

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

D'ARRIGO BROTHERS OF)	Case No. 75-RC-88-F
CALIFORNIA,)	
)	
Employer, and)	
)	4 ALRB No. 92
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.

Following a petition for certification filed by the United Farm Workers of America, AFL-CIO (UFW), an election by secret ballot was conducted on October 11, 1975 among the agricultural employees of the Employer in its Reedley District No. 3 Division.

The tally of ballots issued on that date showed these results:

UFW	92
No Union	98
Void Ballots	2
Unresolved Challenged Ballots	80

The Employer and the Petitioner each timely filed

post-election objections which were noticed for an evidentiary hearing to commence on November 17, 1975. On November 18, 1975, Investigative Hearing Examiner (IHE) Hoyt Simmons granted Petitioner's motion to continue the hearing pending resolution of the challenged ballots, which are sufficient in number to determine the results of the election.

The Regional Director conducted an investigation and, on January 8, 1976, issued his report on challenged ballots, to which both parties filed exceptions. On April 25, 1977, the Board issued a Partial Decision on Challenged Ballots. D'Arrigo Bros, of California, Reedley District No. 3, 3 ALRB No. 34 (1977) The Employer timely filed a motion for reconsideration, which was denied by the Board. Thereafter, on June 10, 1977, the Regional Director issued a revised tally of ballots which showed the following results:

UFW	110
No Union	100
Unresolved Challenged Ballots	7

On December 23, 1977, the Board's Executive Secretary dismissed 25 of the post-election objections and noticed the remaining 10 objections for hearing. On July 14, 1978, IHE Suzanne Vaupel issued the attached initial Decision. The Employer timely filed exceptions and a brief in support thereof and the Petitioner filed a reply brief.

The Board has considered the attached IHE Decision in light of the record, the exceptions, and the briefs, and has decided to affirm the findings, rulings, and conclusions of the

IHE and to adopt her recommendations to dismiss the objections and to certify the UFW as the collective bargaining representative of the unit employees. Accordingly, the objections are hereby dismissed 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 D'Arrigo Brothers of California who are employed in Fresno and Tulare Counties or under the supervision of the Employer's Reedley District No. 3, California Division, but excluding packinghouse employees,^{1/} 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: November 17, 1978

RONALD L. RUIZ, Member

HERBERT A. PERRY, Member

JOHN P. McCARTHY, Member

^{1/} The UFW's petition for certification sought to exclude packing-house employees but to include, in addition to those employees who are employed in Fresno and Tulare Counties, employees who perform agricultural tasks for the Employer in adjacent, but unidentified, counties while under the supervision of the Employer's Reedley District Division. The subsequent notice and direction of election simply called for an election among all agricultural employees of D'Arrigo Brothers, Reedley District No. 3. An appropriate petition for unit clarification may be filed should a determination be required as to whether those employees who are employed within Division No. 3 but whose work assignment takes them out of either Fresno or Tulare Counties are properly included in the bargaining unit.

CASE SUMMARY

D'Arrigo Brothers
of California (UFW)

Case No. 75-RC-88-F
4 ALRB No. 92

IHE DECISION

Following an election, a Partial Decision on Challenged Ballots [see, D'Arrigo Bros, of California, Reedley District No. 3, 3 ALRB No. 34 (1977)], and a revised tally of ballots indicating that the UFW received a majority of the valid votes cast in the election, the Board noticed for hearing 10 of the Employer's 35 post-election objections. After a three-day evidentiary hearing, the Investigative Hearing Examiner (IHE) issued her decision, in which she recommended that the objections be dismissed and that the UFW be certified as the collective bargaining representative of the unit employees.

The IHE found that Board Agents had not abused their discretion, and that the voters' free choice was not impaired by Board Agent actions which the Employer contended were deviations from standard challenged ballot procedures. Each party was represented by election observers who witnessed the registration of prospective voters, were permitted to challenge voters, and observed voters as they received and cast their ballots. The Employer's objection concerned the procedure whereby challenged voters were directed to a nearby state-owned van where Board Agents, outside the presence of the observers, interviewed challenged voters to obtain information which they recorded on the challenged ballot envelopes and included in the voter's declarations. The IHE concluded that the questions asked and answered in these interviews were not determinative of eligibility, as the Board ruled on eligibility questions on the basis of the Regional Director's independent post-election investigation into the eligibility status of each voter whose ballot had been challenged.

Employer observers challenged some 12 to 15 voters on the basis of insufficient identification. Board Agents permitted six of those voters to cast challenged ballots and allowed the remaining voters to cast unchallenged ballots. After the close of balloting, but prior to the tally of ballots, Board Agents overruled and removed the challenges to the group of six voters. The IHE found the procedure acceptable in view of the Board's regulations which confer upon Board Agents sole discretion for the sufficiency of voter identification. She also found there was no evidence that the identity of any of these voters was not as represented by them.

BOARD DECISION

The Board affirmed the findings, rulings and conclusions of the IHE and adopted her recommended order.

Objections dismissed. Election upheld. Certification granted.

* * *

This case summary is furnished for information only and is not an official statement of the case, or of the ALRB.

STATE OF CALIFORNIA
AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of:

D'ARRIGO BROTHERS OF CALIFORNIA,

Employer,

Case No. 75-RC-88-F

and

UNITED FARM WORKERS OF AMERICA,
AFL-CIO,

Petitioner.

Michael J. Hogan and John T. Hayden, Littler,
Mendelson, Fastiff & Tichy for the employer.

Glenn Rothner, for the United Farm
Workers of America, AFL-CIO.

DECISION

SUZANNE VAUPEL, Investigative Hearing Examiner: This case was heard by me on March 9, 10, and 13, 1978 in Fresno, California. A representation election was held at D'Arrigo Brothers of California on October 11, 1975. The Tally of Ballots showed the following results:

United Farm Workers	92
No Union	98
Unresolved Challenged Ballots	80
Total Valid Votes	<u>270</u>

The United Farm Workers of America, AFL-CIO (UFW), and D'Arrigo Brothers ("the company") filed timely objections to the election. A hearing was begun on November 17, 1975. On November 18, 1975 the hearing was continued pending resolution of the challenged ballots. The Regional Director's Report on Challenged Ballots was

issued on January 8, 1976. Both parties filed exceptions. On April 25, 1977, the Board issued a Partial Decision on Challenged Ballots.^{1/} D'Arrigo Brothers of California, 3 ALRB No. 34 (1977). The company filed a Motion for Reconsideration of the Board's decision, which was denied by the Board. An Amended Tally of Ballots was issued on June 10, 1977 showing the following results:

United Farm Workers	110
No Union	100
Unresolved Challenged Ballots	_ 7_
Total Valid Votes	217

An Amended Notice of Hearing was issued on December 23, 1977, setting for hearing the following ten issues and dismissing twenty-five other issues:

1. The Agricultural Labor Relations Board showed bias toward the United Farm Workers of America, AFL-CIO (UFW) by scheduling the election for five days after the certification petition was filed, with the purpose of preventing intervention by the Teamsters Union.
2. The UFW campaigned within the polling area and during the voting period.
3. Board agents permitted the UFW to campaign within the polling area before and during the voting period.
4. Board agents permitted campaigning among eligible voters waiting to vote.
5. Union representatives threatened, coerced, intimidated and harassed voting employees as they approached and left the polling area by writing down license numbers of cars.
6. The Board agents stopped the employer's vehicles some

^{1/} The Board was closed due to lack of funds from February, 1976 until July, 1976.

distance from the voting area, while they permitted the union representatives to drive voters directly to the polls and to discharge and pick up passengers there.

7. The Board agent accused the employer of engaging in illegal and/or improper conduct; (but only insofar as the objections relate to the agent's finding a poster within the polling area in a portable toilet during the balloting).

8. The Board agents instructed the employer's observers that they would not be allowed to observe the challenged ballot procedure, and prevented them from observing the challenged ballot procedure.

9. The Board agents refused to disclose the types of identification used by voters whose ballots the agents resolved.

10. The Board agents did not submit the written record regarding the challenged ballots they resolved and their reasons for resolution, as required by the Board's regulations.

All parties were represented at the hearing and were given full opportunity to participate in the proceedings. Post-hearing briefs were submitted by both parties. Upon the entire record, including my observation of the demeanor of the witnesses and consideration of the briefs submitted by the parties, I make the following findings of fact and conclusions of law.

I.

JURISDICTION

Neither the employer nor the UFW challenged the Board's jurisdiction in this matter. Accordingly, I find that the employer is an agricultural employer within the meaning of Cal. Lab. Code §1140.4(c), that the UFW is a labor organization within the meaning of Cal. Lab.

Code §1140.4(f), and that a representation election was conducted within the meaning of Cal. Lab. Code §1156.3.

II.

ALLEGED MISCONDUCT

A. Background

The polling site for the election was located on Mount Olive, a hill located one-quarter to three-quarters of a mile from the intersection of South and Porter Avenues in Reedley, California.^{2/} There was only one road leading to the polling site and it was wet and muddy on the day of the election. Upon discovering the condition of the road, Janice Johns, the Board agent in charge of the election altered the agreed-upon plan for transporting voters to the polls. At the top of the hill, the road widened into a gravel area. The polling site was on one side of the area and several trees bordered the other side.^{3/}

Four Board agents conducted the election. Janice Johns was the Board agent in charge. Four company observers reported to the election site, three of whom were at the polling site most of the day. Company representatives Kelly Olds and Richard Binns and company attorney John Hayden were stationed at the intersection of South and Porter throughout most of the day, as were UFW representatives. Late in the afternoon a Board agent and an observer from each party were also stationed at the intersection of South and Porter.

B. Scheduling the Election

The company alleges that the Board agents in charge of the

2/ At the hearing, witnesses estimated that the polling site was a quarter-mile from the intersection. The employer's brief indicates that it was three-quarters of a mile away.

3/ See Employer Exhibit 1 for a lay-out of the area.

election showed bias toward the UFW by scheduling the election on the fifth day after the certification petition was filed in order to prevent intervention by the Teamsters Union.

Richard (Dick) Binns testified that representatives of the Teamsters Union sought access to the employer's property in April, May, late June to early July and in September 1975. The Teamsters did not have a collective bargaining agreement with the company.

At the pre-election conference, according to Binns, the employer's attorney protested the scheduling of the election on the fifth day following the filing of the petition and requested the election be held on Monday to allow the Teamsters to intervene. This request was denied by the Board agent in charge of the election, Janice Johns, who stated, according to Binns, that she was not interested in having the Teamsters intervene.

Mr. Binns also testified that on the Monday following the election, he spoke to a Teamster representative and asked him why the Teamsters didn't intervene. The representative replied that they didn't have a chance to intervene since the election was on the fifth day. Binns could not identify the representative by name. The statement of the Teamster representative is uncorroborated hearsay and is not sufficient to support a finding. 8 Cal. Admin. Code §20370(c).

Betty Tobin, a company observer at the election, testified about a conversation she had with Board agent Johns during the lunch break on the day of the election. She stated that Ms. Johns told her and Barbara Trammell, another company observer, that one of the considerations in scheduling the election on Saturday was that the Teamsters couldn't come and say that the Board office was closed on Sunday.

Board agent Johns testified that she did not remember the Teamsters showing interest in intervening in the election and that she had no personal contact with the Teamsters during her work on the election. She testified that notations in the contact sheet made by original Board agent in charge of the election^{4/} indicated that the Teamsters were notified that a petition had been filed at D'Arrigo. No response was received from the Teamsters.

Ms. Johns testified that she did not remember any mention of the Teamsters at the pre-election conference. She did remember a disagreement between the parties over the scheduling of the election. The employer wanted the election to be held on Monday because he believed it would rain on Saturday and not on Monday and because Monday was a regular workday and Saturday was not. The union wanted the election to be held on Saturday because it had information that a number of workers would not be returning to work on Monday, since the season was ending and some had accepted jobs elsewhere. Additionally, the workers would receive their paychecks on Saturday.

Ms. Johns decided to hold the election on Saturday. She felt that a Saturday election would insure maximum voter turn-out, since workers would be visiting company property to receive their checks. She decided against a Monday election because there was no guarantee that the weather would improve by Monday and it was possible that workers would be employed elsewhere by then. Ms. Johns denied that she made the decision in order to avoid possible intervention by the Teamsters.

Ms. Johns also denied telling Ms. Tobin or Ms. Trammell

4/ Johns was appointed as Board agent in charge at about 11:00 p.m. on October 9.

that she had scheduled the election on Saturday to avoid the possibility of the Teamsters intervening.

Analysis and Conclusions

The Board agent supervising the election is allowed reasonable discretion to set the times and places for voting. 8 Cal. Admin. Code §20350(a). The testimony indicates that the parties disagreed on the date the election should be held and that the Board agent made a reasonable decision, which would allow maximum voter participation.

In the post-hearing brief, the company cites V.V. Zaninovich, 1 ALRB No. 24 (1975), in which an election was set aside because a union was prevented from intervening. In that case, the aggrieved union filed the objection. The Board found that the Board agents abused their discretion by scheduling the election and the pre-election conference at such time as to prevent intervention. The election was held less than 60 hours after the filing of the petition. The union had notified the Board agent of its intent to intervene and could have intervened but for the hasty scheduling of the election.

In the case before me, there has been no showing that the Teamsters intended to intervene or attempted to intervene. The Teamsters did not contact the Board agent, although they were notified that the petition had been filed. They did not inquire about nor appear at the pre-election conference. Most importantly, the Teamsters did not file an objection to the election.

Although there is a conflict as to whether Johns made statements concerning the Teamsters, it is not necessary to resolve the conflict here. Without evidence that the Teamsters contacted the Board office or demonstrated any interest in intervening it would be speculation to find that the election was scheduled to prevent intervention.

Moreover, since the Teamsters have not objected to the election, there is no showing that the scheduling affected the outcome of the election. The employer's objection to the scheduling of the election is dismissed.

C. Campaigning Within the Polling Area

In objections 2,3, and 4, the employer alleges that the UFW campaigned among eligible voters in the polling area during the voting period and that Board agents permitted campaigning. In the post-hearing brief the employer cites the activities of Leo Castillo, Humberto Gomez, and an unidentified union organizer as constituting objectionable conduct and argues that these three men were union agents.

Betty Tobin, Joe Casiano and Barbara Trammell, the company observers, testified that they saw a man wearing a straw hat with a UFW symbol on it several times, during the election. He drove a green car with a UFW bumper sticker. One of the company witnesses stated that he did not get out of his car, another stated that he got out of his car and stood in front of it talking to voters as they went by, and the third witness stated that he walked about twenty feet away from his car and "mingled with the people" about five times during the day.^{5/} No witness heard any of the man's conversations with voters, nor could any of the witnesses identify the man. One of the employer's witnesses said the man with the straw hat had a beard, one said he had a moustache, and the third could not remember if he had either a beard or moustache. One described the man as of medium build, one said he was heavy set.

5/ About fifteen seconds of Ms. Trammell's testimony under questioning by the hearing examiner was inadvertently taped over by later testimony. The lost testimony was reconstructed by Ms. Trammell with the aid of notes taken by both parties. The parties stipulated that the reconstructed testimony was a true version of the original testimony. The tape-over occurred at the beginning of Tape 6, side 1. The reconstructed testimony with stipulation is at the beginning of Tape 7, side 1.

Ms. Trammell also testified that she saw another man driving a white car to the polling area five or six times during the day. This man wore a T-shirt with a UFW eagle on it under a red plaid shirt. The witness testified that the man got out of his car each time he came up the hill. At one time he talked to a voter in the front of the line in Spanish, which she did not understand. The witness could not recall whether or not he voted.

Ms. Trammell identified the driver of the white car as Leo Castillo. She testified that Betty Tobin, a company observer, had told her the man's name. Ms. Tobin knew him as a former employee of the company. Ms. Tobin, however, did not testify to this incident.

Dick Binns and Humberto Gomez, a union organizer, identified Lao Castillo as an economic striker. Gomez testified that Castillo showed up at about two meetings of the economic strikers. Castillo helped Gomez on the day of the election and a few days before to inform the economic strikers of the election. Castillo was not a volunteer organizer and did not assist Gomez in any other election.

The employer argues that Humberto Gomez engaged in objectionable conduct by campaigning at the intersection of South and Porter Avenues. No evidence was presented to indicate that Gomez was ever in the polling area. In fact, all testimony indicated that he spent the day at the intersection where the employer's representatives and the company attorney were stationed, a quarter mile or more from the polling site.

Janice Johns testified that she did not see individuals campaigning for either party in the polling area. She did not recall seeing either of the men or cars referred to by the company observers. She did see a UFW staff person in a light bluish-green car transporting

voters to the voting area. Upon seeing him, she asked him to go to the bottom of the hill to wait for the voters he had transported. She described this person as a tall man with brown hair, who is without the use of one hand, a disability which is readily apparent. She did not see him get out of his car. Ms. Johns testified that she saw cars parked in all parts of the gravel area, sometimes within ten to fifteen feet of the registration table. Many looked alike. Whenever she saw cars parked with a driver waiting for voters, she would tell the driver to go to the bottom of the hill and wait for the voters.

Analysis and Conclusions

The employer argues that the presence of Leo Castillo and the unidentified man wearing union insignia in the view of prospective voters was objectionable conduct.

The ALRB and the NLRB have repeatedly held that the presence of campaign insignia within the election area is not a ground for setting aside an election in the absence of evidence that it caused some disruption of polling or otherwise interfered with the election. Harden Farms of California, Inc., 2 ALRB No. 30 (1976); Foremost Dairies Of the South, 172 NLRB 1242, 68 LRRM 1478 (1968).^{6/}

I find no evidence to suggest that the presence of union insignia on the wearing apparel of the two men or on the bumper of a car had any effect on the exercise of free choice by the voters.

The employer argues that Leo Castillo was a union agent and therefore his actions were sufficient to set aside the election. One witness testified that Mr. Castillo spoke to a voter in front of the line but she did not know the contents of the conversation. No other

6/ See also Veg-Pak, 2 ALRB No. 50 (1976); John Elmore Farms, 3 ALRB No. 16 (1977) ; O.P. Murphy & Sons, 3 ALRB No. 26 (1977) .

witness testified to that conversation, although at least one other witness was present.

The ALRB has declined to set aside an election on the grounds that union organizers had conversations with prospective voters absent a showing that such conversations affected the outcome of the election or interfered with the free choice of a collective bargaining representative. Superior Farming Company, 3 ALRB No. 35 (1977); D'Arrigo Bros, of California, 3 ALRB No. 37 (1977).

In the case before me there is neither evidence of electioneering by Mr. Castillo nor a showing that the conversation between him and the voter had any effect on the outcome of the election nor interfered with the free choice of a collective bargaining representative. I find that the conduct of Leo Castillo was de minimis and insufficient to affect the outcome of the election. It is unnecessary, therefore, to determine whether Mr. Castillo was a union agent.

Similarly, there is no evidence that the man in the straw hat was electioneering. Since this man was unidentified, I cannot make a finding that he was a union agent. The fact that a person is an active proponent of a union is not sufficient to attribute that person's conduct to the union. D'Arrigo Bros, of California, 3 ALRB No. 37 (1977); Chula Vista Farms, Inc., 1 ALRB No. 23 (1975).

Additionally, the employer argues that Mr. Gomez, acting as a union agent, engaged in improper electioneering at the entrance to the polling site. Campaigning outside the polling area was not an issue set for hearing and is therefore an improper argument. 8 Cal. Admin. Code §20365 (g). Furthermore, the Board has held that electioneering beyond the polling area is not conduct sufficient to set aside an election. Klein Ranch, 1 ALRB No. 18 (1975); Herota Brothers, 1 ALRB No. 3 (1975).

Finding no evidence of electioneering in the polling area among prospective voters, I dismiss these objections.

D. Coercion

The fifth objection set for hearing alleges that union representatives threatened, coerced, intimidated and harassed voters by writing down license numbers of cars approaching and leaving the polling area. This conduct took place at the intersection of South and Porter Avenues which lies at the bottom of the hill, about a quarter mile from the voting area. It was undisputed that union representatives and supporters were at the intersection most of the day as were company representatives, several foremen and the attorney representing the company.

Employer witnesses Dick Binns and Kelly Olds offered testimony on this objection. Binns testified that he saw Humberto Gomez stop cars by getting in front of them, blocking the road, and being "forceful." Gomez would look directly at the cars, then write something down on a pad of paper, which the witness assumed to be license plate numbers. Binns did not see what was written on the pad, nor did he hear any of the conversations. He testified that he assumed people were threatened because "there was no gaiety or laughter in the discussion."

Kelly Olds testified that he saw Humberto Gomez stop cars by holding up his hand like a traffic officer indicating "stop." Gomez would stop some cars in this manner, while others would stop to talk to him even when he did not motion. After the cars left, he would appear to be taking notes. Olds was standing about twenty yards from Gomez. He did not hear what was said by Gomez to the people in the stopped cars, nor did he see what Gomez was writing down. Olds described Gomez as a man of slight build. The witness could not remember names

or descriptions of anyone else who stopped cars that day.

Olds testified that he was taking notes at the intersection on occurrences which might have been the basis for objections to the election. He was also taking pictures to document objections to the election. He took pictures of Gomez and others who were stationed at Porter and South. He could not recall if he took any pictures of anyone stopping in cars.

Humberto Gomez testified that on the day of the election he was assigned to keep track of which economic strikers had gone to vote. Before the election he had called a meeting of the economic strikers and prepared a list of over one hundred names. He knew many but not all of the economic strikers. Mr. Gomez testified that he never stood in front of a car. He would stand beside cars and make check marks by the names of the people who were going to vote. Some people who drove by were personal friends and would stop to talk to him. Others would stop and ask questions, some asked for directions to the voting area. Leo Castillo relieved Gomez from about 10:00 a.m. until about 11:00 a.m. Gomez did not know what happened to the list of economic strikers since he was transferred to another union office after the election and he left his files behind.

The essential evidence presented is not contradictory. I find that Humberto Gomez was stationed at the intersection of South and Porter on the day of the election and that he kept a list or checked off names of economic strikers going to vote. While he was away from the intersection, Leo Castillo kept the list and checked off or wrote down names.

The company asks me to assume that voters were being threatened and harassed because there was no gaiety or laughter. I cannot make

such a finding on the evidence presented, nor can I conclude that Gomez's presence was threatening.

Analysis and Conclusions

The ALRB has held that the use of a voter eligibility list to check off names as part of a campaign to insure that all eligible workers have notice of the election and an opportunity to vote is not per se impermissible conduct. Such conduct might result in the setting aside of an election, however, where it occurs in a context of coercion or intimidation. Toste Farms, 1 ALRB No. 16 (1975).^{7/} The Board has also found that a UFW table set up outside the entrance to the polls to register or check off economic strikers was not impermissible conduct absent a showing that any eligible voter was turned away by this procedure. D'Arrigo Bros, of California, 3 ALRB No. 37 (1977).^{8/}

The rationale for both of these decisions was based on the difficulty of informing workers in the agricultural setting of the time and place of elections within the time restrictions of the ALRA. Agricultural workers may be scattered over many acres; may have had no previous experience in voting in any election; and may not be able to read the Notice of Election. In addition, to these factors, economic strikers cannot be notified at the work place so must be notified individually of the time and place of voting.

The evidence before me is very similar to the cases previously decided by the Board. Humberto Gomez, a UFW representative, observed

7/ See also, William Dal Porto and Sons, Inc., 1 ALRB No. 19 (1975); Klein Ranch, 1 ALRB No. 18 (1975).

8/ The NLRB has also found efforts by union representatives to get voters to the polls to be unobjectionable. See Craddock-Terry Shoe Corporation, 80 NLRB 1239, 23 LRRM 1215 (1948).

economic strikers arriving to vote and checked their names off a list. He was also involved in a campaign of informing economic strikers of the election and getting them to the polls. There was also evidence that Gomez gave voters directions to the polls. There is no evidence that any person refrained from voting after talking to Gomez nor was there any indication of coercion or intimidation. On the basis of the above, I dismiss the objection.

E. Vehicles in the Polling Area

The company alleges that Janice Johns, the Board agent in charge of the election, stopped the employer's vehicles some distance from the voting area and did not allow them to wait for the voters, but permitted union representatives to drive voters directly to the polls and to wait for their passengers.

Dick Binns testified that at the pre-election conference all parties agreed that the parties would "bring in" the voters. On the morning of the election Janice Johns told him she felt that because of the small area on top of the hill and the possible congestion, all company and union vehicles should park at the bottom of the hill and voters would be shuttled up and down the hill by a state agent in a state vehicle. The state vehicle went up the hill only once, however, after which all cars carrying voters drove directly up the hill. Kelly Olds testified that he saw "dozens" of cars drive up the hill in the morning and fewer in the afternoon.

Janice Johns testified that at the pre-election conference the parties agreed that union organizers and company foremen would transport voters to the bottom of the hill and voters would walk up the hill to the polling site. On the morning of the election she found that the road was not paved and was too muddy and slippery for

people to walk up. It worked out that parties brought the voters to the top of the hill, left them off, went down to the parking area, then came back to pick up the voters. She directed all company personnel and UFW staff people whom she saw to wait at the bottom of the hill for the voters. When the Board agents had time, they directed all voters who drove their own cars to park under the trees which were about 125 feet, from the polls. At times, however, cars were parked all over the gravel area, some practically in front of the registration table. She estimated that there might have been 50 cars parked on top of the hill. The parked cars did not interfere with the election process.

The company observers testified that they saw voters ride up the hill in private cars, company vehicles, and union cars. The company vehicles consisted of company-owned vans and a privately-owned pick-up driven by company personnel. Three field foremen and one crew foreman drove the company vehicles. The company vehicles were not allowed to wait for voters. According to their testimony the first company vehicle to drive up the hill was told to stop and discharge the voters while still on the incline.

The observers described a green car and a white car that were allowed to wait for voters. These are the same cars discussed above in connection with the allegation of campaigning in the polling area. Barbara Trammell believed they were union cars because she saw them on the hill off and on during the day and thought these were "probably people for the union" that were transporting voters.

Janice Johns did not remember seeing the green car or the white car. The only UFW staff person she recognized transporting voters was in the light bluish-green car and she directed him to wait at the

bottom of the hill. She noted that many of the cars looked alike.

Analysis and Conclusions

The evidence presented indicates only that two cars that were not company vehicles^{9/} were parked in the voting area several times during the day. The Board agent denied noticing the two cars, a statement I find reasonable since her duties of overseeing the whole election required her attention to many details and prevented her from observing the cars as closely as the observers were able to do. The cars would not have been as easily distinguishable as the company vans. Since the cars had no distinguishing features other than a UFW bumper sticker, Ms. Johns would have had no reason to believe that they were not cars driven by voters themselves.^{10/} Additionally, the observers did not bring their complaint to the attention of Ms. Johns during the election, when she could have investigated and remedied the situation if necessary. No evidence was introduced regarding any other "union cars" which were allowed to stay in the area.

In light of the many cars driving through the area, many of which parked there,^{11/} I cannot conclude that the presence of two non-company cars on and off during the day indicates a policy of disparate treatment. I find that in light of the slippery conditions and the congested area at the polling site, the transportation procedure as a whole was reasonable.

9/ See discussion at pages 10-11 above concerning the identity of the drivers.

10/ In fact, one of the drivers was identified as an economic striker.

11/ The Tally indicates 227 voters.

The ultimate question, however, is whether an appearance of bias affected the conduct of the election and impaired the free choice of voters. Coachella Growers, Inc., 2 ALRB No. 17 (1976). The burden of proof is on the party seeking to overturn an election to produce evidence that unlawful conduct occurred and that such conduct interfered with the free choice of voters. Bruce Church, Inc., 3 ALRB No. 90 (1977).

The Board has held that the presence of bumper stickers in the voting area is insufficient to set aside an election. Harden Farms of California, 2 ALRB No. 30 (1976). Thus the presence of the cars in itself could not affect the election. I have already concluded that the presence of the drivers of the two cars was insufficient to affect the results of the election. See discussion on pages 11-12, above. Additionally, there is no evidence that voters transported in company vehicles were disenfranchised by the conduct of the Board agents or that they were discouraged from voting. I conclude that the conduct complained of did not affect the election nor impair the free choice of voters.

F. Board Agent Misconduct Toward the Employer

The seventh objection set for hearing is the allegation that Board agent Janice Johns accused the employer of engaging in illegal and/or improper conduct after finding a poster within the polling area.

The three company observers testified that shortly before the noon break, Janice Johns came running back from the portable toilet carrying a poster, identified as Joint Exhibit 1. Casiano, a native Spanish speaker, translated the poster as follows: "You work for all your life for the UFW, you haven't got a pension. Vote

'no union.'" Tobin said Johns yelled, "They know better than this, because he was warned against it." Casiano testified that she said excitedly that the paper was not supposed to be in the portable toilet. Trammell quoted Johns as yelling, "Look what I found. I told them not to do this. Look what they've done." Tobin and Trammell testified that five or six voters were on the hill at the time.

Johns showed the paper to the observers, called over another Board agent, then signed and dated the poster. The second Board agent also signed the poster.

Shortly after twelve, Hayden and Binns came into the polling area and were addressed by Johns. Hayden testified that she was angry and said it was improper and the company had been warned. Binns testified that she accused him of putting the poster in the portable toilet.

Johns testified that she went to the portable toilet after the voting site had been closed and the ballot box sealed and found the poster. She removed the poster, took it to the table and called over another Board agent to inspect it. She showed the poster to the observers, signed and dated it, then put it into the file. She then had several observers accompany her on a tour of the area to look for additional campaign literature. When Binns and Hayden arrived she showed them the poster and said she would assume its presence was an unintentional oversight and that it had been in the lavatory for some time.

Analysis and Conclusions

With this objection and the previous one the employer argues that Board agent Johns displayed a bias in favor of the petitioner which adversely affected the results of the election. He cites

Athbro Precision Engineering Co.,^{12/} and Glacier Packing Co.,^{13/} two NLRB cases, to support the argument that the election should be overturned because of such Board agent conduct.

In both Athbro and Glacier Packing, the national Board emphasized the Board agent's role in protecting the integrity and neutrality of its elections procedure. In Athbro, the NLRB set aside an election after the Board agent conducting the election was seen drinking a beer with a union agent in a public place during a break in the voting. In Glacier Packing, a Board agent yanked a "vote neither" campaign button off a company observer, publicly rebuked him and loudly denounced the employer's personnel director in front of about fifteen employees. This election was also set aside.

As discussed in the analysis of the previous objection, the ALRB looks to whether bias or an appearance of bias affected the conduct of the election and impaired the free choice of voters. Coachella Growers, Inc., 2 ALRB No. 17 (1976). The same concern was voiced in Baumritter Corp. v. NLRB, 386 F.2d 117, 67 LRRM 2027, (CA 1, 1967). In Baumritter, a Board agent personally removed a company campaign notice from the line of march to the polling area on the day of the election. Upholding the election, the court stated that it did not think the agent interfered with the rights of the employer or the employees, nor did the conduct interfere with the employees' freedom of choice nor have any substantial effect on the outcome of the election.

In another case, a Board agent said, in response to a question by the employer's observer, that he felt the union would win

^{12/} 166 NLRB 966, 65 LRRM 1699 (1967).

^{13/} 210 NLRB 571, 86 LRRM 1178 (1974).

the election and do the people a lot of good. NLRB v. Dobbs House, 435 F.2d 704, 76 LRRM 2120 (CA 5, 1970). The court upheld the election, distinguishing between acts of public fraternization as in Athbro and an expression of personal feelings to a limited audience. Noting that the agent's comment was in response to the employer's observer, the court stated:

An employer cannot through his agent lead the Board agent to make improper statements and then rely on such statements to void the election without a showing of prejudice. NLRB v. Dobbs House, Inc., supra.

The present case is similar to Baumritter in that the Board agent personally removed a company campaign notice from the polling area. Removal of the notice did not interfere with the rights of the employer or the employees.

The employer argues that the commotion caused by Ms. Johns was prejudicial to the company and that this incident indicates her bias against the company. The issue is not one of bias, however, when Johns reacted to the discovery of a company campaign poster by talking to company officials. The proper question is whether or not her conduct impaired the free choice of voters. I find that it did not. Firstly, there is no showing that any voters were in the area waiting to vote when the incident occurred^{14/} or when Johns spoke to Binns and Hayden about the poster.

Secondly, her conduct was not such as to impair the free choice of voters. When she found the poster, she referred only to "they" or "he" as being responsible for it. She did not refer to anyone by name, nor did she verbally abuse the company or any person. The witness quoted

14/ Johns testified that the voting site was closed and the voting box sealed when she went to the lavatory and found the poster. I credit her statement. Tobin testified that five or six voters were standing around when Johns returned with the poster, but she stated that they voted before the ballot box was sealed. She did not state when the box was sealed.

her as merely stating the established policy and the fact that it had been breached. She then followed a reasonable procedure by documenting the incident and looking for other campaign materials in the voting area. Whether or not she accused the company officials of being responsible for the poster is not relevant since no voters were present. Since her conduct was not of the type to impair the free choice of voters, the objection is dismissed.

G. Observation of Challenged Ballot Procedure

The eighth objection set for hearing alleges that Board agents instructed the employer's observers that they would not be allowed to observe the challenged ballot procedure and prevented them from doing so. Testimony established that there was no table available to be used as a challenge ballot table so a Board van was used for this purpose.

Joe Casiano, an observer for the company, testified that Board agent Fred Lopez refused to allow him to observe the procedure at the challenge van because it was confidential. Casiano asserted that he had a right to observe, but was told again that it was confidential. Casiano and Johns then got into an argument because she refused to let him stay at the challenge van.^{15/}

Company observer-Betty Tobin corroborated Casiano's

15/ Casiano also testified that he overheard leading questions being asked of economic strikers at the challenge van, specifically he heard the question, "Did you strike in 1973?"

The Executive Secretary dismissed a company objection that the Board agent coached and assisted economic strikers in casting challenged ballots. See Board Exhibit 10, number 19 of objections dismissed. The dismissal was not appealed. Evidence on this objection is therefore improper in the present hearing. 8 Cal. Admin. Code §20365 (g). Additionally, the eligibility of challenged voters was determined by the Board in D'Arrigo Bros. of California, 3 ALRB No. 34 (1977).

testimony. She also testified that voters were challenged at the registration table, sent to the challenge van, then they returned to the registration table with a challenged ballot envelope. At the table, Janice Johns handed each challenged voter a ballot and instructed the voter how to put the ballot into the envelope. No UFW observers were allowed to observe the taking of declarations. The attorney for the employer testified that he was told by the Regional Director that the standard procedure was to allow observers to be present at the challenge table.

Analysis and Conclusions

The employer argues that by preventing its observer from viewing the challenged ballot procedure, the Board agent denied the employer the opportunity to have an observer for that part of the election. The employer analogizes this situation to the case of Breman Steel Co., 115 NLRB 247, 37 LRRM 1273 (1956), in which the NLRB set aside an election where the Board agent did not allow the employer to have the observer of his choice.

The case cited by the employer is not apposite to the case at hand. In Breman Steel, the employer was told only minutes before the election began that he could not use the observer he had named and who was present. Since the Board agent refused to delay the election, the employer did not have an observer present during the election.

In the present case, the employer had at least three observers present at the polls. The only procedure that the observers from both parties did not view was the taking of affidavits from the challenged voters. Instructions to the voters concerning the handling of the challenged ballots were given at the checking table in front of all observers.

The regulations allow each party to be represented by observers of its own choosing. 8 Cal. Admin. Code §20350(b). Neither the Act, the regulations, nor the case law indicates whether observers should view the taking of affidavits from challenged voters. It is arguable that such information given by voters should be held in confidence since it could reveal the person's voting preference.^{16/}

The more fundamental question, however, is whether the employer was prejudiced by the procedure. I conclude that the conduct complained of could not have affected the outcome of the election. The eligibility of the economic strikers and other challenged voters was not decided on the basis of the questions asked and answers given at the challenge van. The Regional Director investigated the eligibility of the challenged voters pursuant to 8 Cal. Admin. Code §20365(e)(1) (1975); re-enacted as §20363 (a) (1976). He issued a Report on Challenged Ballots to which both parties filed exceptions. The Board issued a Decision on Challenged Ballots, taking into account the Regional Director's report and the parties' exceptions. D'Arrigo Bros. of California, 3 ALRB No. 34 (1977). Since the eligibility of the challenged voters has been investigated apart from the affidavits given at the election and has been decided by the Board on the basis of that investigation, the conduct complained of could not have affected the outcome of the election. The objection is dismissed.

H. Challenged Ballots Resolved by Board Agent

The ninth objection set for hearing alleges that Board agents refused to disclose the types of identification used by voters

16/ The Act protects the right of employees to a secret ballot. Cal. Lab. Code §1156. Information acquired in confidence by a public employee is privileged from disclosure. Evidence Code §1040. See also, Government Code §6254(k).

whose challenged ballots the agents resolved. The tenth objection alleges that Board agents did not submit a written record, as required by the regulations, regarding the challenged ballots which were resolved before the tally.

While on the witness stand, company attorney John Hayden identified UFW Exhibit 3 as a copy of a memorandum by Janice Johns explaining the Board agent resolution of challenged ballots. He also identified UFW Exhibit 2, dated October 23, 1975, as a letter which he wrote in reply to that memorandum.

Janice Johns identified UFW Exhibit 3 as a copy of the memorandum she wrote on the resolution of challenged ballots at the request of the Regional Director, Barry Bennett. The memorandum states that the Board agent resolved the challenges of six voters who had been challenged by a company observer on the basis of insufficient identification. Each challenged voter signed an affidavit as to his identity, and each presented a form of identification that carried either (1) a photograph of the voter, (2) a signature that matched the signature on the affidavit, and/or (3) a social security number. Additionally, many of those voters had been identified by the UFW observer. The Board agent resolved the challenges, finding that each had presented sufficient identification.

Evidence was presented by both parties on the sufficiency of various types of identification used by the voters. Many voters presented D'Arrigo employee identification cards. Employer Exhibit 3 is an example of such a card, which the employer argues was sufficient identification. Typed onto this card is the employee's name, social security number, employee number and the date of the end of the first payroll period in which the employee was employed. On the back of the

card is printed "DEMAND POSITIVE IDENTIFICATION - NOT TO BE USED FOR CREDIT."

Some voters presented metal plates showing their social security numbers. Others presented UFW membership cards. Company observers challenged these two forms of identification because they felt the identification was insufficient. None of the company observers indicated, however, that they knew or believed that ineligible people were voting.

Johns testified that she resolved the six challenged ballots after asking Fred Lopez, the Board agent who had taken the affidavits, what kind of identification the voters had presented. She did not state the type of identification each voter used in the memorandum because she felt that revealing a voter's union preference through a union membership card would put the employee in a vulnerable position.

Analysis and Conclusions

At the request of the employer's attorney, I took administrative notice of the Board's regulation in effect at the time of the election concerning resolution of challenged ballots:

Subsequent to the balloting but prior to the tally of ballots, the Board agent supervising the election shall have discretion to rule upon challenged ballots and may defer the tally of ballots for a period of 24 hours to consider the resolution of such challenges. In the event the Board agent so rules upon challenged ballots, the Board agent shall prepare a written record of the ruling and the reason therefore. 8 Cal. Admin. Code §20350(d) (1975).

UFW Exhibit 3 is a memorandum from Board agent Johns which explains the resolution of the challenged ballots. Since the memorandum includes the ruling and the reason therefore, it meets the requirements of the regulation in effect at the time. The employer has introduced no evidence of prejudice and has raised no factual dispute as to any of

the challenged voters. The tenth objection should be dismissed.

The company argues that the Board agent resolved the challenged ballots arbitrarily since the company was not given an opportunity to present evidence and since the type of identification used by the voters was not revealed.

The Board's regulations which are presently in effect and were in effect at the time of the election gives the Board agent discretion to accept voter identification which s/he deems adequate. 8 Cal. Admin. Code §20350(c)(1975); amended as 8 Cal. Admin. Code §20355(c)(1976). UFW membership cards have been accepted as sufficient identification. Toste Farms, Inc., 1 ALRB No. 16 (1975). Neither the Act nor the regulations require a Board agent to later reveal to the parties the type of identification used, nor ask the parties for evidence relating to voter identification. The observers represent the parties in relation to voter identification at the election.

In the present case, the resolution of the challenged ballots prior to the Tally of Ballots was merely the Board agent's determination of the adequacy of identification supplied by the voters. There is no evidence that the Board agent abused her discretion. There has been no allegation that any ineligible person voted. Since no factual dispute has been raised by the company, the objection is dismissed.

III. RECOMMENDATION

Based on the findings of fact, analysis, and conclusions, I recommend that the employer's objections be dismissed and that the United Farm Workers of America, AFL-CIO, be certified as the exclusive

bargaining representative of all agricultural employees of D'Arrigo Brothers
of California, Reedley District #3.

DATED: July 14, 1978

Respectfully submitted,



SUZANNE VAUPEL
Investigative Hearing Examiner