

STATE OF CALIFORNIA
AGRICULTURAL LABOR RELATIONS BOARD

KITAYAMA BROTHERS NURSERY/)	
GREENLEAF WHOLESALE FLORIST,)	
INC.,)	Case No. 79-RC-1-S
)	
Employer,)	
)	
and)	5 ALRB No. 70
)	
LABORERS' INTERNATIONAL)	
UNION LOCAL 304, AFL-CIO,)	
)	
Petitioner.)	
)	

DECISION AND CERTIFICATION OF REPRESENTATIVE

Following a Petition for Certification filed by the Laborers' International Union Local 304 (LIU), a representation election was conducted among the agricultural employees of Kitayama Brothers Nursery (Employer) on June 13, 1979. The official Tally of Ballots showed the following results:

LIU	110
No Union	58
Challenged Ballots	<u>6</u>
Total	174
Void	4

The Employer timely filed post-election objections which were set for hearing. After the hearing, conducted before Investigative Hearing Examiner (IHE) Richard Doctoroff, the IHE issued the attached Decision on September 19, 1979, in which he recommended that the Employer's objections be dismissed and that the LIU be certified as the exclusive collective bargaining

representative of the Employer's agricultural employees. The Employer timely filed exceptions to the IHE's Decision with a supporting brief, and the LIU filed a reply brief.

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.

The Board has considered the objections, the record, and the IHE's Decision in light of the exceptions and briefs, and has decided to affirm the rulings, findings, ^{1/} and conclusions^{2/} of the IHE and to adopt his recommendations. Accordingly, we hereby dismiss the objections and uphold the election, and shall certify the LIU.

CERTIFICATION OF REPRESENTATIVE

It is hereby certified that a majority of the valid votes has been cast for the Laborers' International Union Local 304, and that, pursuant to Labor Code Section 1156, the said labor organization is the exclusive representative of all agricultural

^{1/} Respondent excepts to the IHE's credibility resolutions. To the extent that such resolutions were based upon demeanor, we will not disturb them unless the clear preponderance of the relevant evidence demonstrates that they are incorrect. Adam Dairy dba Rancho Dos Rios, 4 ALRB No. 24 (1978); El Paso Natural Gas Co., 193 NLRB 333, 78 LRRM 1250 (1971); Standard Dry Wall Products, 91-NLRB 544, 26 LRRM 1531 (1950). We have reviewed the record and find the IHE's credibility resolutions to be supported by the record as a whole. However, we reject the IHE's recommendation that the testimony of Charles R. Fahl should be disregarded because he was admittedly opposed to the LIU. We also note that the ALO incorrectly attributed the Employer's threat to call the Immigration Service and to fire workers to Tom Kitayama rather than to the Employer's labor consultants.

^{2/} We reject the ALO's implication that the tire-slashing incident was not coercive because some employees expressed sympathy to the victim rather than fear of similar incidents in the future.

employees of Kitayama Brothers Nursery in the State of California, for the purpose 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: December 5, 1979

GERALD A. BROWN, Chairman

RONALD L. RUIZ, Member

HERBERT A. PERRY, Member

CASE SUMMARY

Kitayama Brothers Nursery/
Greenleaf Wholesale Florist,
Inc. (LIU)

5 ALRB No. 70
Case No. 79-RC-1-S

THE DECISION

Following a Petition for Certification filed by the Laborers' International Union (LIU), a representation election was conducted among the Employer's agricultural employees. The Employer filed three objections to the election. The IHE found that the Employer failed to prove that a Board agent instructed voters on the mechanics of voting in such a way as to favor the LIU. The IHE also found that although a supervisor's tires were slashed by persons unknown, three months before the election, the incidents were too remote to affect the results of the election. Finally, the IHE found that the Employer's ability to express its opinions about unionization were not unduly hampered despite the removal of some leaflets it had placed with employees' time cards on the eve of the election; and that the removal of the leaflets, by a person or persons unknown, did not therefore tend to affect the results of the election.

BOARD DECISION

The Board affirmed the rulings, findings and conclusions of the IHE and adopted his recommendations to dismiss the objections and certify the LIU. Accordingly, the Board certified the Laborers' International Union as the exclusive collective bargaining representative of the Employer's employees.

* * *

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

KITAYAMA BROTHERS NURSERY/
GREENLEAF WHOLESALE FLORIST, INC.,

Employer,

Case No. 79-RC-1-S

and

ADMINISTRATIVE LAW
OFFICER'S DECISION

LABORERS' INTERNATIONAL UNION
LOCAL 304. AFL-CIO

Petitioner.

Robert J. Stumpf, Bronson, Bronson & McKinnon, San Francisco, CA.
for Employer.

W. Daniel Boone, Van Bourg, Allen, Weinberg & Roger, San Francisco,
CA. For Petitioner.

STATEMENT OF THE CASE

RICHARD K. DCCTCRFF, Administrative Law Officer: This case was
heard by me on July 24, 1979 in Hayward, California.

A petition for certification was filed by the Laborers' International,
Local 304, AFL-CIO on June 6, 1979. On June 13, 1979 an election was conducted
among the agricultural employees of the employer "by the Agricultural Labor
Relations Board. 178 of 182 eligible employees voted in the election. The
tally of the ballots showed these results: Laborers' International, Local 304,
AFL-CIO--110 votes; No Union--58 votes; Void Ballots--4; Challenged Ballots--
6.

Subsequent to the election, timely objections were filed by the
employer. Pursuant to 8 Cal. Admin. Code Section 20365(g) the Executive
Secretary ordered on June 25, 1979 that an

^{1/} A petition was filed with the NLRB on one of the last days of April or the
first days of May, 1979 but was rejected for Jurisdictional reasons.

Investigative Hearing be held, limited to the following, issues;

1. Whether an ALRB agent instructed voters in a confusing manner and in a manner favorable to the Union, and whether such conduct affected the results of the election or substantially impaired the integrity of the election process;

2. Whether the Union or its agents committed acts of violence during the campaign, and if so, whether that caused the election to be conducted in an atmosphere of fear which prevented a free choice by the voters;

3. Whether the Union or its agents interfered with the Employer's right to campaign by removing Employer's leaflets from the time clocks of employees, and if so, whether said action affected the outcome of the election.

All parties were represented, at the hearing and given a full opportunity to participate in the proceedings. Pursuant to 8 Cal. Admin. Code Section 2037C(e) the case was submitted after oral argument without briefs. Upon the entire record, including my observation of the demeanor of witnesses, and after consideration of the arguments made by the parties, I make the following findings fact and conclusions of law:

I. No BOARS AGENT MISCONDUCT

Employer contends that two incidents of alleged confusing and biased instructions by Board Agent Myriam Chaumont to voters justify overturning the election. Ms. Chaumont was the Board agent assigned in this election to distribute the ballots to individual voters and to explain to them the proper method for marking the ballot to indicate their choice.

A. CHUCK FAHL'S OC FUSION

Chuck Fahl, a maintenance worker, testified that when he was given his ballot to vote in the election by Ms. Chaumont, she told him, "to mark both boxes or the ballet." Fahl further testified that he asked Ms. Chaumont, "What kind of instruction was that and did she want me to nullify my vote?" and she failed to respond. Fahl made no further effort to resolve his confusion with Ms. Chaumont and proceeded to vote in the election--marking only one box on the ballot. Fahl registered no complaint with other Board agents or election observers who were also present, but he did report the incident to his employer, Tom Kitayama after the election was completed. Although there were four void ballots in the election--three marked twice and one not marked at all, the Employer presented no other witnesses concerning this matter.

Myriam Chaumont testified in behalf of the Petitioner at the hearing. Ms. Chaumont is a Field Examiner II and has worked for the Board since it commenced operation in 1975, excluding the period in 1976 when the Board ceased functioning.

According to Ms. Chaumont's testimony, as she handed the ballots individually to each of the 178 prospective voters, after each was declared eligible by other Board agents, she would routinely explain, "This is an official ballot. You vote by making a small cross on either one of the two small squares, whatever you preference is. " If a voter questioned this instruction and asked how to vote for the Union specifically, Ms. Chaumont testified that she said, "You mark a cross in the square under the union, the same way you mark a cross under the no if you want to vote no." If the employee indicated to Ms. Chaumont that he or she want to vote "no union", she testified

that she would begin by first explaining how to mark the side of the ballot but she would also include how to vote for the Union in her explanation. Ms. Chaumont indicated that in each instance where the voter explained he or she wanted to vote a certain way, she would give both explanations together to avoid any appearance of bias. At the same time she would point back and forth, from one side of the ballot to the other, to supplement her verbal explanation, never pointing to only one side. She also testified that in each instance where an employee asked instruction how to vote a certain way, she would advise them, "Don't tell me the way you want to vote."

Ms. Chaumont testified that she recalled there was some confusion when she handed a ballot to Chuck Fahl. According; to Ms. Chaumont, after she explained to Mr. Fahl that he should "vote by making a cross on the small square under either one of the symbols, he asked, "What do you mean with each one of the squares? You mean either one." Ms. Chaumont testified she replied to Fahl by saying, "Yes, that's what I mean. Either one of those," After this conversation, Ms. Chaumont testified Fahl turned from her and went to vote.

I found Ms. Chaumont to be a most credible witness. She was concerned with fairly presenting the ballot so that the workers could vote intelligently. Although the Employer contended that she was biased in favor of the Union and gave confusing instructions to Fahl, because he was known to oppose the Union, there was no evidence indicating that she had any knowledge of his sentiments, and this motive fails. Partner, I find it difficult to believe that Mr. Fahl could have questioned Ms. Chaumont's voting instructions yet he walked away from her to vote without resolving the problem with her or with the other Board

agents or observers who were present, Ms. Chaumont's testimony describing her efforts to eliminate the confusion in Mr. Fahl's mind appears significantly more probable. Finally, Mr. Fahl testified that he opposed the union. I believe that this admitted bias rather than the speculative bias on the part of Ms. Chaumont, whose duty was to run a fair election was a factor in this case. Although three ballots were in fact marked twice, Ms. Chaumont explained that three out of 178 ballots voided in this Ismner was not unusual in her experience. Consequently, I credit Ms. Chaumont's version of this incident as opposed to that of Mr. Fahl.

B. LAURIE AND CASSIE TAKEDA

In contrast to the testimony of Myriam Chaumont that she would consciously and consistently point to both sides of the ballot whenever she answered workers questions on how to vote, two sisters, Laurie Takeda and Cassie Takeda testified on behalf of the Employer that they observed Ms. Chaumont instruct voters only about the Union side of the ballot and not the "No " side. Although both sisters testified that they observed Ms. Chaumont give questionable instructions while they stood in line together waiting to vote, their perceptions are so doubtful and their testimony is so contradictory that neither witness can be considered credible.

Focusing first en perception. Neither Laurie or Cassie Takeda was able to hear any complete conversation between Ms. Chaumont and any prospective voter. Although Ms. Chaumont spoke to many employees in Spanish, neither sister could understand Spanish, Neither sister could identify any voter to whom the faulty instruction was given and none of these other alleged workers testified at the

hearing,

Both of these witnesses testified that their belief that Ms. Chaumont gave one sided instructions was based largely on their visual observations of Ms. Chaumont pointing only to the Union side of the ballot, but both Takedas admitted that they could not see the face of the ballots being shown. Both explained that Ms. Chaumont held the ballots cradled in her arms in such a way that they were able to determine from a distance of 10-15 feet to the side, to which side of the ballot she pointed. I was unconvinced by their demonstrations of this feat at the hearing, and believe that it was physically impossible for either to tell which side of the ballot was being pointed to. Furthermore, even in the unlikely event that they could tell which side of the ballot was being pointed to, both Takedas admitted that they were not continuously observing Ms. Chaumont, allowing that she pointed to the other side while they were not looking.

While Cassie Takeda testified that she heard Ms. Chaumont instruct a voter how to vote for the Union and not for "No Union", her sister Laurie, who was standing next to her the entire time they waited in line, testified she heard nothing, and was told nothing of what Cassie heard. Laurie Takeda stated that 3 voters were instructed only how to vote for the Union; Cassie said only 2. Laurie said 30 people were in line to vote when they arrived; Cassie saw only 8-10. Cassie correctly remembers Ms. Chaumont actually handing ballots to various voters; Laurie only saw her sister receive one.

Had Ms. Chaumont actually told voters which way to vote and vote for the Union as the Employer contends, I suspect that

at least one of the 58 employees who in fact voted for "So Union" would have come forward, but none did, Also ether Board agents and Employer and Union observers were within earshot of Ms. Chaumont and had an unobstructed view as she distributed the ballots, yet none of these people complained of her behavior.

In view of the multifold problems of perception and the clearly contradictory testimony presented by the employers witnesses Laurie and Cassie Takeda, I credit Ms. Chaumont's testimony that she instructed prospective voters in a fair, unbiased way.

C. BURDEN OF PROOF NOT MET

In light of the preceding facts, I find that the Employer failed to meet the burden of proof in coming forward with credible evidence's owing that an ALRB agent instructed voters in a confusing manner and in a manner favorable to the Union, and consequently such alleged conduct cannot be found in any way to affect the outcome of the election or impair the integrity of the election process. I recommend that this objection be dismissed. Martori Brothers Distributing, 4 ALRB No. 5 (1978); TMY Farms. 2 ALRB No. 58 (1976); Agman, Inc., d/b/a Spring Valley Farms. 4 ALRB No. 7 (1978); Tomooka Brothers. 2 ALRB No. 52 (1977); Abatti Farms, Inc., 3 ALRB 83 (1977); D'Arrigo Brothers of California. 3 ALRB No. 37 (1977); Bud Antle, Inc. 3 ALRB No. 7 (1977).

II. NONUNION VIOLENCE-TIRE SLASHING

There was credible testimony introduced at the hearing that on March 9 and March 27, 1979 car tires of foreman Trinidad Casarez were slashed at locations away from Employer's workplace. This evidence was uncontested, but the Employer admitted that there was no evidence which linked this violence with the union or its agents. Although there was evidence, that at least 10 employees knew of the tire slashing, their reactions appeared to be supportive

and sympathetic toward Mr. Casarez

Inasmuch as these events occurred 2 to 3 months before the election and there was no evidence linking the violenos with the union nor was there any evidence tending to show that the election was conducted in an atmosphere of fear which prevented a free choice by the voters, I recommend that this objection be dismissed. Takara International, Inc. , d/b/a _Niedens Hillside Floral, 3 ALRB No. 24 (1977)

III. NO INTERFERENCE WITH EMPLOYER'S CAMPAIGN-REMOVAL OF LEAFLETS

The employer contends that the removal of an Employer campaign leaflet, Petitioner's Exhibit 3, from employee time card slots during the night or early coming before the election deprived him of his right to propagandize the workers. Although it was undisputed that most of the leaflets, which had been placed in the timeclock slots the right before the election, had been removed by morning, before the workers had an opportunity to read them, there was no evidence presented at the hearing which connected the removal with the Union or its agents.

Also I find that the content of the leaflet in question duplicates the content of four other Employer leaflets that were received into evidence, and which present the Employer's "No Union" arguments. Owner-Employer Tom Kitayama testified that in addition to the leaflets in evidence several other Employer propaganda leaflets were distributed to workers in the weeks preceding the election. The Employer enlisted the help of outside labor consultants to present his opposition to voting for the Union during a series of three or more meetings. In view of these facts, I find that the Employer was able to wage an intensive propaganda campaign prior to the election,

and the removal of the one leaflet had only a de minimis offset.

Employer's contention that the chart or the leaflet was critical to the campaign was unconvincing.

Similarly, I am unconvinced that the removal of the leaflet deprived the Employer of his last chance to communicate with the workers before the election. None of the Board agents present at the election were advised of the problem with the leaflet. Even though time problems existed, if the Employer deemed the leaflet to have such paramount importance, as is claimed, there was sufficient time between the time Owner-Employer Tom Kitayama learned of the missing leaflets at 8:30 a.m. and the election at 10:00 a.m. to make additional copies on the Employer's copying machine from copies not distributed. Alternatively, Mr. Kitayama could have called a meeting of employees when he discovered the leaflets missing, and the leaflet could have been read to the assembled workers. The Employer's mistaken belief that the National Labor Relations Board rule barring certain campaigning within 24 hours of an election applied to the ALR3 is no excuse. Dunlao Nursery, 4 ALRB No. 9 (1976).

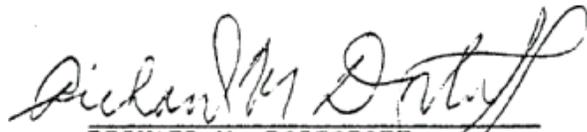
In contrast to the Employer's failure to show interference in its election campaign by the Union or its agents, there was undisputed evidence that the Employer attempted to interfere with the Union's campaign. Clemente Gomez, who acted as an observer for the Union during the election, testified that Tom Kitayama said he would call the Immigration Service and fire workers if the Union won the election. Gomez further testified that a supervisor, described only as "Trini" offered him money to oppose the Union.

Since I find that neither the Union or its agents interfered with the Employer's campaign by removing the leaflets, and further that such removal did not affect the outcome of the election, I recommend that this objection be dismissed.

RECOMMENDATION

Based on the foregoing findings of fact, analysis and conclusions, I recommend that the Laborers' International Union, Local 304, AFL-GIC be certified as the exclusive collective bargaining agent of all agricultural workers of the Employer in the State of California.

Dated: September 19, 1979.



RICHARD M. DCOTCROFE
Administrative Law Officer