

STATE OF CALIFORNIA
AGRICULTURAL LABOR RELATIONS BOARD

SEARS & SCHUMAN COMPANY, INC.,)	
)	
Employer,)	Case No. 79-RC-9-SAL
)	
and)	
)	6 ALRB NO. 39
INDEPENDENT UNION OF)	
AGRICULTURAL WORKERS,)	
)	
Petitioner,)	
)	
and)	
)	
UNITED FARM WORKERS OF)	
AMERICA, AFL-CIO,)	
)	
Intervenor.)	
)	

DECISION AND ORDER
SETTING ASIDE ELECTION

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

Following a petition for certification filed by the Independent Union of Agricultural Workers (IUAW) on July 24, 1979, and a petition for intervention filed by the United Farm Workers of America, AFL-CIO (UFW), on July 27, 1979, a representation election by secret ballot was conducted on August 1, 1979, among the agricultural employees of Sears & Schuman Company, Inc., the Employer herein. The tally of ballots showed the following results:

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UFW	61
IUAW	59
No Union	3
Challenged Ballots	<u>3</u>
Total	126

As the challenged ballots were sufficient in number to determine the outcome of the election, the Regional Director investigated the challenges and issued a report on August 8, 1979, subsequently affirmed by the Board, in which he concluded that two of the challenges should be sustained. As a result, neither union had received or could receive a majority, and a runoff election between the IUAW and the UFW was conducted on August 20, 1979. The tally of ballots showed the following results:

IUAW	74
UFW	52
Challenged Ballots	<u>18</u>
Total	144

The UFW filed two objections to the election pursuant to Labor Code Section 1156.3 (c), both of which were set for hearing. At the hearing, Investigative Hearing Examiner (IHE) Ron Greenberg, finding no evidence to support the objection alleging Employer domination of and assistance to the IUAW, dismissed that objection upon motion of the Employer. Subsequent to the hearing, he issued a decision wherein he found that the other objection was supported by the evidence and that the conduct complained of had a coercive impact and could reasonably be expected to have affected the outcome of the election. He therefore recommended that the UFW's

second objection be sustained and that the election be set aside.

Exceptions to the decision of the IHE, and a brief in support thereof, were filed by the Employer. Intervenor UFW filed a brief in opposition to the Employer's exceptions. No exception or brief was filed by Petitioner IUAW.

The Board has considered the record and the attached decision in light of the exceptions and briefs and has decided to affirm the IHE's rulings, findings, and conclusions, as modified herein, and to adopt his recommendation that the election be set aside.

The conduct which requires that the election be set aside consists of repeated statements made to employees by the Employer's supervisor, Eugene Felipe, to the effect that there would be a loss of work should the UFW prevail in the election. Felipe's statements were based on the prior statements of a third party, Charles Overfelt, a landowner, who, two months before the first election, had stated in the presence of approximately 20 of the Employer's agricultural employees that if the UFW won the election he would take back the land that he had leased to the Employer.^{1/} However Felipe failed to tell the workers he addressed that any loss of

^{1/}The evidence indicates that Felipe heard Overfelt's statement and made it the basis for his subsequent warnings about loss of work in the event of a UFW victory. About one week after Overfelt's statement, he had a conversation with Felipe, which the IHE describes as involving a threat by Overfelt to plow up his fields rather than leasing the land to be worked under a UFW contract. The record indicates that this conversation did not include any reference to the UFW but instead concerned the fact that Felipe's crew had walked off the job and left a lettuce field unharvested. However, we note that the IHE did not rely upon the incorrect description of the conversation in reaching his conclusions or recommended disposition of this case.

work following the election would be the result of Overfelt's acts, over which the Employer presumably had no control. Moreover, Felipe did not tell the employees that the Employer could, or would attempt to, mitigate the effects of a lease cancellation by Overfelt by leasing land from someone else. Rather, Felipe warned employees of a loss of work to follow a UFW victory as if it would result from the Employer's own actions, thus giving employees the impression that a UFW victory would necessarily cause a loss of jobs. Such statements can reasonably be expected to deprive employees of a free choice and thereby affect the outcome of the election. Royal Packing Company (Feb. 5, 1976) 2 ALRB No. 29; Albert C. Hansen dba Hansen Farms (Dec. 20, 1976) 2 ALRB No. 61. We shall, therefore, set aside the election and dismiss the petition.

As we find that Felipe's statements alone warrant setting aside the election, we find it unnecessary to determine whether Overfelt's statement also tended to affect the result of the election, or whether Overfelt himself is an agricultural employer, as the UFW has contended.

ORDER

It is hereby ordered that the runoff election heretofore conducted in this matter be, and it hereby is, set aside and that the petition herein be, and it hereby is, dismissed. Dated: July 18, 1980
HERBERT A. PERRY, Member JOHN P. MCCARTHY, Member RALPH FAUST, Member

CASE SUMMARY

Sears & Schuttan Company, Inc.
(IUAW) (UFW)

6 ALRB No. 39
79-RC-9-SAL

IHE DECISION

An election was held among the agricultural employees of Sears & Schuman on August 1, 1979. The IUAW had filed the petition, and the UFW had intervened. Neither union obtained a majority, and a runoff election was held. Of 181 eligible voters, 74 cast votes for the IUAW, 52 voted for the UFW, and 18 votes were challenged.

The UFW filed post-election objections, alleging that the Employer dominated and assisted the IUAW and that the Employer encouraged its employees to vote for the IUAW and made threats concerning what would happen if the UFW won the election. At the hearing, the Investigative Hearing Examiner (IHE) dismissed the first objection on the grounds that the UFW had presented no evidence that the Employer dominated or assisted the IUAW.

In his decision, the IHE found that one Overfelt, an individual who leased land to the Employer, threatened to terminate his leases with the Employer if the UFW won an election among the Employer's workers. This statement was made within hearing range of a crew of 20 employees who were working on the leased land.

After the first election the supervisor told groups of employees that if the UFW won, certain fields would be taken away and a loss of jobs would result. He also told certain employees to vote for the IUAW. Rumors ran through the crews that leases would be lost and layoffs would occur if the UFW won the next election. To the Employer's managers the potential loss of leases appeared to be a matter of common knowledge.

The IHE did not find it necessary to determine whether Overfelt was an agricultural employer, as his remarks were made more than two months before the first election, and lapse of time would have dissipated their direct impact. It was the subsequent statements of supervisor Felipe which form the critical focus of inquiry.

The IHE acknowledged the Employer's free speech rights, citing *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969), but concluded that Felipe did not provide a sufficient factual foundation for his remarks, citing *Royal Packing Company* (Feb. 5, 1976) 2 ALRB No. 29. In talking to the employees, the supervisor did not refer to the remarks of Overfelt and left the workers with the impression that the Employer would eliminate jobs if the UFW won the election. The statements therefore did not receive the protection of the First Amendment. Having been made to a substantial number of workers and carrying a coercive impact, the statements could reasonably be expected to have affected the outcome of the election. The IHE consequently recommended that the election be set aside.

BOARD DECISION

The Board affirmed the decision of the IHE but clarified the reason why Overfelt's statements had a coercive impact. Not only did Felipe fail to indicate that job losses would be due to the act of a third party over which the Employer had no control, he also failed to indicate that the Employer would make any attempt to mitigate the effects of a lease cancellation by leasing land from someone else. Employees were thus given the impression that a UFW victory would necessarily cause a loss of jobs.

Concluding that Felipe's statements alone warranted setting aside the election, the Board found it unnecessary to determine whether Overfelt's statement tended to affect the result of the election or whether Overfelt himself was an agricultural employer.

BOARD ORDER

Election set aside and petition dismissed.

* * *

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

STATE OF CALIFORNIA
BEFORE THE
AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of:)	
)	
SEARS & SCHUMAN COMPANY,)	
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Employer)	
)	CASE NO. 79-RC-9-SAL
and)	
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INDEPENDENT UNION OF)	
AGRICULTURAL WORKERS,)	
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Petitioner,)	
)	
and)	
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UNITED FARM WORKERS)	
OF AMERICA, AFL-CIO,)	
)	
Intervenor)	

Brian Barsotti, Esq.,
Abramson, Church & Stave,
for the Employer.

Martha Cano, Union Vice
President, IUAW, for
the Petitioner.

Daniel A. Garcia, Esq.
for the Intervenor.

DECISION

STATEMENT OF THE CASE

RON GREENBERG, Administrative Law Officer: This case was heard before
me on December 11, 12, 13, 1979,¹ in

¹ Unless otherwise stated, all dates refer to 1979.

Watsonville, California. A petition for certification at Sears & Schuman (hereinafter "Employer") was filed by the Independent Union of Agricultural Workers (hereinafter "IUAW") on July 24. On July 27, United Farm Workers of America, AFL-CIO (hereinafter "UFW") filed a petition for intervention. An election was subsequently conducted on August 1. Of 174 eligible workers, 61 cast votes for the UFW, 59 voted for the IUAW, 3 voted for no union, 3 votes were challenged. On August 8, the Regional Director for Salinas issued his Challenged Ballot Report. He ordered that two of the three challenged ballots not be counted. In that the one counted vote would not determine the outcome of the election, the Regional Director recommended that a run-off election be held.

On August 20, a run-off election was held. Of 181 eligible voters, 74 cast votes for the IUAW, 52 voted for the UFW, and 18 votes were challenged and remain unresolved.

On August 27, the UFW filed an objections petition² pursuant to Labor Code §1156.3(c), alleging two types of misconduct. The UFW argued that such misconduct required the Agricultural Labor Relations Board (hereinafter "Board") to set aside the election. By order dated October 17, the Executive Secretary of the Board set for hearing the following issues:³

1. Whether the Employer dominated and assisted the Petitioner Independent Union of Agricultural

²ALRB Exh. 1J.

³ALRB Exh. 1M.

Workers (IAUW), and if so, whether such conduct affected the results of the election.⁴

2. Whether the Employer encouraged its employees to vote for the IOAW and made threats concerning what would happen if the UFW won the election, and if so, whether such conduct affected the results of the election.

All parties were represented at the hearing and were given full opportunity to participate in the proceedings. The UFW and IUAW submitted post-hearing briefs.

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

I. Background

A. Employer's Operations

Sears & Schuman Company runs a farming operation involved in growing and harvesting lettuce and cauliflower. Company-owned fields are located in Watsonville. The Company also leases fields in San Juan Bautista from Mr. Charles Overfelt. During the harvest, the lettuce crew has 60-80 employees. There are two cauliflower crews of approximately 20 workers in each. The Company's General Manager is John McPike, who oversees the entire farming operation. Dennis

⁴After the UFW rested its case, the Employer moved to dismiss both objections, arguing that insufficient evidence had been presented to substantiate either objection. After taking the motion under submission, I granted the motion as to Objection #1. The UFW presented no evidence that in any way established that the Employer dominated or assisted the IUAW. Thus, my Decision focuses solely on the evidence presented by the parties involving Objection #2.

Parker is the harvesting superintendent. Gilbert Banuelos is a foreman in charge of the cauliflower crews, while Eugene Felipe ("El Doctor") is the foreman in charge of the lettuce crew.

B. The Organizing Campaign

Both the UFW and IUAW began their campaign in July, anticipating the expiration of a collective bargaining agreement between the Employer and the International Brotherhood of Teamsters (hereinafter "Teamsters"). The IUAW, through rank and file employee Mike Dakiwag, collected the necessary signatures on a petition to trigger the August 1 election. During that time, the UFW also sent organizers to the Employer's fields to collect signatures.

The Employer presented evidence that one cauliflower crew of approximately 20 employees did not vote in the first election. No side received a majority of the votes cast, and the Regional Direction ordered a run-off election.

II. Issue—Whether the Employer encouraged its employees to vote for the IUAW and made threats concerning what would happen if the UFW won the election.

A. Findings of Fact

On or about May 25, Charles Overfelt, owner of land in San Juan Bautista that was leased to the Employer, contacted General Manager Me Pike and harvesting superintendent Parker, both of whom were present with the lettuce harvesting crew that morning. Also present were foremen Banuelos and

"El Doctor." Within 20 feet of the entire crew, Overfelt told McPike and Parker that if the UFW won an election he would terminate the present growing agreement. Overfelt testified that he made the statement while standing in the middle of the workers and that he was within earshot of 20 workers.

McPike testified that he said nothing in response to Overfelt's remarks. Several workers asked McPike in the days following whether it was true. McPike believed the statement to be one of common knowledge amongst the workers.

In early June, approximately one week later, Overfelt had a conversation with Eugene Felipe, "El Doctor," as the latter left the fields. Overfelt testified that he told "El Doctor" that he would disc up the fields rather than leasing the land under a UFW contract.

Following the first inconclusive election on August 1, "El Doctor" talked with employees, using the translation services of Spanish-speaking Enio "Marshall" Villanueva. Employee Antonio Martinez testified that "El Doctor" approached his group of six workers and said, "If Chavez's union would win, they would take away most of the fields in San Juan Bautista, and it would take away some of the work because [there] would not be enough work for all the workers." Marshall corroborated Martinez's testimony. Martinez further testified that after

The group consisted of the witness, David Aguirre, David Villegas, Refugion Villegas, Jamie Toscano, and Enrique Villegas.

the first election, "El Doctor" told them to vote for the IUAW.⁶

Worker Jose Gonzales testified that he was with another group of workers on the day following the first election. "El Doctor" and Marshall delivered the same message to these workers regarding discing up the fields in San Juan Bautista.

Employees Jesus Caballero and Isidro Soto corroborated the remarks attributed to "El Doctor" following the first election, Soto testified that his remarks occurred during a 15-day period following the first election.

Employee Santiago Quintero testified that after the first elections, rumors ran through the crews that some leases were going to be up and that some workers would be laid off. Quintero further testified that other workers said that "El Doctor" was offering money for votes against Chavez's Union.

Worker Leon Juan, who testified for the IUAW, stated that he heard workers talking after the first election about the fact that the Company might cut fields and cut work if

⁶Eugene Felipe ("El Doctor") did not testify at the hearing.

⁷I make no finding as to whether "El Doctor" offered workers money to vote against the UFW. Those worker rumors are totally unsubstantiated and must be treated as uncorroborated hearsay. "El Doctor," who was described by workers as a very generous man, often loaned workers money that later would be deducted from their paychecks. Thus, his frequent money advances continued during the organizational campaign and were not necessarily related to the elections.

the UPW won the election. Juan testified that everybody was talking about it. General Manager McPike testified that in August quite a few employees asked about loss of leases or losing work because of leases at San Juan Bautista ranches. Harvesting Superintendent Parker further stated that in August, employees asked whether a UFW victory would mean losing fields in San Juan Bautista or any other area.

The testimony of all witnesses confirms the fact that "El Doctor" made these remarks to many of his crew members following the first election. I therefore conclude that "El Doctor," following the first election, told workers that if the UFW won, they would take away most of the fields in San Juan Bautista, and there would be less work.

I further find that "El Doctor" told employee Antonio Martinez to vote for the IUAW.⁸

B. Conclusions of Law

Having found that "El Doctor" made the above remarks to employees, two inquiries follow: (1) Whether "El Doctor" is a "supervisor" as defined by Ifll40.4(j) of the Act; and (2) Whether the statements warrant setting aside the election.

Section 1140.4(j) of the Agricultural Labor Relations

⁸I credit Martinez's uncontradicted testimony, finding Martinez to be a particularly credible witness. Although an active UFW supporter, Martinez's version of the incident sounded particularly believable. The statement of advise by "El Doctor" to vote for the IUAW is clearly consistent with his warning against voting for the UFW.

Act states that:

the term 'supervisor'¹ means any individual having the authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees; or the responsibility to direct them, or to adjust their grievances, or to effectively recommend such action, if, in connection with the foregoing, such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

General Manager McPike testified that "El Doctor" runs the lettuce crew. He hires and fires all workers who do work on that crew. He is responsible for directing the work of all lettuce crew employees. Clearly, his job responsibilities make him a supervisor as defined by 111140.4 (j) of the Act. Mid-State Horticulture Co., 4 ALRB No. 101 (1978); Anderson Farms Co., 3 ALRB No. 67 (1977).⁹

In analyzing the effect of the remarks "El Doctor" made to many groups of employees, I am aware of the ALRB's agreement with the reservations expressed by the National Labor Relations Board in overturning elections on the basis of the Board's evaluation of campaign statements out of the context of a heated election campaign Jake J. Cesare & Sons, 2 ALRB

⁹Although the UPW argues that Charles Overfelt is an "agricultural employer" as defined by Section 1140.4(c) of the Act, it is unnecessary for me to make that finding for purposes of the Decision. The Overfelt remarks were made in late May, more than two months before the first election. The passage of time apparently had dissipated the effect of these remarks prior to the first election.

My focus of attention must necessarily move to the time following the first election, when supervisor Eugene Felipe used the Overfelt statements as background for his own remarks.

No. 6 (1976); Modine Manufacturing Company, 203 NLRB 527 (1973).

Furthermore, the ALRB has endorsed Employer free speech guidelines set forth by the U.S. Supreme Court in NLRB v. Gissel Packing Co., 395 U.S. 575 (1969) .

He may even make a prediction as to the precise effects he believes unionization will have on his company. In such a case, however, the prediction must be carefully phrased on the basis of objective fact to convey an employer's belief as to the demonstrably probable consequences beyond his control or to convey a management decision already arrived at to close the plant in case of unionization. See Textile Workers v. Darlington Manufacturing Co., 380 U.S. 263, 274, n. 20 (1965). If there is any implication that an employer may or may not take action on his own initiative for reasons unrelated to economic necessities and known only to him, the statement is no longer a reasonable prediction based on available facts but a threat of retaliation based on misrepresentation and coercion, and as such without protection of the First Amendment. Id. at 618.

Clearly, any balancing of an employer's free speech rights against employee rights guaranteed by U1152 of the Act must necessarily consider the coercive impact of "unfounded predictions" upon employees who are economically dependent on their employer. Royal Packing Company, 2 ALRB No. 29 (1976) .
Albert C. Hanson d/b/a/ Hanson Farms, 2 ALRB No. 61; Dal-Tex Optical, 137 NLRB 1782 (1962).

It is apparently the employer's position that the May 25 conversation between Overfelt and Company personnel provided sufficient factual foundation for "El Doctor's" subsequent remarks regarding the termination of the San Juan Bautista lease, if the UFW won the election.

However, that analysis is not consistent with the

facts of the present case. The Overfelt remarks occurred on May 25. The first election was not held until August 1. After that date, "El Doctor" made different remarks to different groups of people. He told Antonio Martinez and one group of workers that they would take away most of the fields in San Juan Bautista and there would not be enough work for all workers. "El Doctor," during this period also told Martinez to vote for the IUAW. Employee Isidro Soto testified that "El Doctor's" remarks occurred within a 15-day period following the first election. Worker Santiago Quintero testified that rumors ran rampantly through the crews following the first election.

At no time during those conversations between "El Doctor" and the different groups of employees did the foreman provide a "sufficient factual foundation" for his remarks. Royal Packing Co., supra. According to the testimony of all worker witnesses, "El Doctor" never referred to the Overfelt statements of May 25 or early June. The worker witnesses testified that "El Doctor" told them that if the Chavez 'union won, they would take away fields (emphasis supplied). Clearly, "El Doctor's" remarks left the impression that the employer might take action on his own initiative for reasons unrelated to economic necessities and known only to him. The statements therefore are not protected by the First Amendment.

I conclude that "El Doctor's" remarks to a substantial number of workers following the first election had a coercive

impact and could reasonably be expected to have affected the outcome of the election.

RECOMMENDATION

Based on the findings of fact, analysis and conclusions herein, I recommend that the UFWs objection be sustained and that the election be set aside.

Dated: February 1, 1980

Respectfully submitted,

Ron Greenberg
Administrative Law Officer