to ALRB case law. In any event Mr. Slovak went out to Dunlap Nursery and arrived at approximately 2:30. By this time the election was little more than one hour away. When he ascertained that Mr. Williams had not, in fact, came to the nursery unsolicited, he and Mr. Lugo then decided to press for a postponement of the election. He and Mr. Lugo decided not to attempt the speech for two reasons: Mr. Lugo and he thought it would not be most effective under the circumstances since it was likely to be interrupted by the arrival of Board agents to set up the polls, and Mr. Lugo was still concerned that it might be an unfair labor practice. This decision was made at approximately twenty to three.[5/] Mr. Slovak also testified that he neither advised Mr.Lugo to go ahead with the speech as planned nor did he advise

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[4/] The ALRB has twice considered the applicability of the Peerless Rule to the agricultural setting. See California Coastal Farms, 2 ALRB No. 26; Yamada Bros., 1 ALRB No. 13. I do not believe it necessary, under the circumstances of this case, to consider whether the Board has or has not held the rule applicable. While mere speech is not an unfair labor practice, it obviously can constitute grounds upon which to overturn an election. Even when Peerless is applicable, then, an employer only runs the risk (with noncoercive speech) of having the election set aside if it wins. This is a risk, consistent with the First Amendment, it can decide to take. On the other hand, if Peerless is inapplicable there is no risk at all and employer should have been able to make its speech anyway. In either case, as a matter of law, employer should have been able to make its speech.

[5/] The speech as planned was to be only 15 minutes long, although Mr. Lugo testified that another part of the campaign plan was to have a question and answer period following the speech which might last for half an hour to forty-five minutes.

him that, even if it were a violation of the Peerless Rule, and the rule were applicable, that it was not an unfair labor practice to give such a speech.

ANALYSIS

The positions of the parties are relatively simple: on the one hand, the employer argues that Mr. Williams' advice regarding the Peerless Rule prevented the employer from giving the speech it had planned and thereby deprived it of its right to campaign; the Union on the other hand, essentially argues that the employer itself decided not to make the speech it had planned. The Union makes much of the fact that it was the employer itself who delimited- the time available to campaign and the record is absolutely clear as to that. "Thus, the speech was set, by decision of the employer and its counsel, for Thursday, at 12:30 p.m., three hours before the election. There is 'no indication that the speech could not be given before this time. All evidence shows that it was a matter of choice and tactical timing on the part of the employer." Union Brief, p. 4. This is undoubtedly true, but it does not much advance our consideration of the case because it could not have been part, of the employer's tactics either to be advised or to think that it was advised that it could not give the speech it had planned.[6/] While it is certainly true that the employer limited itself so that its purpose might be more easily

[6/] Although Union comes close to arguing the contrary See Union Brief, p. 10, Ftn. 4, in which it is pointed out that employer's attorney was also the attorney in Borgia Farms. It was Borgia Farms, 2 ALRB No. 32, in which the Board overturned an election on the grounds that the Board agent effectively precluded an employer from campaigning. Union argues "Thus, the urging of the particular objection in this case based upon somewhat fortuitous occurrence of events may be less than coincidental." The admitted fortuity of events takes the sting out of the argument. Whether it is "more or less" coincidental, it doesn't seem to me that a lawyer's use of available precedent ought to be assessed in terms of coincidences.

frustrated by the events which were the subject of this hearing, this fact merely furnishes the context of subsequent events without being sufficient to conclude the matter.

It is clear from Mr. Slovak's own testimony, and I so find, that, with nearly an hour to go before the election, he and Mr. Lugo decided, for the twin reasons that the speech would not be most effective in the time remaining, and Mr. Lugo's residual fear of an unfair labor practice, not to give the speech. This clearly represents *a* choice and it is from this point in time that Union really stakes its case for Employer was by now represented by its own counsel and there was enough time in which to give the speech. While it is understandable to me that Mr. Lugo might be disconcerted, even paralyzed, upon learning that the speech he had planned was "prohibited," especially since a layman might not readily understand the difference between conduct being prohibited and conduct constituting an unfair labor practice, and while it is also understandable to me that an attorney, under the impression that his client had received contrary advice from another attorney, might be more interested in finding out under what circumstances such advice had been tendered than in debating the content of the advice, these factors do not compel the conclusion that the employer was effectively precluded from exercising any right to campaign.

The "right to campaign" which is claimed by the employer to have been abridged, while (probably) nothing less than the First Amendment,* is certainly nothing more than it. The scope of protection offered by that right, and emphasized by both the NLRA and the

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* See generally, German, Basic Text on Labor Law, 1976, pp. 148 et seq., Annotation 35 ALR 2d 408, Note, Limitations Upon an Employer Right of Noncoercive Free Speech, 38 University of Virginia Law Review 1037.

ALRA, Taft-Hartley Act Section 8 (c; ALRA Section 1155, goes no further than to forbid agencies from "preventing an employer from expressing its views on labor practices or problems [or from imposing] *a.* penalty because of any utterances which it has made." NLRB v. Virginia Electric and Power Co., 314 U.S. 469 (1941).

Clearly, we do not have a record in this case that reveals any "penalty" levied against employer; nor, as I view it, do we have one that shows Mr. Lugo was prevented from giving his speech. Instead we have a record which indicates that the employer had a speech planned for one time, itself solicited advice from a Board attorney about the propriety of giving the speech, understood from that advice that it could not, and was not in a position to be independently advised by its own counsel until two hours later when there was still enough time to address the workers, at which point employer itself, deciding the speech would not be most effective, declined to give it.

Even if the freedom of speech embraces the freedom to choose, in the first instance, when to speak, NLRB v. Montgomery Ward Co., 157 F.2d 486, 499 (8th Cir. 1946), it does not follow that the right is *a* guaranty of the choice. As long as there is no actual restraint or, what amounts to the same thing, the opportunity to persuade is not foreclosed, it appears contradictory of the purposes of the First Amendment to construe it as a shield behind which a party may now refuse to exercise the privilege in order to later claim that it was denied. Whether a speech would have been more effective if delivered at noon than at 2:30 is an imponderable question about which the most that can be said, if we grant that the speech would have been effective at all,is that to give it at either time would have been more effective than not to have delivered it.The

employer having made his choice, and the employees having made theirs I recommend the election be certified.

DATED: December 5, 1977

Respectfully submitted,

THOMAS SOBEL
Investigative Hearing Examiner, ALRB