

STATE OF CALIFORNIA
AGRICULTURAL LABOR RELATIONS BOARD

S. A. GERRARD FARMING CORP.,)	
)	
Employer,)	Case No. 79-RC-8-OX (SM)
)	
and)	
)	
INTERNATIONAL UNION OF)	6 ALRB No. 49
AGRICULTURAL WORKERS,)	
)	
Petitioner,)	
)	
and)	
)	
UNITED FARM WORKERS OF)	
AMERICA, AFL-CIO,)	
)	
Intervenor.)	
)	
_____)	

DECISION AND CERTIFICATION OF REPRESENTATIVE

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

A Petition for Certification was filed by the International Union of Agricultural Workers (IUAW) on August 16, 1979, and the United Farm Workers of America, AFL-CIO (UFW) subsequently intervened. On August 23, 1979, a representation election was held among the employees of S. A. Gerrard, the Employer herein. The Tally of Ballots showed the following results:

////////////////
////////////////

IUAW	10
UFW	45
No Union	21
Challenged Ballots	<u>6</u>
Total	82

After the Employer and the IUAW filed post-election objections, the Board's Executive Secretary issued a Notice of Objections Set for Hearing and Order Partially Dismissing Employer's Objections. On February 19 and 28, 1980, an evidentiary hearing was held on the remaining objections.

On May 14, 1980, Investigative Hearing Examiner (IHE) Ruth Rokeach issued her Decision in which she recommended that the UFW be certified as the collective bargaining representative of the Employer's agricultural employees.

The Employer timely filed exceptions to the IHE's Decision and a brief in support of the exceptions.

The Board has considered the record and the IHE's Decision in light of the exceptions^{1/} and brief, and has decided to affirm

^{1/}Employer has urged the ALRB to adopt the rule in *Milchem, Inc.* (1968) 170 NLRB 362 [67 LRRM 1395]. Under *Milchem*, if a party engages in sustained conversation with prospective voters within the polling area, the NLRB sets aside the election regardless of the content of the statement. This Board has never applied the NLRB's *Milchem* rule to the agricultural setting. See *Superior Farming Company* (Apr. 26, 1977) 3 ALRB No. 35, certification subsequently withdrawn on other grounds, (Apr. 28, 1980) 6 ALRB No. 21; see also *Sakata Ranches* (Aug. 28, 1979) 5 ALRB No. 56. In any event, the facts of the instant case do not warrant consideration of the applicability of the *Milchem* rule, as the statements were not made by an agent of the UFW or any other party. The Employer also argued that this Board should apply the *Milchem* rule to the conduct of Amado Pereyra, the UFW observer at the election. In situations

[fn. 1 cont. on pg. 3]

the rulings, findings,^{2/} and conclusions of the IHE, as modified herein and to adopt her recommendation to dismiss the objections and to certify the UFW.

We agree with the IHE's conclusion that Jesus Alvarez was not an agent of the UFW, noting that the union took no action which would indicate a grant of authority to Alvarez. However, we do not agree with her suggestion that the perceptions or beliefs of the affected employees as to apparent authority are not relevant to the question of agency. A major purpose of the ALRA is to free collective bargaining from all taint of compulsion, domination, or undue influence by either union or management, including their agents. To achieve this purpose, we must scrutinize all the factors which tend to restrain the employees' exercise of free choice. International Association of Machinists, Tool and Die Makers Lodge No. 35, etc. v. NLRB (1940) 311 U.S. 72 [7 LRRM 282].

[fn.1 cont.]

involving observers speaking to voters during voting, we will follow NLRA precedent and, rather than apply the Milchem rule, we will inquire into the substance of the statement. See General Dynamics Corp. (1970) 181 NLRB 874; see also Harden Farms of California, Inc. (Feb. 23, 1976) 2 ALRB No. 30. We agree with the IHE's conclusion that Pereyra's conduct did not tend to affect the outcome of the election.

^{2/}The Employer excepted to the IHE's credibility resolutions as not sufficiently definitive. Our review of the IHE's Decision and the record herein convinces us that her findings and credibility resolutions are fully supported by the evidence. We agree with the IHE that Jesus Alvarez shouted some chants at prospective voters, but not directly in their faces, and that observer Pereyra did speak to and make gestures at some of the employees waiting to vote. We agree with the IHE that none of these actions tended to affect the outcome of the election. We have also reviewed the IHE's credibility resolutions as they relate to the testimony of the Board agent who participated in the hearing and find them free of prejudicial error.

Therefore, when applying the principle of apparent authority, we will consider whether any act or omission of any principal, however subtle, has given the employees reasonable cause to believe an agency relationship exists. See Vista Verde Farms (Dec. 14, 1977) 3 ALRB No. 91; Paul W. Bertuccio and Bertuccio Farms (Jan. 24, 1979) 5 ALRB No. 5.

CERTIFICATION OF REPRESENTATIVE

It is hereby certified that the United Farm Workers of America, AFL-CIO, having received a majority of the valid votes cast in a representation election among the agricultural employees of the Employer, is, pursuant to Labor Code Section 1156, the exclusive representative of all the agricultural employees of S. A. Gerrard Farming Corporation 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: August 26, 1980

RONALD L. RUIZ, Member

HERBERT A. PERRY, Member

JOHN P. McCARTHY, Member

CASE SUMMARY

S. A. Gerrard Farming Corp. (UFW)

6 ALRB No. 49

Case No. 79-RC-8-OX(SM)

IHE DECISION

In a representation election conducted among the employees of S. A. Gerrard on August 23, 1979, the Tally of Ballots showed 45 votes for the UFW, 10 votes for the IUAW, 21 votes for no union, and 6 challenged ballots.

After a hearing on post-election objections, involving agency issues and whether objectionable conduct occurred during the voting, the Investigative Hearing Examiner (IHE) concluded in her decision that an ardent supporter of the UFW, who was not an employee of the Employer, was not an agent of the UFW. The IHE dismissed the Employer's objections as to certain conduct which occurred during the voting, finding that the conduct did not tend to affect the outcome of the election. The IHE recommended that the objections be dismissed and that the UFW be certified as the exclusive collective bargaining representative of the Employer's agricultural employees.

BOARD DECISION

The Board affirmed the rulings, findings, and conclusions of the IHE, with minor modifications, and adopted her recommendation to dismiss the objections and certify the UFW as the exclusive collective bargaining representative of the Employer's agricultural employees.

* * *

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

* * *

STATE OF CALIFORNIA
AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of:

S. A. GERRARD FARMING
CORPORATION,

Employer

Case No. 79-RC-8-OX(SM)

and

INTERNATIONAL UNION OF
AGRICULTURAL WORKERS,

Petitioner,

and

UNITED FARM WORKERS OF
AMERICA, AFL-CIO,

Intervenor.

Robert K. Carrol and Michele S. Poohar,
Littler, Mendelson, Fastiff & Tichy
for the Employer.

Arturo Castro for the International
Union of Agricultural Workers.

Peter Cohen for the United Farm
Workers of America, AFL-CIO.

DECISION

STATEMENT OF THE CASE

RUTH ROKEACH, Investigative Hearing Examiner: This case was heard before me on February 19 and 28, 1980, in Santa Maria, California.

On August 16, 1979, the International Union of Agricultural Workers (hereinafter "IUAW") filed a petition for certification for the agricultural employees of S. A. Gerrard

Farming Corporation. The United Farm Workers of America, AFL-CIO (hereinafter "UFW") subsequently intervened. On August 23, 1979, the Agricultural Labor Relations Board (hereinafter "ALRB" or "Board") conducted an election for the above stated employees. The results of the election were as follows:

IUAW	10
UFW	45
No Union	21
Unresolved Challenges	6
Total Ballots	82

Following the election, the employer filed a timely objections petition pursuant to Cal. Lab. Code §1156.3(c). The Executive Secretary dismissed some objections and set others for hearing. The employer then filed a timely Request for Review of the Executive Secretary's dismissal of objections pursuant to 8 Cal. Admin. Code §20393(a). On January 18, 1980, the Board upheld the Executive Secretary's dismissal of all but one objection. The issues ultimately set for hearing were:

1. Objection 32, whether an agent of the UFW campaigned in the voting area as the voting was going on, and if so, whether such conduct unlawfully affected the outcome of the election;

2. Objection 33, whether an agent of the UFW returned to the voting area during the voting, argued with an employee, defied the ALRB agent's instruction to leave and engaged in a fight with the agent, and if so, whether such conduct unlawfully affected the outcome of the election;

3. Objection 34, whether a UFW observer instructed employees regarding the manner in which to vote as they came

into the voting area, and if so, whether such conduct unlawfully affected the outcome of the election;

4. Objection 35, whether the same UFW observer winked at employees as they came into the voting area to vote, and if so, whether such conduct unlawfully affected the outcome of the election; and

5. Objection 36, whether observers for the UFW discussed working conditions at the employer's premises with Board agents in view of employees waiting to vote, and if so, whether such conduct affected the outcome of the election.

Representatives of the employer and UFW were present throughout the entire hearing and were given a full opportunity to participate in the proceedings. An IUAW representative appeared on February 19, 1980, and had a full opportunity to participate in the proceedings. No representative from the IUAW appeared on February 28, 1980. Both the employer and the UFW filed post-hearing briefs. Upon the entire record, including the demeanor of the witnesses and consideration of the briefs submitted by the parties, I make the following findings of fact and conclusions of law.

JURISDICTION

None of the parties challenged the Board's jurisdiction in this matter. Accordingly, I find the employer is an agricultural employer within the meaning of Cal. Lab. Code §1140.4(c), and the UFW and IUAW are labor organizations within the meaning of Cal. Lab. Code §1140.4 (f).

INTRODUCTION

The evidence established the following concerning the location and mechanics of the election. The election took place in a shed on the employer's premises. The shed had walls on only three sides. In front of the open side of the shed was a dirt area. A road passed through this area, parallel to the open side of the shed. A table, at which, the voters received the ballots, and a voting booth were located inside the shed. Prospective voters gathered outside, in front of one corner of the open side of the shed, and waited in a group for the polls to open. ^{1/} They then proceeded into the shed to the voting table and then onto the voting booth. Observers were stationed both inside and outside the shed throughout the election. The balloting started at about 6:15 a.m.

At the pre-election conference, the parties agreed that six persons, claimed by the company to be working foremen, would cast challenged ballots and would vote after the other people on the eligibility list had finished voting.

INCIDENTS INVOLVING JESUS ALVAREZ (Objections 32 and 33)

1. Agency

Objections 32 and 33 involve a man named Jesus Alvarez. The employer contends that Alvarez is an agent of the UFW. The UFW claims that Alvarez is a supporter of the UFW but not an

1/ Cresencio Sumaya, who served as an observer for the company, was called as a witness, and drew a detailed map of the election site which was admitted into evidence as Employer's Exhibit 1.

agent. In determining whether misconduct affected the outcome of an election, the conduct of a non-party is accorded less weight than that of a party. Takara International, Inc., 3 ALRB No. 24 (1977); ^{2/} C. Mondavi & Sons, 3 ALRB No. 65 (1977). Since the conduct of a party and a non-party is judged by a different standard, preliminary determination of Alvarez' status is necessary.

The parties stipulated that Alvarez was a UFW supporter. A number of witnesses testified concerning Alvarez' involvement with and connection to the UFW. The undisputed testimony established that Alvarez has attended some UFW meetings, and has been seen on UFW picket lines as well as carrying flags and wearing UFW buttons. For a brief time a number of years before the election, he served on in-plant committees while working for a labor contractor at various ranches in the area. Alvarez has not been a dues paying member of the UFW since about 1975. He has never worked for the UFW. The UFW has never asked Alvarez to go to ranches in the area for the purpose of talking about the UFW. Nor has the UFW ever supplied Alvarez with leaflets to pass out to friends or persons involved in a union campaign.

2/ In Takara, supra, at p. 3, the Board explained the rationale behind this rule: "...[M]isconduct by a party will be considered more destructive of a healthy atmosphere than misconduct by a non-party. Parties have far greater economic strength and institutional power than do individuals, and therefore their actions and statements are more coercive of employees. With that greater power comes a strong responsibility for proper conduct".

Alvarez testified that he believes deeply in the cause of the UFW because it is on the side of poor people. Both Alvarez and Cresencio Sumaya, a company observer, testified that Alvarez has talked to workers at ranches other than S. A. Gerrard about the UFW. The testimony did not, however, establish the circumstances or extent of such conversations except as to one conversation between Alvarez and Sumaya about one month prior to the election.^{3/} Sumaya further testified that he regularly saw Alvarez bring his wife to work at Gerrard and stop to chat with employees, but that he (Sumaya) could not possibly know what Alvarez was chatting about.

Under the ALRA, as under the NLRA, the existence of an agency relationship must be determined by applying common law principles of agency. San Diego Nursery Co., Inc., 5 ALRB No. 43 (1979). In International Longshoremens and Warehousemen's Union, CIO, Local 6, 79 NLRB 1487, 1509 (1948}, the NLRB set forth the fundamental rules of the law of agency which are to be utilized in determining the existence of an agency relationship between a labor organization and a person who purportedly represents it:

1. 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...
2. Agency is a contractual relationship (emphasis in original), deriving from the mutual consent of principal and agent that the agent shall act for the principal. But the principal's consent, technically called authorization or ratification, may be manifested by conduct, sometimes even passive acquiescence as well as by words.

^{3/} Sumaya testified that Alvarez stated to him, "Now we are going to get the union and they're going to vote now, and now yes".

Authority to act as agent in a given manner will be implied whenever the conduct of the principal is such as to show that he actually intended to confer that authority.

3. A principal may be responsible for the act of his agent within the scope of the agent's general authority, or the "scope of his employment" if the agent is a servant, even though the principal has not specifically authorized or indeed may have specifically forbidden the act in question. It is enough if the principal actually empowered the agent to represent him in the general area within which the agent acted.

The employer argues that the UFW authorized Alvarez to act for it in the general sphere of organizing, and on that basis should be held responsible for Alvarez' actions even if the union did not specifically authorize or may have forbidden the acts in question. The employer's argument is not convincing. None of the above evidence indicates that the UFW authorized Alvarez to organize for it or act on its behalf in any capacity whatsoever.^{4/} The evidence shows only that Alvarez was an active union supporter, The ALRB has held that union adherence is not a sufficient basis for finding an agency relationship. Tepusquet Vineyards, 4 ALRB No. 102 (1978).^{5/} Nor does Alvarez' participation on in-plant organizing committees a number of years before the election render him an agent of the UFW. Takara International, Inc., 3 ALRB No. 24 (1977); Kawano Farms, Inc., 3 ALRB No. 25 (1977);

4/ Alvarez testified that on the morning of the election, someone from the UFW told him to leave the area. The employer argues that it is highly unlikely that Alvarez would have received such an instruction if he had not been organizing the Gerrard employees as a UFW agent prior to the election. I do not draw such an inference from this testimony as it is highly speculative.

5/ The employer attempts to distinguish the present case from Tepusquet Vineyards, supra, by arguing that the person in question in Tepusquet was found not to be an agent by virtue (footnote continued on page 8)

San Diego Nursery Co., Inc., 5 ALRB No. 43 (1979).

The employer further argues that even if the UFW did not authorize Alvarez to act on its behalf, the UFW should be held responsible for his actions because the employees had just cause to believe that Alvarez was acting for and on behalf of the UFW, since he is not a Gerrard employee, yet was seen campaigning for the UFW prior to and during the election. This argument cannot prevail because regardless of the beliefs of the employees, (which are not established by the facts here,^{6/}) apparent authority must arise from manifestations made by the principal to the third party. Restatement (Second) of Agency §8, 27, (1957); San Diego Nursery Co., Inc., 5 ALRB No. 43 (1979) Here there is no evidence that the UFW took any action that in any way indicated to the employees of Gerrard that Alvarez was

(footnote 5/ cont.)

of the fact that he was an employee of the employer. Here, the employer argues, Alvarez is not an employee of Gerrard and so an agency relationship should be found. However, that distinction is not controlling here. In Tepusquet, the facts were similar to those in International Woodcutters of America, AFL-CIO, 131 NLRB 189 (1961), a case in which a person was found to be an agent. The Board, in Tepusquet, distinguished the two cases on the ground that the person in Tepusquet, unlike the person in Woodcutters, was an employee of the employer. However, in both those cases, there were other indicia of agency: the union had provided authorization cards and leaflets, had given instructions on the purpose and use of the cards and had relied on the persons in question to carry the burden of organizing. None of these factors are present in the instant case.

6/ For facts concerning Alvarez' alleged campaigning during the election, see discussion in paragraphs 2 and 3, *infra*.

acting on behalf of the UFW.^{7/}

Since the employer has not met its burden of proving the existence of an agency relationship, Alvarez' conduct will be viewed as that of a non-party.

2. Incident At Beginning of Election (Objection 32)

Objection 32 concerns an incident that allegedly occurred at the very beginning of the election. The employer contends that Jesus Alvarez campaigned in the quarantined area and defied the authority of the Board agent in front of 40-45 potential voters and that the election must, therefore, be set aside. Several witnesses testified and gave contradictory versions of the events that occurred.

Cresencio Sumaya, the company observer, called by the employer, testified as follows: Jesus Alvarez, who is not employed at Gerrard, drove his pickup truck to the area in front of the voting shed about three to four minutes before the election began. When the Board agent told the union and company

7/ The employer cites NLRB v. Georgetown Dress Corp., 537 F.2d 1239, 92 LRRM 3282 (4th Cir. 1976) in support of its position that the UFW should be held responsible for Alvarez' conduct on the theory of apparent authority. There, the court found that in-plant committee members acted as union agents under the theory of apparent authority. The committee had its inception through professional organizers, contacting employees and advising them to organize. The committee was the union's only in-plant contact. The court found that in the eyes of the employees, the committee represented the union, and the union had authorized them to hold that position.

The facts in Georgetown, do not resemble the facts here. In that case, there was action on the part of the union in creating an in-plant committee which was the union's sole contact with the employees. These circumstances are not present in the instant case.

representatives to leave, everyone who was not going to vote left the area except Alvarez. At that time, Alvarez said, "Viva Chavez, Vote for Chavez and give it with everything you've got." He made these statements several times in a strong voice. He went over to the group of 40 to 45 people waiting to vote outside the shed and shouted these things in their faces. Some of the prospective voters reacted with surprise while others were, in the witness's word, "conforming".

Meanwhile, the Board agent was telling Alvarez to leave the area. Alvarez told the Board agent to go fuck himself because he (Alvarez) wasn't going to pay any attention to him. The people waiting to vote could hear this exchange. Alvarez remained in the area for two or three minutes after the time the agent told him to leave.^{8/}

The Board agent in charge of the election, called by the employer, and identified by Sumaya as the agent involved in the incident, testified that he was not aware of any incident involving Alvarez that occurred at the beginning of the election.

Jesus Alvarez, called by the UFW, testified that he drove his wife, an employee of Gerrard, to the election site on

8/ The employer argues that Denny Hackett, general manager of John English Frozen Foods, Co., the company of which S. A. Gerrard is a wholly owned subsidiary, corroborated Sumaya's testimony in every respect. In his testimony, Hackett related a report given to him by Sumaya after the election concerning the events that had occurred. Hackett's testimony was hearsay, admissible pursuant to 8 Cal. Admin. Code §20370 (c) for the purpose of supplementing or explaining other evidence. Hackett's testimony is simply a repetition of Sumaya's direct testimony and does not add to the understanding of the events that occurred.

the morning of the election; drove his truck into the area in front of the voting shed; parked it for about five minutes; remained inside the truck until the election began; and then left. At that time, he did not talk to the Board agent.

Amado Pereyra, a UFW observer called by the UFW, testified that he arrived at the election site at 6:00 a.m. As he was arriving, he saw Alvarez leaving. He did not see Alvarez talk to anyone.

There is considerable conflict in the testimony regarding this incident. Sumaya, the company observer, testified that Alvarez chanted UFW slogans into the faces of prospective voters and made vulgar and defiant statements to the Board agent. Yet the Board agent did not recall the incident. Alvarez admitted he was in the area prior to election but denied that he was present or talked to the Board agent when the election first began.

I do not totally credit the events as alleged by Sumaya. I find it unlikely that the Board agent would have been a main character in an exchange yet had no memory of it. The Board agent appeared to have a clear memory and to be a credible witness.^{9/} Furthermore, Sumaya's testimony, that Alvarez shouted the chants directly into the faces of prospective voters, was

9/ None of the parties challenged the credibility of the Board agent. In fact, both the employer, in its closing argument, and the UFW, in its post-hearing brief, expressed their belief that he was a neutral witness.

given in response to a leading question by the employer's attorney. ^{10/}

Nor do I fully credit Alvarez' version that the incident did not occur at all. Based on the testimony of all of the witnesses, I find it most likely that Alvarez shouted some chants which may have been heard by prospective voters, but that the chants were probably not delivered directly into the faces of the prospective voters.

Even crediting the company observer's version of the events, there is insufficient evidence to show that the misconduct created an atmosphere in which the employees could not freely vote. The issue in determining if an election should be set aside is whether the misconduct created an atmosphere in which employees could not freely and intelligently choose their bargaining representative. Takara International, Inc., 3 ALRB No. 24 (1977). See also Tespusquet Vineyards, 4 ALRB No. 102 (1978) and Chula Vista Farms, Inc., 1 ALRB No. 23 (1975).

The Board has held that an employee's shouting of "Viva Chavez" inside the polling area while the voting was going on is not conduct which affects the free choice of other employees. Veg-Pak, Inc., 2 ALRB No. 50 (1976); Harden Farms, 2 ALRB No. 30 (1976). There is no evidence to indicate that Alvarez' statements should be viewed differently than statements of an employee, in view of the fact that he was not an agent

10/ Question; "Did Mr. Alvarez go over to the people waiting to vote...and shout these things in their faces?"
Answer: "Yes"

of the UFW. I also note that he was apparently known to some employees as the husband of a Gerrard employee.

Even if Alvarez shouted the chants into the faces of prospective voters or made vulgar statements or defied the Board agent's authority, there is no evidence to show that his conduct affected the voters' free choice. Sumaya testified that the people waiting to vote reacted either with surprise or were "conforming." Contrary to the employer's contention in its brief, this witness did not testify that employees were intimidated or had expressions of fear in their faces. ^{11/}

Since there is no evidence here that the alleged conduct unlawfully affected the outcome of the election, I conclude that Objection 32 should be dismissed.

3. Incident Later in Election (Objection 33)

Objection 33 involves an incident that allegedly occurred later on in the election. The employer contends that Alvarez returned to the voting area and again campaigned for the UFW and defied the Board agent's authority in front of voters. There are also contradictions in the testimony regarding this incident. Sumaya, the company observer, testified that Alvarez returned to the voting area prior to the end of the election. Alvarez drove his pickup truck into the area in front of the voting shed and approached a man, Jose Antonio Pereyra (brother of UFW observer Amado Pereyra), who was standing

^{11/} Denny Hackett testified that after the election Sumaya told him that the employees were intimidated and had expressions of fear in their faces. This testimony is hearsay, does not corroborate Sumaya's testimony and cannot support a finding of fact. 8 Cal. Admin. Code §20370 (c).

near his tractor in the same area, Sumaya did not hear the words that Alvarez and the tractor driver said, but saw them flinging their hands in the air. Based on these movements of their hands and on the tone of their voices, Sumaya thought they were having an argument. ^{12/} Sumaya testified he informed the Board agent of Alvarez' presence and that the Board agent approached Alvarez and told him to "get out" because the election was not over. Alvarez said that he was not going to "fucking go." Alvarez then made another vulgar comment to the agent, stated in a loud voice that he would be back, and left. Sumaya testified that the several voters in the area could hear this exchange.

The Board agent in charge of the election, called by the employer, testified that Alvarez ^{13/} arrived sometime after the initial group of voters (about 3/4 of those who voted in the election) had already voted, Alvarez talked to someone near a tractor and then yelled some cheers, such as "Viva Chavez." The agent approached Alvarez, asked him if he was an employee and if he was there to vote. Alvarez responded that he was not,

12/ On direct examination, Sumaya testified that the tractor driver said to Alvarez, "Get out of here. I don't want to talk to you." On cross-examination, Sumaya testified that he did not hear anything that was said and denied that he had made the above statement during direct examination.

13/ The Board agent did not know Alvarez' name but identified the participant in the incident as an "older man." Since other witnesses identified Alvarez as the person involved in this incident and no one contested his identity, there seems to be no question that the Board agent was referring to Alvarez.

at which time the agent identified himself and asked the man to leave. Alvarez refused, stating, "You are nobody. You don't have any authority. I don't have to leave." The agent told him that if he did not leave, he (the agent) would have to call the police. After the agent spoke to him, Alvarez stopped shouting.

The Board agent further testified that Alvarez was in the area for about five minutes. There were about twelve voters in the area at the time. The voters were in the voting shed; Alvarez was outside. The man spoke in a loud voice but did not scream. Everyone in the voting area seemed rather oblivious. Nobody seemed bothered. The agent did not notice any reaction to the incident. No one, including the observers, complained to him about the incident. The agent testified that he did not consider the incident a serious disruption of the election, just a nuisance.

Jose Antonio Pereyra, the tractor driver involved in the incident, testified that he was fixing his tractor about 30 feet from the shed where the election was taking place. At about 7:15 or 7:20, a man approached him, said good morning and asked if the election had finished. Pereyra responded that he believed so. At that time, the Board agent arrived and told the man to get out as there was an election and he could not be there. The man responded that the agent was nobody to chase him out of there.

The tractor driver further testified that the man did not argue with him but that the Board agent and the man did

shout at each other. The man did not say anything like "Vote for Chavez." The man did not tell the Board agent to go fuck himself or anything of that nature. The people could hear the exchange if they were paying attention because the two were talking loudly.

Jesus Alvarez himself testified as follows: He returned to the voting area, as there was no one else to take his wife back to the fields. He parked his truck and asked the tractor driver if the election was still going on. The driver replied that it was over for the discarders (hoers) and that only the tractor driver and foremen were left to vote.

The man from the State then asked him if he was a worker and going to vote. Alvarez told him that he was not. The agent identified himself as from the State, told Alvarez he could not be there and that Alvarez had to obey him. Alvarez explained to the agent that he (Alvarez) was not doing anything wrong, that if the agent was from the State, he should know the laws, that this was a democratic country. Alvarez told the agent that the boss has the right to tell him to get out but that he did not. The agent again told Alvarez to leave, at which time he did so.

Alvarez further testified that he did not tell the agent that he was "nothing" or that he (Alvarez) was not going to do as told. He did not say that he would be back or tell the workers to vote for Chavez or tell the agent to go fuck himself.

Two UFW observers testified about this incident. Amado Pereyra testified that throughout the incident, Alvarez was 25

to 30 feet from the voting shed. When Alvarez returned, the only people left to vote were the foremen. Alvarez chatted with the tractor driver for about two or three minutes. Pereyra did not hear any of the conversation between these two. ^{14/}

Vicente Navarro, another UFW observer, testified that when Alvarez showed up, everyone had voted except the foremen. He was present when the Board agent went to speak with Alvarez. He did not hear Alvarez shout any chants.

Since Sumaya did not hear any of the words exchanged between Alvarez and the tractor driver, and because the two people involved in the exchange corroborated each other's testimony, I credit the version of events, regarding the conversation between Alvarez and the tractor driver, as testified to by them. With respect to the rest of the incident, it is unclear whether Alvarez used vulgar language or shouted chants.

However, assuming that Alvarez made all the statements to the Board agent as stated by the company observer, and that he also yelled cheers as stated by the Board agent, his conduct was not such that it could have affected the employees' free choice in choosing a bargaining representative. As stated above, the Board has held that the yelling of cheers such as

14/ The witness at this point in the testimony said that he did not hear any of the conversation because he was deaf. The comment was made partially in jest. The witness had indicated earlier that he was hard of hearing in one ear and had switched seats with the interpreter so that the interpreter would be talking into his good ear.

"Viva Chavez" is not conduct that requires the Board to set aside the election. Veg-Pak, Inc., 2 ALRB No. 50 (1976); Harden Farms, 2 ALRB No. 30 (1976). Moreover, there is no evidence that the totality of Alvarez' conduct had any effect on the voters in the election. The UFW observers testified that everyone had voted other than the foremen. Although the Board agent testified that about twelve voters were in the area, he further testified that the voters were in the shed and Alvarez was outside and that he did not notice any reaction to the incident.

Since there is no showing that the conduct here interfered with the free choice of the voters, I conclude that Objection 33 should be dismissed.

INCIDENT INVOLVING UFW OBSERVER AMADO PEREYRA
(Objections 34 and 35)

The employer argues that a UFW observer, Amado Pereyra, campaigned in the voting area by saying to each voter, "Now, yes, now," (Objection 34) and winking at each one (Objection 35).

Sumaya, the company observer, testified that Amado Pereyra was standing inside the voting shed near the voting table throughout the election. Pereyra's back was to the Board agents. Every time a voter approached, Pereyra winked his eye and said, "Now, yes, now." When Pereyra winked, some voters smiled and others did nothing or bowed their heads. Pereyra winked at about 60-70 voters, all the voters who went by. Throughout the election, Sumaya was standing just outside

the voting shed. ^{15/}

Amado Pereyra testified that he did not talk to any voters as they were waiting in line. He never said, "Now, yes, now." He did not wink at any voter.

I do not find the testimony of Cresencio Sumaya to be wholly credible. Sumaya did not inform the Board agent that any misconduct was taking place even though the misconduct supposedly started at the beginning of the voting and continued throughout the election. By way of comparison, it is noteworthy that Sumaya claims to have informed the Board agent of Alvarez' return to the voting area as soon as Sumaya perceived a disruption. ^{16/} Furthermore, although Sumaya claims that Pereyra spoke to and winked at 60 or 70 voters, the employer did not produce one voter to testify that the observer did so to him or her. ^{17/}

15/ The distance between Sumaya and Pereyra is not clear. Based on the diagram drawn by Sumaya, which indicates some distances, a very rough estimate of distance would be 15 feet.

16/ In *NLRB v. USM Corp.*, (6th Cir. 1975) 89 LRRM 2585, 517 F.2d 971, the Court found that the NLRB did not abuse its discretion by upholding the Regional Director's dismissal of the employer's objections. The employer's observer had stated that the union observer had engaged in conversations with employees waiting in line to vote. The Regional Director discredited the employer observer's version of events, in part, because the observer had signed a certificate at the end of the election attesting that the election was properly conducted, making no mention of the alleged misconduct.

17/ Another reason that the Regional Director discredited the employer observer in *NLRB v. USM Corp.*, supra, fn. 16, was because the employer did not produce any employee to testify that the alleged conversation took place.

Finally, Sumaya emphatically testified that he saw Pereyra wink at and heard him speak to 60 or 70 voters, every voter who came by. It is difficult to believe that Sumaya had his eyes focused on Pereyra throughout the entire election and never took his eyes off of him.

Although Amado Pereyra appeared to be a credible witness, I do not credit his total denial of the allegation since to do so would require a finding that Sumaya's version was a fabrication. I find that Sumaya was most probably embellishing the facts as they really occurred. I find it impossible, based on the testimony of the two witnesses to this event, to determine the extent to which Pereyra engaged in the described conduct.

However, even assuming that the events occurred exactly as stated by Sumaya, for the reasons discussed below, I conclude that the conduct does not warrant setting aside the election. To be grounds for setting aside an election, statements by observers must be of such character as to affect the free choice of the voters in the election. Harden Farms, 2 ALRB No. 30 (1976); Kawano Farms, Inc., 3 ALRB No. 25 (1977).

Contrary to the employer's assertion, the NLRB's Milchem rule, Milchem, Inc., 170 NLRB No. 46 (1968), should not be applied to invalidate the present election. Under the Milchem rule, the NLRB sets aside an election when a party engages in a sustained conversation with voters in the polling area during the election, without inquiry into the content of the statements

made. However, when the alleged statements are made by observers, both the NLRB and the ALRB inquire into the content of the statement and determine if the statements were of such character as to affect the free choice of the voters. Harden Farms, supra, (and NLRB cases cited therein); Kawano Farms, Inc., supra.

The employer asserts that Pereyra's statements and winks amounted to instructions to the prospective voters to vote in favor of the UFW and that such electioneering requires setting aside the election. I do not agree that Pereyra's statements and winks amounted to instructions to vote for the UFW. Pereyra's statement, "Now, yes, now", is similar to statements made by observers in two cases in which the NLRB found that the statements did not amount to electioneering. In South Pacific Furniture, Inc., 241 NLRB No. 89 (1979), the NLRB held that an observer's statement to voters, "Come on and vote, exercise your power", after the polls had opened, did not constitute electioneering. In Amalgamated Industrial Union, 246 NLRB No. 124 (1979), the NLRB found that an observer's statements to employees urging them to come and vote did not constitute electioneering.

Here, Pereyra's statement might have been a similar invitation to vote or might have been an instruction to keep the voting line moving. There is nothing to indicate that the statement was an instruction to vote for the UFW and I therefore find that the statement did not constitute electioneering.

Furthermore, there is nothing to indicate that the wink itself was an instruction to vote for the UFW or that the wink converted the statement, "Now, yes, now", into such an

instruction. ^{19/}

Finally, there is no evidence that the voters were affected by the statement or the wink of the UFW observer. Sumaya stated that some voters smiled, others did nothing or bowed their heads. Neither a smile, nor a bow of the head nor simply doing nothing, is a reaction that indicates that the voters were in any way affected.

For the above reasons, I find that the alleged misconduct, even if it occurred, did not affect the voters' free choice of a bargaining representative and conclude that Objections 34 and 35 should be dismissed.

ISSUE INVOLVING OBSERVERS AND BOARD AGENTS
(Objection 36)

The employer argues that complaints made by UFW observers during the course of a conversation with Board agents, during the election, amounted to campaigning for the UFW and that such campaigning is grounds for setting aside the election. The complaints purportedly indicated to everyone the reasons why it was necessary to vote for the UFW, i.e., improved wages, benefits and working conditions. The employer alleges that the

19/ The employer, in support of its argument that the wink constituted electioneering, cites U.S. v. International Union, Mine Workers of America, 77 F.Supp. 563 (1948), aff'd in part and appeal dismissed in part, 177 F.2d 29 (D.C. Cir. 1949), cert.den., 338 U.S. 871 (1949), for the proposition that a wink is the equivalent of an oral communication, having a force and affect equal to that of words. In that case the issue was whether a strike had been called. The court stated, "If a nod or a wink or a code was used in place of the word 'strike', there was just as much a strike called as if the word 'strike' had been used." Id. at 566. The use of a wink as a code word for an agreed-upon action is distinguishable from the employer's assertion, here, that the wink constituted improper electioneering.

conversation lasted at least five minutes and clearly took place in front of several voters who were actually in the process of casting their ballots at the time.

As with, the other incidents herein, the testimony is somewhat contradictory. Cresencio Sumaya, the company observer, testified as follows: He overheard a conversation between three Board agents and three UFW observers. This conversation took place at the voting table, during the voting. The UFW observers said that the company was robbing them, that the company chased them away when they went to look at the books and that the company was not supporting them or their seniority. The Board agents were writing as the UFW observers were talking. The agents told the UFW observers that they could complain at another office. The conversation lasted about five minutes. There were some voters standing around in the area.

Sumaya further testified that only the UFW observers complained to the Board agents. Neither he nor any other company observer participated in this conversation.

Amado Pereyra, the UFW observer, testified that all of the observers, both from the UFW and the company, participated in the conversation with the Board agents. He, Pereyra, told the agents that the company was giving very little money and that they wanted to see the weights on the freezer scales. Cresencio Sumaya, the company observer, told the agents that the bosses had "played a bad trick on him"; he had been working as a track driver and they "brought him down as a tractor driver"; and that "he was going to get back." Pereyra further testified that the other company observers also had complaints about the

company. The conversation took place after everyone had voted other than the foremen. During the conversation no one was in the voting area except the observers.

Vicente Navarro, a UFW observer, testified that the UFW observers and Cresencio Sumaya, the company observer, engaged in the conversation with the Board agents. He did not remember if other company observers participated or not. When the conversation took place, the only people left to vote were the foremen. Navarro testified that he, Navarro, told the Board agents that the seniority system was not being carried out. He testified that Sumaya told the Board agents that the company had "done one to him" and they were "going to pay." Navarro further testified that Sumaya did not object to the conversation or say that it should not be taking place.

The Board agent in charge of the election testified that he had a conversation with observers during a lull in the voting after most of the people had already voted. He could not recall if all the observers participated in the conversation. The conversation consisted of small talk; the general topic of which was wages and working conditions. The agent testified that he told the observers that if they thought they had problems, they could call the local ALRB number. The observers did not react much, to his suggestion; they just started talking about other things.

The Board agent further testified that he did not tell the observers to stop the discussion in the voting area because the discussion was just small talk. He testified that generally

conversations such, as the one in question only take place when no voters are in the area. Otherwise, the observers are working. They have things to do; he has things to do.

The uncontradicted evidence indicates that UFW observers did complain about the company to the Board agents. However, there is conflict in the testimony regarding the participation of the company observers in the conversation. The Board agent could not recall which observers participated in the conversation. One of the UFW observers testified that all the company observers participated. Although Sumaya denied that he or any other company observer complained to the Board agents, the two UFW observers who testified each specifically related the complaint made by him. Since the testimony of the UFW observers gave specific and essentially consistent versions of Sumaya's complaint, I find that at least Sumaya participated in the conversation and complained about the company.

There is also conflict regarding voter presence during the conversation. Sumaya testified that some voters were standing around the area but he was not specific as to the number of voters or where they were located. The two UFW observers testified that the conversation took place after everyone had voted other than the foremen. One of the UFW observers said that no one was in the area other than the observers. The Board agent testified that the conversation took place during a lull in the voting after most of the people had already voted and that such conversations generally only take place when no voters are in the area. Contrary to the employer's assertion, there is

no evidence that the conversation took place in front of any voter who was in the process of casting his or her ballot. Resolution of the conflict as to the number of voters in the area is therefore unnecessary since there is no evidence to indicate that any prospective voter who might have been in the area was close enough to hear what the observers and agents said.

As discussed above, the ALRB inquires into the content of the statements of observers to determine if the statements were of such character as to affect the free choice of the voters. Harden Farms, supra; Kawano Farms, Inc., supra. Since there is no evidence that any prospective voter overheard the conversation, I find that the statements of the observers did not affect the free choice of any voter. Moreover, even if a prospective voter had overheard the complaints about the company, the complaints did not amount to campaign statements for the UFW and any effect of such complaints on the election is speculative. The complaints were made by both UFW and company observers. There were two unions on the ballot and the complaints made no mention of either the UFW or the IUAW.

Since there is no evidence to show that the statements of the observers had any effect on the free choice of any voter, I conclude that Objection 36 should be dismissed.

CONCLUSION

For all of the above reasons, I conclude that Objections 32, 33, 34, 35, and 36, considered individually do not constitute conduct which would warrant setting aside the election. In

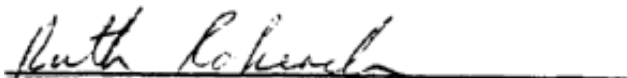
addition, I have considered all of the above objections as a whole and conclude that the alleged misconduct did not have a cumulative impact which affected the voter's free choice of a bargaining representative. Therefore, the objections taken as a whole do not provide grounds for setting aside the election. Harden Farms, supra.

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: May 14, 1980

Respectfully submitted,



RUTH ROKEACH

Investigative Hearing Examiner