

STATE OF CALIFORNIA
AGRICULTURAL LABOR RELATIONS BOARD

SAN DIEGO NURSERY CO., INC.,)	
)	
Employer,)	Case No. 78-RC-10-X
)	
and)	
)	
UNITED FARM WORKERS OF)	5 ALRB No. 43
AMERICA, AFL-CIO,)	
)	
Petitioner.)	
)	

DECISION AND CERTIFICATION OF REPRESENTATIVE

Pursuant to the provisions of Labor Cede 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 August 21, 1978, a representation election was conducted on August 25, 1978, among the agricultural employees of San Diego Nursery Co., Inc. The official Tally of Ballots showed the following results:

UFW	31
No Union	9
Challenged Ballots	3
Void Ballots	<u>2</u>
Total Ballots	50
Number of Eligible Voters	52

The challenged ballots were not sufficient in number to affect the results of the election.

On January 12, 1979, after a hearing on objections held

on November 13 and 14, 1978, Investigative Hearing Examiner (IHE) Susan Matchem Urbanejo issued her initial Decision, in which she recommended that the Employer's post-election objections be dismissed and that the UFW be certified as the collective bargaining representative of the Employer's agricultural employees. The Employer filed timely exceptions to the IHE's Decision and a brief in support thereof.

The Board has considered the objections, the record, and the IHE's Decision^{1/} in light of the exceptions and brief, and has decided to affirm the rulings, findings, and conclusions of the IHE, as amplified herein.

The Employer excepts to the IHE's conclusion that the employees who formed the organizing committee were not agents of the UFW, contending- that the conduct of the said employees is attributable to the union under the principle of apparent authority.^{2/} We find no merit in this exception.

In February or March of 1978, UFW organizers attempted to organize the employees of San Diego Nursery, but abandoned the effort when it became apparent that the workers were not interested

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^{1/}We hereby correct the IHE's error on Line 15, p. 11 of her Decision to show that the person referred to was Agnes Cabrera rather than Agnes Larson.

^{2/}If the committee members were found to be agents of the union, their conduct would be judged according to stricter standards than those applied to nonparties, in analyzing the effect of their conduct on the workers* free choice of collective bargaining representatives. Takara International, Inc., dba Niedens Hillside_ Floral, 3 ALRB No. 24(1977).

in union representation.^{3/} In August 1978, some of the nursery employees began their own campaign for an election and went to the UFW officials for assistance. The union officials responded that they had no time to organize at San Diego Nursery and that the employees would have to organize themselves. When asked for advice, the union representatives told the employees how to solicit authorization cards and support for the union. The employees formed an organizing committee, solicited authorization cards, distributed leaflets and buttons, and talked to their fellow workers about the union. Although certain members of the committee met periodically with union representatives for advice, the employees conducted the election campaign on their own. Except, for one or two visits which UFW organizer Acosta made to the Employer's premises in August 1978, the union officials had no contact with the rest of the San Diego Nursery employees during this organizational campaign.

We have held that an agency relationship is not established merely by evidence that an employee has solicited authorization cards and distributed leaflets in support of a union. Tepusquet Vineyards, 4 ALRB No. 102 (1978); Select Nursery, 4 ALRB No. 61 (1978). Furthermore, functioning as an in-plant organizing committee does not convert union adherents into union agents. Takara International, Inc., dba Niedens Hillside Floral, 3 ALRB No. 24 (1977); Kawano Farms, Inc., 3 ALRB No. 25 (1977). The

^{3/} Although the IHE found that the UFW's attempts to organize occurred in January 1978, the testimony of UFW witness Acosta establishes that these attempts occurred in February or March 1978.

Employer argues that, in this case, an agency relationship exists because the committee members conducted an organizational campaign without the presence of union organizers but, the Employer claims, under the direction of union officials.

The Employer relies on NLRB v. Georgetown Dress Corp., 537 F.2d 1239, 92 LRRM 3282 (4th Cir. 1976) to support its argument that the union, should be held liable, under the principle of apparent authority, for the committee members' statements and conduct. In Georgetown, professional union organizers, in conducting an election, campaign, initiated contact, with some employees and formed, an in-plant organizing committee. The organizers directed the committee's activities in the plant, relying upon, the committee's efforts because union representatives were not permitted, on the employer's property. The committee was therefore the union's only in-plant contact with the workers. The committee distributed leaflets requesting employees to attend union meetings, solicited authorization cards, and helped plan union meetings. The NLRB, finding that the committee members solicited other employees because of their own interest in obtaining union, representation, concluded that an agency relationship did not exist. Georgetown Dress Corp., 214 NLRB 706, 83 LRRM 1593 (1974). The U.S. Circuit Court reversed, finding that the committee members were the representatives of the union in the eyes of the other employees and that the union had authorized them to occupy that position. Accordingly, the court held the union liable, under the principle of apparent authority, for the acts and conduct of the committee members. NLRB v. Georgetown Dress Corp., supra.

We find that the court's decision in Georgetown is not controlling in this case. Under NLRA precedent, employees who are members of an in-plant organizing committee or prominent in a union's organizational campaign are not, for those reasons alone, deemed agents of the union. Certain-Teed Products Corp. v. NLRB, 562. F.2d 500, 96 LRRM 2504 (7th Cir. 1977); Mike Yurosek & Sons, 225 NLRB 148, 92 LRRM. 1535 (1976); Tennessee Plastics, Inc., 215 NLRB 315, 88 LRRM 1472 (1974), enf'd 525 F.2d. 570, 91 LRRM 2240 (6th Cir. 1975); Tunica Manufacturing Co., Inc., 182 NLRB 729, 76 LRRM 1535 (1970). In Georgetown, the court gave great weight to the fact that, the committee was the union's sole contact with the employees, in the plant. It is not clear whether other circuit courts or the NLRB would rely so heavily on this fact and diverge from settled precedent in deciding a, similar case.

Furthermore, the facts of this case are distinguishable from those in Georgetown and do not establish union liability by apparent authority. The existence of an agency relationship under both the NLRA and our Act must be determined in light of common law principles of agency.^{4/} NLRB v. Local 64, Carpenters Union, 497 F.2d 1335, 86 LRRM 2670 (6th Cir. 1974). Under the common law, the apparent authority of an agent arises from manifestations made by
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^{4/}Section 2(13) of the National Labor Relations Act, the equivalent provision of Section 1165.4 of the ALRA, reads:

In determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question, of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

the principal to the third party.^{5/} Restatement (Second) of Agency §§ 8, 27 (1957). Although the Georgetown court did not explain how, in the court's view, the union officials' conduct led the employees to believe that the in-plant committee members were union agents, the court expressly found that the union had authorized the committee members to act as union agents. There, the union officials undertook and actively engaged in an organizing campaign, held meetings for the employees and supervised the in-plant activities of the committee members, who were used because union organizers were not allowed in the plant.^{6/}

Here, no UFW official, or organizer made any statements or engaged in any conduct which would indicate to the Employer's employees that members of the organizing committee were acting as agents of the union. Union officials did not engage in campaigning at San Diego Nursery. The employees conducted the organizational campaign by themselves. Therefore, unlike the Georgetown employees, the San Diego Nursery committee members were not acting as the union's contact with the rest of the workers. The nursery workers knew the committee members, not as UFW organizers but as fellow employees, some of whom had worked for the Employer for a

^{5/}Section 8 of the Restatement (Second) of Agency (1957), reads:

Apparent authority is the power to affect the legal relations of another person by transactions with third persons, professedly as agent for the other, arising from and in accordance with the other's manifestations to such third persons. (Emphasis added.)

^{6/}Under the ALRA, access to the worksite is provided by the access rule; unions seeking to organize agricultural workers need not rely on employees for on-site organizing.

number of years. There was no manifestation by the UFW to the other employees that the UFW had authorized the committee to act as agents.

The burden of proof in determining union agency is on the party asserting the agency relationship. International Longshoremen's and Warehousemen's Union (CIO), Local 6 (Sunset Line and Twine Co.), 79 NLRB 1487, 23 LRRM 1001 (1948). The Employer has not met its burden, of proving apparent authority in this case. The fact that employees, sought advice and met with UFW officials during their organizing campaign is insufficient to establish apparent authority. We agree with the IHE that to find an agency relationship on, the facts before us would hinder the ability of unions to advise, and encourage workers wishing to seek union representation because of the potential liability for the misconduct of individual employees, and would infringe upon employees' Section 1152 right to self-organization.

The objections are hereby dismissed, the election is upheld, and certification is granted.

CERTIFICATION OF REPRESENTATIVE

It is hereby certified that a majority of the valid votes have been cast for the United Farm Workers of America, AFL-CIO, and that, pursuant to Labor Code Section 1156, the said labor organization is the exclusive representative of all agricultural employees of San Diego Nursery Co., Inc. in the State of California, for purposes of collective bargaining, as defined in

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Labor Code Section 1155.2Cal, concerning employees' wages, working hours and other terms and conditions of employment.

Dated: June 14, 1979

GERALD A. BROWN, Chairman

RONALD L. RUIZ, Member

HERBERT A. PERRY, Member

MEMBER McCARTHY, Dissenting in Part:

I would find that an agency relationship existed between Agnes Cabrera and the Petitioner (UFW) during the campaigning at the Employer's nursery. The threats which the Investigative Hearing Examiner finds were made by this individual would, therefore be attributable to the Petitioner. In that event the Board is required to accord the threats greater significance than, if they were made by someone who was not an agent of a party to the election. See Takara International, Inc. dba Niedens Hillside Floral, 3 ALRB No. 24 (1977).

Cabrera was the acknowledged leader of the effort to make the Petitioner the collective, bargaining agent for the nursery workers.^{1/} She and her committee spoke on behalf of the

^{1/} Cabrera directed the efforts of fellow employees on the organizing committee and, according to the testimony of a UFW employee, made daily visits to the UFW office. During these visits she received advice and reported in detail the progress

(fn. 1 cont. on p. 10)

UFW, distributed UFW literature and UFW buttons, obtained signatures on UFW authorization cards and acted as the employees' only contact point with the union at their place of employment. These circumstances were a clear manifestation to the other workers that the committee was authorized to represent the union.^{2/} In the absence of official union personnel, employees were unable to readily verify statements made by Cabrera and her committee members and were thus left with little

(fn. 1 cont.)

of the organizing effort. In the words of the IHE, "of all the committee members, Agnes Cabrera is the person most likely to be deemed a UFW agent".

It is evident that a strong symbiotic relationship existed between Cabrera and the Petitioner. Professional organizers for the UFW had been unsuccessful in sustaining an organizing drive at the Employer's nursery during the early part of 1978. However, with Cabrera at the helm in August of that year, sufficient authorization cards were obtained on behalf of the Petitioner. Working together, Cabrera and the union thus accomplished what neither appeared able to do individually.

^{2/} The doctrine of apparent authority, as enunciated in the Restatement (Second) of Agency, is applicable here. In the comment to section 27 ["Creation of Apparent Authority: General Rule"], the authors state:

For apparent authority there is the basic requirement that the principal be responsible for the information which comes to the mind of the third person, similar to the requirement for the creation of authority that the principal be responsible for the information which comes to the agent. Thus, either the principal must intend, to cause the third person to believe that the agent is authorized to act for him, or he should realize that his conduct is likely to create such belief. The information received by the third person may come directly from the principal by letter or word of mouth, from authorized statements of the agent, from documents or other indicia of authority given by the principal to the agent, or from third persons who have heard of the agent's authority through authorized or permitted channels of communication. [Emphasis added.]

choice but to accept those statements as true.

The apparent authority of an employee organizing committee was the critical factor in NLRB v. Georgetown Dress Corp., 92 LRRM 3283, 537 F. 2d 1239 (4th Cir. 1976). There the court found that the conduct of the committee members was attributable to the union on whose behalf they were working-The following statement by the court has direct application to the matter at hand:

Concededly, there is no evidence to show that the union authorized the acts of misconduct, and in that sense the acts are not attributable to the union under the principle of express authority; but we think that the union is chargeable with the misdeeds under the principle of apparent authority. The committee members in the eyes of other employees were the representatives of the union on the scene and the union authorized them to occupy that position. While they may have exceeded, their authority and, indeed, acted contrary to their express instructions, their acts were apparently within the scope of their authority, neither their misdeeds nor their authority were repudiated by the union, and their acts did not so far exceed their authority as to make obvious to the persons who were coerced and intimidated that the union would not ratify what was done. [92 LRRM at 3285-3286.]

The foregoing analysis finds support in. the ALRA itself. Section 1165.4 states:

For the purpose of this part, in determining whether any person is acting as an agent of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

The majority attempts to distinguish the Georgetown case on the grounds that, "Unlike the Georgetown employees, the San Diego Nursery committee members were not acting as the

union's contact with the rest of the workers." This assertion hardly seems tenable when one considers that the committee served as the union's sole vehicle for staging an organizational campaign at San. Diego Nursery, that the union encouraged and guided the committee in that effort, and that the union received progress reports from the leader of the committee. It is also implied by the majority that the Georgetown organizers, not having access rights, had to rely on the employees for in-plant organizing, whereas the UFW was not so dependent because it could have taken access to the property under our access rule. But the fact remains that the UFW, for whatever reason, elected not to utilize its access rights and instead relied exclusively upon the efforts of the employee committee.

The union knew it was delegating virtually all organizing responsibilities to Cabrera, that she had become the embodiment of the union's presence at the nursery, and that, the workers were likely to perceive the committee and its leaders as having authority to speak for the union. Under these circumstances, the union should not be allowed to accent the fruit of the organizing committee's labor without also assuming responsibility for acts done and statements made by the committee leadership on the union's behalf. Failing to require some accountability on the part, of the union, in. these situations will tend to make the union less diligent in seeing that campaigns conducted in its name are conducted properly.

On the basis of applicable NLRA precedent and for what I feel are sound policy reasons, I would find that the statements

and conduct of at least the employee committee leader is attributable to the Petitioner. When reevaluated in the light of this finding, the conduct in question might well be found serious enough to warrant overturning the election.

Dated: June 14, 1979

JOHN P. McCARTHY, Member

CASE SUMMARY

San Diego Nursery Co., Inc. (UFW) 5 ALRB No. 43
Case No. 78-RC-10-X

IHE DECISION

After an election won by the UFW, a hearing was held on the Employer's objections that: UFW "agents" intimidated, and coerced employees into voting for the UFW; and that a Board Agent showed favoritism toward the UFW in the presence of eligible voters by discussing with UFW representatives the best way to schedule the election in order to prevent the Employer from distributing campaign literature.

The IHE found that a group of San Diego Nursery employees formed an organizing committee in support of the UFW. The committee conducted the organizational campaign, soliciting cards and distributing literature. Its most active member, Agnes Cabrera, visited the UFW office every day, but UFW officials had little or no contact with the employees at the Employer's premises during the campaign.

The IHE found that certain members of the committee had, on four separate occasions, made threats to fellow employees, but concluded that the committee members were not union agents, on the grounds that an agency relationship is not created because an employee is a member of an in house organizing committee or a union adherent. The IHE distinguished *NLRB v. Georgetown Dress Corp.*, 537 F.2d 1239, 92 LRRM 3282 (4th Cir. 1976), in which an agency relationship was found to exist between a union and an in-plant organizing committee where the union initiated the campaign, whereas the organizing drive at San Diego Nursery originated with the employees rather than union officials. The IHE, in analyzing the committee members' statements as nonparty misconduct, concluded that the statements, even when considered as threats, did not affect the results of the election.

The IHE concluded that the Board Agent did not exhibit bias toward the UFW in scheduling the election. She discredited the testimony of an Employer witness that the Board Agent discussed with UFW representatives preventing the Employer from distributing literature by scheduling the election early in the day. She found that the Board Agent scheduled the election in compliance with one of the Employer's suggestions for an appropriate time.

The IHE recommended dismissal of the objections and certification of the UFW.

BOARD DECISION

In its exceptions to the IHE's Decision, the Employer contended that the statements of the committee members are attributable to the union under the principle of apparent authority, as stated in *Georgetown*, supra. The Board held that *Georgetown* was not controlling, finding that the facts of this case are distinguishable from *Georgetown* and did not give rise to union liability based on apparent authority. Apparent

authority of an agent arises from manifestations made by the principal to the third party. In Georgetown, the court found that the union had authorized the committee members to act as its agents and that union officials undertook and actively engaged in the campaign, supervising and using committee members for in-plant organizing because union organizers were not allowed in the plant. In the instant case, the UFW made no manifestations to the employees that the committee members were its agents, and no union officials participated in the campaign. The Board held that the Employer did not meet its burden of proving agency based on apparent authority.

The Board dismissed the objections, upheld the election, and granted certification to the UFW.

DISSENT

Member McCarthy, dissenting, would find that committee leader Cabrera was an agent of the UFW, and that the Board should accord greater significance to her threats than to nonparty statements. The dissent noted that Cabrera was the acknowledged leader of the effort to make the UFW the collective bargaining representative and that she directed fellow committee members and made daily visits to the UFW office, where she received advice and reported in detail the progress of the campaign. Noting that Cabrera and the committee members spoke on behalf of the union, distributed UFW literature and buttons, obtained signatures on UFW authorization cards, and were allowed to act as the employees' only contact with the union at the place of employment, the dissent would conclude that these factors amounted to a clear manifestation to the employees of the committee's apparent authority to represent the union. In the absence of official union personnel, employees could not readily verify statements made by the committee and were thus left with little choice but to accept those statements as e

The dissent disagreed with the majority's distinguishing of Georgetown, stating that the committee herein serv as the union's sole vehicle for staging a campaign, that the union encouraged and guided the committee and received daily progress reports from Cabrera. The dissent would find that the union knew it was delegating its organizing authority to Cabrera, that she had become the embodiment of the union's presence, and that the workers were likely to perceive the committee as having authority to speak for the union. The dissent would hold that the union should not be allowed to accept the fruit of the committee's labor without also assuming responsibility for the acts and statements of the committee members. The dissent would conclude that the conduct of at least Cabrera is attributable to the UFW, and that this conduct might well be found serious enough to warrant setting aside the election.

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

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STATE OF CALIFORNIA
AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of:

SAN DIEGO NURSERY, INC.,

Case No. 78-RC-10-X

Employer,

and

UNITED FARM WORKERS OF AMERICA,
AFL-CIO,

Petitioner.

Richard B. Andrade, of
Dressler, Stoll & Jacobs
for the Employer.

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

DECISION

STATEMENT OF THE CASE

SUSAN MATCHAM URBANEJO, Investigative Hearing Examiner: The case numbered above was heard before me on November 13 and 14, 1978 in Chula Vista, California.

A Petition for Certification was filed on August 21, 1978, by the United Farm Workers of America, AFL-CIO (hereafter "UFW"). An election was held on August 25, 1978, with the following results:

UFW	31
No Union	9
Challenged Ballots	8
Void Ballots	<u>2</u>
Total Ballots	50
Number of Eligible Voters	52

The employer filed a timely objections petition, pursuant to Cal. Lab. Code §1156.3 (c). The Executive Secretary dismissed two of the objections pursuant to 8 Cal. Admin. Code §20365(e). Evidence at the investigative hearing was limited to the following issues:

1. UFW agents, in the presence of other employees, verbally abused and made threats of physical harm and loss of jobs to employees who had not previously evidenced a desire to support the UFW and that this conduct was calculated to and did in fact intimidate and coerce employees into supporting and voting for the UFW.
2. The totality of conduct by UFW agents deprived employees of their right to select a bargaining representative and intimidated and coerced them in their selection of a bargaining representative.
3. A Board agent showed bias and favoritism toward the UFW in front of eligible voters by discussing with UFW representatives and nursery employees the best way to proceed with the election in order to prevent, the employer from distributing lawful campaign literature, and that this conduct tended to destroy the neutrality of the Board's procedures and created the appearance of impropriety.

The employer and the UFW were represented at the hearing and were given full opportunity to participate in the proceedings and submit post-hearing briefs. Only the employer submitted a post-hearing brief.

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

I. THREATS OF PHYSICAL HARM AND LOSS OF JOBS BY UFW AGENTS

FINDINGS OF FACT

A. The Agency Relationship

The employer contends that certain employees of San Diego Nursery, who made allegedly threatening statements to their fellow

employees, are also agents of the UFW. The employer's objection petition lists the following persons as agents: Agnes Cabrera, Concepcion Victorio, Martha Carranza, Carlos Navarro, Martha Escoto and Susana Barragon.^{1/} Four of these persons testified at the hearing along with an admitted UFW employee, Javier Acosta.

Javier Acosta's uncontradicted testimony established that an organizing drive was attempted by the UFW in January of 1978 but that it was discontinued because of lack of interest on the part of the employees. Later in the year, a group of workers from San Diego Nursery came to the UFW office in San Isidro and requested a meeting with a union representative. A meeting was arranged for the early part of August, At that meeting Acosta explained to the employees that in order to have an election it was necessary that they first organize themselves by forming a committee. Acting upon Acosta's suggestion immediately, the above-named persons were chosen by the workers as the organizing committee.

At subsequent meetings, Acosta told the workers to collect authorization cards and gave them instructions on how to do this. He told them, "Tell them (the employees) in a nice manner if they don't want to join the union just leave people alone. It's their own choice." Acosta testified that the workers requested meetings with union representatives almost every week, but that the UFW people couldn't comply because they had so much other work to do, Acosta did, however, visit the company one or two times

^{1/}Agnes Cabrera is also known as Inez Cabrera or Maria Inez Cabrera. Concepcion Victorio is also known as Concepcion Carillo.

during the month of August. Other than these visits, the organizing efforts were left largely to the employees organizing committee.

The testimony of the four members of the organizing committee who were called at the hearing (Cabrera, Carranza, Escoto and Navarro) corresponds with the testimony of Acosta. Agnes Cabrera, the most active member of the organizing committee stated that she became involved with the union "to defend one's rights and because she liked the union." Although no one told her to organize, the employees she actively took charge of the organizing committee. Cabrera visited the UFW office everyday according to the testimony of Acosta, and according to her own testimony, attended at least six or seven meetings at the UFW office prior to the election. Cabrera testified that she had never before organized a ranch but that she had been a UFW member since 1975 and had participated in a UFW Picket line at a neighboring nursery. Additionally she testified that her husband is a UFW delegate and had been since 1972. Nevertheless, she consistently maintained that she entered into organizing efforts on her own initiative and not because of instruction by the UFW.

Martha Escoto and Martha Carranza both testified that they became involved in organizing for the election during early August when they attended a meeting at the UFW office. At the meeting they became part of the organizing committee and thereafter went to the UFW office several times a week until the election. They both received authorization cards to pass out. At the UFW office they also received an explanation on the concept of

a union security clause.^{2/}

The testimony of Carlos Navarro and of other witnesses establishes that Navarro was also a member of the ranch organizing committee. He was the most active in asking his fellow employees to sign authorization cards. Navarro testified that he always took the initiative in seeking authorization cards and that he received no instructions from the union to do so.

B. The Threats

1. Statements Made to Antonia Larson

Antonia Larson, an employee of San Diego Nursery for nine years, testified concerning several incidents where fellow employees made allegedly threatening statements to her. The first two incidents concerned Agnes Cabrera. Larson testified that on August 18, 1978, in the company potting shed Agnes Cabrera approached her while she was working and said in a loud voice, "if we didn't sign for the union we would be without work." According to Larson, Cabrera did not say anything else. Two other workers were present to hear this exchange.

At another time in August, on a date which Larson could remember, only as before the election, Cabrera arrived at the company kitchen saying, "All those fuckers that don't vote for the union won't have a job. We're going to fire them." Again, according to Larson's testimony, nothing else was said. Approximately six other workers were present.

^{2/} There was additional testimony to the effect that approximately a month and a half following the election Martha Carranza told Antonia Larson, "I'm the union representative." Carranza denied making the statement. Even assuming such an admission was made, the circumstances of the conversation indicate that it would only be probative of Carranza's status contemporaneous to the timing of the statement and not to her pre-election status.

Agnes Cabrera testified that she and Larson at one time had been good friends but had ceased being friends and had ceased speaking to each other because of their differences concerning the union issue. Cabrera denied having any discussions whatsoever with Larson during the month of August. She further testified to not speaking to Larson since she began wearing a union button, an occurrence Cabrera estimated took place approximately one year prior to the election.

The third incident involving Antonia Larson occurred August 24, 1978 at 4:30 p.m. in the company parking lot when she and Josefina Manriquez were confronted by Martha Carranza. According to the testimony of Antonia Larson, Carranza allegedly said "Tomorrow the voting is going to take place. We just have this day left and. there are only three left that haven't signed. It's you, Josefina Manriquez and Rosario. You know, if you don't sign, we don't give you a job. We're going to fire you."

Martha Carranza testified that this incident took place two days before the election during lunchtime at the parking lot. Carranza testified, "I told her that most all of the persons had signed the union card and that we thought that in two days we could have an election and that the union offered us a little bit more benefits that the company did. If she thought about it, that it was the best for us."

According to Carranza, Larson replied, "that she was going to wait to see who would win, that if the union won, then she would go to that side, and if the company won, she would stay on that side."

I cannot conclude that the testimonial quality of either Antonia Larson or Agnes Cabrera was sufficiently impressive to credit one of their version's completely over the other's. In light of Agnes Cabrera's key role in the organizing efforts of the San Diego Nursery, her strong support of the UFW, and her testimony that she knew that Antonia Larson was one of the workers who did not sign for the union, I find it not credible that she made no organizing statements at all in the presence of Antonia Larson, especially considering the relative small size of the nursery work force and the similar work shifts of the two women.

On the other hand, certain weaknesses in Antonia Larson's testimony lead me to the conclusion that she was not telling the truth concerning the alleged threats made by Cabrera. Larson's recollection of the date that the first incident occurred is inconsistent. She testified on both direct and cross-examination that, the incident occurred on August 18, but she also stated that the event took place one day before the election which was August 25. Larson testified that she reported the two alleged threats of Agnes Cabrera to her supervisor Guadalupe Padilla. However, this assertion was not corroborated, by Padilla who did testify earlier in the hearing that several employees reported, alleged pre-election threats to him, including Rosario Otanez and Josefina Manriquez. Additionally Antonia testified that two other persons were present at the incident in the potting shed and that approximately six other workers were present at the incident in the company kitchen, yet no corroborating testimony was presented.

Similar problems arise with Antonia Larson's testimony with regard to the incident involving Martha Carranza. Although Larson testified that Josefina Manriquez was present when the alleged threat was voiced, Manriquez did not provide corroborating

testimony when she took the witness stand. I find this unusual in light of Manriquez's readiness to report other alleged threats made in her presence.

It should also be noted that Antonia Larson was a nervous witness, and that a strong antagonism apparently existed between her and her former friends who became supporters of the UFW. I was impressed by the quiet forthright testimony of Martha Carranza and her testimony that she and Antonia Larson had once been friends. I find it inconsistent with Carranza's general character as I perceived, it that she would use threats as a means of convincing Larson to support the UFW.

I find that Agnes Cabrera may have made organizing statements in the presence of Antonia Larson, but that she did not say that those who did not vote or sign for the union would be fired. I also find that Martha Carranza did not say to Antonia. Larson that if Larson did not sign for the union she would be fired.

2. Statements Made by Josefina Manriquez

On August 1, 1978, Josefina Manriquez was approached by Carlos Navarro, a pro-union employee. She testified, "he said we (non-union members) could be easily fired, that if they didn't want a person at a job, all the people would get together and get rid of the person."

Carlos Navarro testified that he only asked Manriquez "if she would back us up with her vote with the upcoming election."

On August 25, the day of the election, Josefina Manriquez was in the company potting shed with about seven or eight persons.

Guadalupe Lopez, a pro-union worker said she thought the union was going to win and "what face were they going to have, those who were not in the union." Concepcion Victorio asked Guadalupe Lopez, "Can all the persons who are not in the union be fired? Lopez said, "I believe so, it can be done." Josefina Manriquez then asked what assurance did she have that we could be fired." Lopez then told her, "I don't know, but it can be done."

Martha Escoto, a witness for the UFW, present during this conversation, essentially corroborated Manriquez's statement.

I find the testimony of Josefina Manriquez to be credible with respect to both incidents. Manriquez's testimony concerning the conversation between she, Lopez and Victorio in the potting shed is corroborated by her supervisor, Guadalupe Padilla who testified that Manriquez came to him reporting the incident. The supervisor testified that Manriquez told him, that women in the potting shed "were telling her that as soon as the UFW took over they were going to get rid of the non-union people."

I find the quality of Manriquez's testimony to be straightforward and convincing in comparison with that of Navarro who responded in a defensive and antagonistic manner. Additionally I find it probable that Navarro and Lopez who were strong UFW supporters used a perhaps misconstrued explanation of the union security clause concept as leverage in convincing Josefina Manriquez to support the union.

On cross-examination Josefina Manriquez testified to the following additional facts. She knew that her vote would be secret and that only her bosses had the power to fire. She also testified

that upon reporting the potting shed incident to her supervisor, he told her that she shouldn't get scared and that she had her job for sure as the others did. Manriquez testified to feeling reassured after this conversation. Finally Manriquez testified that her conversations with Guadalupe Lopez, Concepcion Victorio and Carlos Navarro did not cause her to change the way she voted.

3. Statements Made to Rosario Otanez

Rosario Otanez testified that on August 21, 1978, in the company kitchen, Agnes Cabrera entered and addressing Otanez said, "All those persons that don't sign--all those son of a bitches that don't sign for the union, the pleasure that rests within me is that once the union wins, we're going to send you all to hell. All of you."

Agnes Cabrera testified that she had an argument with Otanez in the company kitchen after the election on the 27th or 28th of August. She denied having any discussion with Rosario prior to the election in which she might have told Rosario what would happen to people who did not join, support or vote for the union.

Rosario Otanez testified that later on the 21st of August she had a second argument with Cabrera. According to Otanez's testimony Cabrera came and pulled down the table where Otanez was potting and said, "I don't want to see your pretty big face. I can't stand you, you son of a bitch, because you are crooked. You don't want to sign the union card. Don't do so much to me because I'm going to sock it to you, even if they fire me from work here." Several other persons were present in the shed.

According to Agnes Cabrera's testimony the potting shed incident happened in the morning, not in the afternoon. She could not remember the exact date. Cabrera testified that at one point Otanez got mad, threw a pot at Cabrera and said Cabrera wasn't the same co-worker since she had joined the union. Cabrera then said that nobody was forcing her to go in the union.

I find the testimony of Rosario Otanez to be credible concerning the statements which were made to her by Agnes Cabrera. Rosario Otanez was a calm witness who appeared to have a good memory for the incidents she was describing. The testimony of her supervisor, Guadalupe Padilla corroborates Otanez's testimony concerning the second event in that she reported to him following the incident Agnes Cabrera threatened her with verbal abuse and loss of job if Otanez would not support the UFW. With regard to the kitchen incident I find Agnes Larson's testimony that she made no statement whatsoever to Otanez not credible considering it was close to the election, Cabrera was a key UFW supporter and she knew Otanez, a prior UFW supporter, had in Cabrera's own words, "got away from the union."

ANALYSIS AND CONCLUSIONS OF LAW

A. The Agency Relationship

The employer contends that the actions of an in-house organizing committee at San Diego Nursery can be attributed to the UFW under principles of agency. The issue of agency has been considered by both the National Labor Relations Board (NLRB) and the Agricultural Labor Relations Board (ALRB) in recent cases. The ALRB has yet to find that an employee of an employer who does not work for the union, either with or without pay, yet engages

in organizational activities at his or her place of employment is a union agent. On the other hand, the NLRB and certain federal circuit courts have determined that particular circumstances warrant a finding that a union has authorized an employee of an employer to be its agent.

With regard to ALRB law, the Board found in Patterson Farms, Inc., 2 ALRB No. 59 (1976) that an agency relationship cannot be found between the union and an employee when the relationship is based solely on the fact of membership in an in-plant organizing committee. Such membership alone will not convert union adherents into union agents. See, Takara International, Inc. dba Niedens Hillside Floral, 3 ALRB No. 24 (1977) and Kawano Farms, Inc., 3 ALRB No. 25 (1977), both citing Mike Yurosek and Sons, 225 NLRB No. 20, 92 LRRM 1535 (1976).

In the case of Tepusquet Vineyards, 4 ALRB No. 102 (1978), the employer argued that based on the authority of International Woodworkers of America, AFL-CIO, 131 NLRB 189, 48 LRRM 1005 (1961), the UFW authorized an employee to act as its agent by providing him with authorization cards and leaflets, by instructing him on the purpose and use of the cards, and by relying on him to carry the burden of organizing, distributing the leaflets and cards, collecting signatures and advocating the union. The Board distinguished the Tepusquet situation from the Woodworkers case by the fact that in Tepusquet the person was an employee of the employer whereas the person the NLRB found to be a union agent was not an employee of the company he sought to organize. Citing D'Arrigo Bros. of California, 3 ALRB No. 37 (1977) and Firestone Steel Products Co., 235 NLRB No. 80, 98 LRRM 1014 (1978), the

Board found that the fact that an employee is a proponent or adherent of a union is not a sufficient basis for attributing responsibility for his conduct to the union and that an agency relationship is not established by evidence that an employee has solicited signatures for union authorization cards.

In the case at hand the employer in its post-hearing brief argues the applicability of NLRB v. Georgetown Dress Corp., 92 LRRM 3283, 537 F.2d 1239 (4th Cir. 1976). This decision by the appellate court, which was discussed in detail in Select Nursery, 4 ALRB No. 61 (1978), reversed a NLRB decision by finding an agency relationship did exist between a union and members of an in-house organizing committee. In Select, the ALRB affirmed the Investigative Hearing Examiner's conclusion, distinguishing Georgetown, that where, as in the present case, the impetus to form an organizing committee came from the employees themselves rather than a professional organizer, no agency relationship is found to exist between the members of the in-house organizing committee and the union.

The employer here maintains that the San Diego Nursery organizing committee was created due to the initiative and impetus of the professional organizer, Javier Acosta. A close examination of the facts, however, demands a contrary conclusion. Of all the committee members, Agnes Cabrera is the person most likely to be deemed a UFW agent. Cabrera had direct contact with the union, but was an employee of the employer. Along with her fellow employees she participated in such activities as soliciting authorization cards, distributing leaflets and buttons and organizing

workers. She was a union member and had participated in at least one other union activity apart from her activities at San Diego Nursery. From her own testimony and the testimony of others it is clear that she more than any other employee assumed the responsibility of organizing the workers of San Diego Nursery. What is also evident from the testimony is that the impetus and initiative to organize arose from Cabrera and the other workers themselves and was not due to the solicitation or influence of the professional union organizer. This is made clear by the fact that professional union organizers had tried to organize San Diego Nursery seven to eight months previously and failed, It was only when the workers themselves engaged in their §1152 rights by organizing themselves for union representation and then went to the UFW seeking advice that the notion of union representation became a possibility.

In determining union agency the burden of proof is on the party asserting an agency relationship, both as to the existence of the relationship and as to the nature and extent of the agent's authority. International Longshoremen's and Warehousemen's Union (CIO), Local 16, 79 NLRB No. 207, 23 LRRM 1001 (1948). The employer in this case has failed to carry its burden of proving an agency relationship under ALRB case law. Evidence that employees obtained advice from a union on organizing techniques and then engaged in their right to self-organize is not sufficient to create an agency relationship between workers and a petitioning union. To so hold would severely hinder the ability of such unions to advise workers who desire representation elections for fear of being held responsible for the misconduct

of the individual worker. This in turn could have a detrimental effect on the right of the farmworkers to self-organize. Tepusquet Vineyards, supra, p.33, n.23.

I find that Agnes Cabrera and the other members of the San Diego organizing committee were not agents of the UFW.

B. Threats of Physical Harm and Loss of Jobs

The employer alleges that UFW agents threatened employees of San Diego Nursery with verbal abuse of loss of job and physical harm. I have found that the employees who made the alleged threats are not agents of the UFW and therefore their statements will be analyzed as non-party misconduct and accorded less weight than that given to the conduct of the parties. Patterson Farms, Inc., supra, p.8. Additionally, I did not credit the testimony of Antonia Larson and I found that Agnes Cabrera and Martha Carranza did not make the statements which Larson alleged. I did credit the testimony of Josefina Manriquez that Carlos Navarro and Guadalupe Lopez told her all the persons who are not in the union could be fired. I also credited the testimony of Rosario Otanez that Agnes Cabrera told her that those persons who don't sign for the union will be sent to hell once the union wins and that Cabrera told Otanez I'm going to sock it to you even if they fire me from work here.

In several cases the Board has considered the impact of non-party threats during an election campaign and has concluded that an election will be set aside when a general atmosphere among the employees of confusion and fear of reprisal for failing to vote for or to support a union renders a free expression of

choice of representative impossible. Patterson Farms, Inc., supra, p.7;
Takara International, Inc., dba Niedens Hillside Flora, supra.

Two of the alleged threats in the present case are statements about possible loss of employment for those employees who do not sign authorization cards or join the union. The remaining two statements are alleged by the employer to be threats of violence against Rosario Otanez.

Considering all the statements to be threats, they did not affect the election since the evidence demonstrates that a free expression of choice of representative was exercised by the San Diego Nursery employees.^{3/} Both Otanez and Manriquez testified that they notified their supervisor of the alleged threats. Manriquez testified that the supervisor reassured her about the security of her job. Otanez testified that she "seemed" to remember that her supervisor told her not to worry. Both also stated that they knew the pro-union employees did not have the power to fire them and that the alleged threats did not cause them to change their vote when they did vote in the election.

With regard to the "sock it to you" statements of Agnes Cabrera, similar statements have been characterized by the NLRB and the ALRB as the sort of exaggerations which are recognized

^{3/}The Board has frequently suggested that a statement regarding loss of jobs for failure to support the union might well not be considered a threat. The statement is subject to the interpretation that if the union won, it would attempt to negotiate a union security clause in its contract with the employer. Patterson Farms, Inc., supra; Jack or Marion Radovich, 2 ALRB No. 12 (1976); Ron Nunn Farms, 4 ALRB No. 31 (1978).

as such by workers, especially when they occur in the context of heated statements made in clashes of personalities during campaigns involving vigorous displays of emotional involvement. Patterson Farms, Inc., supra, p. 10; Tunica Manufacturing Co., 182 NLRB 111, 76 LRRM 1535 (1970); Movsovitx and Sons, Inc., 194 NLRB 68, 78 LRRM 1656 (1971). In Patterson a threat of death by starvation by an employee whose conduct could not be attributed to the union was found not to have created a general atmosphere of confusion and fear of reprisal when it was heard by a relatively small number of people while witnessing a shouting match between two persons of differing views on the subject of unionization.

In the present case little evidence was presented concerning the extent that other employees heard the statements in question. Testimony was given that other employees were present. However, no one, other than the three women against whom the threats were directed, testified to hearing the statements much less interpreting them as being threatening. The alleged threats did not dissuade San Diego Nursery employees from voting since fifty out of fifty-two eligible voters participated in the election.

I conclude that employer's objections number one and two should be dismissed for failure to show that the alleged non-party misconduct created such an atmosphere of fear that employees at San Diego Nursery were unable to choose a collective bargaining representative freely and without coercion.

II. BOARD AGENT BIAS

FINDING OF FACTS

The employer contends that a Board agent showed bias toward the UFW in front of eligible voters by discussing with UFW representatives the best way to proceed with the election in order to prevent the employer from distributing lawful campaign literature.

Alfredo Padilla, an employee of San Diego Nursery for one year, testified to attending a UFW meeting in San Isidro prior to the election. At the office he saw Board agent David Arizmendi conversing with five pro-union, employees of San Diego Nursery.^{4/}

Padilla testified to overhearing Martha Carranza telling the Board agent that she wanted the elections to be held early on Friday from 7:30 to 9:00 a.m. in front of the office. The Board agent allegedly replied that he would try to do something so they could be held early. Carranza said she wanted them held early so the company wouldn't distribute anymore papers to the workers and so that no one else from the company would vote. The Board agent then asked at what day and time could they be done. Padilla overheard the Board agent say as he left the office, "We'll see you later. Don't lose enthusiasm, we'll see you tomorrow."

The Board agent testified that he contacted both the company and the union to obtain their positions on the scheduling of the election. The position of the company was that the election

^{4/} The employees were Martha Carranza, Martha Escoto, Susana Barragan, Concepcion Victorio and Agnes Cabrera.

should be on Friday, between 12:00 and 2:00 p.m. at the volley-ball court. The employer's second position was to have the election between 9:00 and 11:00 a.m.

The union requested that the Board agent meet with the ranch organizing committee and two UFW organizers. A meeting was set up for 5:00 p.m. that afternoon at the UFW's office. The workers told the Board agent that they wanted the election to be on Friday, August 25, between 7:00 a.m. and 9:00 a.m. in front of the office of San Diego Nursery.

The Board agent testified that prior to stating their position at this meeting a worker showed him two or three leaflets that the company had passed out and asked if they were legal. The Board agent replied that the company could legally pass out leaflets as long as they were not coercive or intimidating.

The Board agent denied having any discussion with workers about scheduling the election to prevent the company from passing out leaflets. He also denied telling the workers not to lose their enthusiasm.

I credit the Board agent's version of his conversation with the ranch committee over the version testified to by Alfredo Padilla. Padilla's testimony was confusing and inconsistent. Padilla testified that he did know who David Arizmendi was and that he could recognize him, yet he did not remember who Arizmendi worked for. At one point in his testimony he could not remember whether he saw the Board agent at the UFW office before or after the election. Padilla also could not remember the date of the election. I find this recollection of the specific conversation in question to be inconsistent with his lack of recollection of these fundamental facts.

ANALYSIS AND CONCLUSION

I have not credited the testimony of Alfredo Padilla but even assuming that the conversation between the Board agent and the pro-union employees took place as he testified, the facts of the situation lead me to conclude that the Board agent was not biased in favor of the UFW with regard to the scheduling of the election.

The Board agent scheduled the election for Friday, August 25, at the volleyball court as the employer had requested. Balloting was scheduled to last between 9:00 and 11:00 a.m., the employer's second position with regard to timing. Moreover, at the request of the company representative, a site was set up between 5:30 and 6:00 a.m. so that truck drivers could vote prior to leaving the area.

Section 20350 of the Board's administrative regulations states that, "Reasonable discretion shall be allowed to the agent supervising the election to set the exact times and places to permit the maximum participation of the employees eligible to vote." In the present situation the Board agent solicited suggestions from the union, the ranch committee and the employer as to when to schedule the election. By holding the election at a time which happened to most closely correspond to the employer's suggestion, the Board agent achieved a voter turnout of over 95 percent. Instead of exhibiting bias the Board agent, by utilizing the method he did, successfully carried out his duty to maximize voter participation.

I find that the employer has failed to show that the Board agent acted in such a fashion as to destroy the neutrality

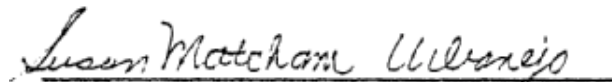
of the Board's procedures and create the appearance of impropriety as alleged. Employer's objection three should be dismissed.

RECOMMENDATION

Based on the findings of fact, analysis and conclusions herein, 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 the agricultural employees of the employer in the State of California.

DATED: January 12, 1979

Respectfully submitted,



SUSAN MATCHAM URBANEJO
Investigative Hearing Examiner