

STATE OF CALIFORNIA
AGRICULTURAL LABOR RELATIONS BOARD

JOSEPH GUBSER CO. ,)	Case No. 80-RC-47-SAL
)	
Employer,)	
and)	
)	7 ALRB No. 33
)	
UNITED FARM WORKERS OF)	
AMERICA, AFL-CIO,)	
)	
Petitioner.)	
)	

DECISION AND CERTIFICATION OF REPRESENTATIVE

Following a Petition for Certification filed by the United Farm Workers of America, AFL-CIO, (UFW) on August 19, 1980, a representation election was conducted on August 26 among the Employer's agricultural employees. The official Tally of Ballots showed the following results:

UFW	116
No Union	9
Challenged Ballots. .	<u>50</u>
Total	175

The Employer timely filed post-election objections, one of which was set for hearing. In its objection, the Employer alleges that the UFW, through its agents, committed acts of physical and verbal violence which prevented employees from making a free choice as to a bargaining representative.

A hearing was held before Investigative Hearing Examiner (IHE) Janet Vining in October 1980. In a decision issued on January 19, 1981, the IHE found that, although the incident of

violence occurred on the date alleged, the violence was not of such character as would tend to affect the outcome of the election. The IHE recommended that the Employer's objection be dismissed and that the UFW be certified as the exclusive representative of the Employer's agricultural employees.

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

Pursuant to Labor Code section 1146, the Agricultural Labor Relations Board has delegated its authority in this case to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief, and has decided to affirm the IHE's rulings, findings, and conclusions, and to adopt her recommendations.

Respondent excepts to the IHE's finding that the people involved in the field-rushing incident were not agents of the UFW. To the extent this exception suggests that a different result would be reached if the field-rushers were UFW agents, it is without merit. All violence, actual or threatened, is coercive to a greater or lesser degree depending on the circumstances and the character of the author. The violence in this case was isolated and remote from the election and therefore would not tend to create an atmosphere of fear or coercion sufficient to affect the free choice of the voters, regardless of the status of the field rushers. Frudden Enterprises, Inc. (Aug. 21, 1981) 7 ALRB No. 22.

Accordingly, the Employer's objection is hereby dismissed, and we shall certify the UFW as collective bargaining representative

of the Employer's agricultural employees.

CERTIFICATION OF REPRESENTATIVE

It is hereby certified that a majority of the valid votes have been cast for the United Farm Workers of America, AFL-CIO, and that, pursuant to Labor Code section 1156, the said labor organization is the exclusive representative of all agricultural employees of Joseph Gubser Company, in the State of California for purposes of collective bargaining, as defined in Labor Code section 1155.2(a), concerning employee's wages, hours, and working conditions .

Dated: October 9, 1981

HERBERT A. PERRY, Acting Chairman

JOHN P. MCCARTHY, Member

JEROME R. WALDIE, Member

CASE SUMMARY

Joseph Gubser Co. (UFW)

7 ALRB No. 33

Case No. 80-RC-47-SAL

IHE DECISION

The IHE found that UFW supporters rushed Respondent's fields in August 1980 and committed acts of violence and intimidation. However, the conduct of the field-rushers was isolated and remote in time from the election and would not tend to create an atmosphere of fear and coercion that would interfere with employees' free choice. The IHE therefore recommended that the Employer's objection to the election be dismissed and the UFW be certified as exclusive representative of Respondent's agricultural employees

BOARD DECISION

The Board adopted the IHE's rulings, findings, conclusions, and recommendations, dismissed the objection, and certified the UFW.

* * *

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:

JOSEPH GUBSER CO.,

Case No. 80-RC-47-SAL

Employer,

and

UNITED FARM WORKERS OF
AMERICA, AFL-CIO,

Petitioner.

Robert M. Hinrichs
Abramson, Church & Stave
for the Employer.

Carmen S. Flores and Stephen
Matchett for the United Farm
Workers, AFL-CIO.

DECISION

STATEMENT OF THE CASE

JANET VINING, Investigative Hearing Examiner: This case was heard before me on October 22 and 23, 1980,^{1/} in Gilroy, California.

On August 19, 1980, the United Farm Workers of America, AFL-CIO (hereinafter "UFW" or "Union") filed a petition for certification of the agricultural employees of Joseph Gubser Co. (hereinafter "Employer" or "Gubser"). The Agricultural Labor Relations Board [hereinafter "ALRB" or

^{1/} Unless otherwise specified, all dates are in 1980.

"Board") subsequently conducted an election on August 16, 1980. The results of the election were as follows:

UFW	116
No Union	9
Unresolved Challenged Ballots	<u>50</u>
Total Ballots	175

Following the election, the Employer timely filed an objections petition pursuant to Labor Code section 1156.3 (c). The Executive Secretary dismissed two of the Employer's objections and set a third for hearing. The Employer then filed, pursuant to 8 Cal. Admin. Code section 20393(a), a request for review of the Executive Secretary's dismissal of objections. On October 20, 1980, the Board upheld the Executive Secretary's dismissal of the two election objections.^{2/}

The issue set for hearing was:

Objection 1, whether an incident which occurred on August 7, 1980, when UFW supporters entered the Employer's garlic field on the Anderson Ranch, affected the outcome of the election.

Representatives of both the Employer and the UFW were present throughout the entire hearing and were given a full opportunity to participate in the proceedings. Both the

2/ In its Brief after Hearing, the Employer renewed and incorporated its request for review of the Executive Secretary's dismissal of the two election objections. Those objections were dismissed pursuant to the Board's post-election objections procedures, 8 Cal. Admin. Code section 20365, which received the approval of the California Supreme Court in *J. R. Norton Co. v. Agricultural Labor Relations Board* (1979) 26 Cal. 3d 1. The Employer's request is therefore denied.

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 reach the following conclusions of law:

JURISDICTION

Neither party challenged the Board's jurisdiction in this matter. Accordingly, I find the Employer is an agricultural employer within the meaning of Labor Code section 1140.4(c), and the UFW is a labor organization within the meaning of Labor Code section 1140.4 (f).

FINDINGS OF FACT

The Employer's Garlic Operation

The Employer grows a late-harvest variety of garlic. The harvest begins in mid-July, when the garlic is pulled from the beds in which it is grown and placed in rows called windrows to dry and cure. If the garlic is allowed to dry completely while in the ground, the bulb may break from the stem during pulling. When the garlic has dried in the windrows, the next operation, trimming or topping, begins.' In this process, a worker shakes the loose dirt from the garlic and removes the top. The Employer reaches its peak employment period during the topping operation.

In 1980, the Employer started pulling garlic in July. However, before the pulling was completed, the Employer voluntarily shut down its garlic operation for about two weeks because of a general garlic strike in the Gilroy-Hollister area. In early August, Ginnis McFadden, a buyer who sells

braided garlic, ^{3/} asked the Employer to supply him with garlic pursuant to an earlier agreement. McFadden pressed his request because the longer the garlic dried in the windrows, the greater the likelihood that the bulbs would break off from the stems before braiding was completed. The Employer agreed to gather some garlic for McFadden and put a small crew to work on August 7 placing already-pulled garlic into large bins.

The August 7 Incident

On Thursday, August 7, 1980, a crew of nine employees worked in the Employer's Anderson field, located at the intersection of Anzar Road and San Juan Highway in San Benito County. ^{4/} Anderson field is a large field of about 45 acres and is bordered, directly across from San Juan Highway, by a large ditch. A dirt farm road parallels this ditch.

August 7 was the first day any employees had worked on the Employer's premises since the decision two weeks earlier to shut down operations until general strike activity in the area subsided. The crew went to work in the southeast corner of Anderson field, in the area farthest from both Anzar Road and San Juan Highway. Also present in the field were Gilberto Retiz, the crew foreman, William L. Lane, Jr., Gubser's general

3/ I hereby correct the several incorrect references in the hearing transcript to "grading" and "gradability" of garlic instead of "braiding" and "braidability".

4/ The following description of the August 7 incident is based on the testimony of foreman Gilberto Retiz, general manager William L. Lane, Jr. and farm manager Joseph R. Lane. The testimony of these three witnesses concerning the incident was substantially consistent and was uncontroverted.

manager, Joseph R. Lane, Gubser's farm manager, Ginnis McFadden, the buyer, and a truck driver. The workers were picking up garlic from the windrows and placing it in large bins. Foreman Retiz was driving a forklift, taking empty bins to the workers and picking up bins filled with garlic.

At approximately 1:00 or 1:30 p.m., a group of cars approached the field. Four to six cars stopped on San Juan Highway, and an additional four to six cars continued to Anzar Road and parked there.^{5/} A group of people got out of the cars on San Juan Highway and started to enter the field.^{6/} They did not, however, penetrate the field to where the crew was working. About 30 people got out of the cars parked on Anzar Road^{7/} and began to cross the field, moving toward the area where the employees were working. William Lane testified that about one-fourth of the people carried red flags that displayed the UFW's symbol, the black aztec eagle. The field was posted with no trespassing signs.

5/ William Lane took photographs of the people who entered the field, and he testified that Employer's Exhibit B, a photograph he took while facing Anzar Road, shows all the cars parked on Anzar Road. There are six cars in the photograph.

6/ Gilberto Retiz testified that about five people got out of the cars on San Juan Highway, while William Lane testified that there were about 20 people.

7/ William Lane testified that Employer's Exhibit B also shows all the people who left the cars parked on Anzar Road. Although the photograph was taken at some distance from the cars, it shows 20 to 25 people entering the field from Anzar Road.

As the people entered the field from Anzar Road, they began to run and wave their flags, yelling in Spanish in an angry tone. They progressed across the field at different speeds and, although they attempted to run, their progress was impeded by the clods, garlic beds, and windrows of garlic in the field, Joseph Lane testified that, when the people . entered the field, he told the crew, "Don't run, that's what they want you to do." ^{8/} Joseph Lane then ran toward the group that had entered the field and yelled, "You're trespassing. Get out of here." ^{9/} The people ran past Lane and continued toward the workers, picking up hard dirt clods or rocks and throwing them at the workers. Gilberto Retiz testified that he heard the people who entered the field say, "I told you guys before to get out of the fields," and also heard them use swear words in Spanish, such as "you sons of bitches". ^{10/} Some of the workers

8/ Joseph Lane made this statement in English. He testified that most of the nine employees working on August 7 spoke English, with the possible exception of the two newest employees, who probably did not understand his statement.

9/ Joseph Lane testified that he made this statement in both English and Spanish.

10/ Retiz also testified that the people entering the field said "We're after the Mexicans, we are not after the gringos". However, on further questioning, Retiz indicated that he did not actually hear this statement on August 7, but a few days earlier, or at some other time, and that he "just knows" that the people who entered the field are after the Mexicans and not the gringos.

ran out of the field as soon as the people with the flags entered. Others seemed bewildered and continued to work, and then left when the clods were thrown. Some workers ran to a house located on the other side of the ditch, more than 100 yards off the field, and others ran to a barn located past the ditch off the southeast corner of the field. None of the crew members remained in the field. No one saw any workers hit by dirt clods.

After all the workers had run out of the field, the people with the red flags started walking out of the field along the dirt road that parallels the ditch. Both William and Joseph Lane had cameras. William Lane took pictures while following the people with flags as they left along the dirt road, ^{11/} and Joseph Lane ran in front of the group to try to get a picture. Joseph Lane had positioned and aimed his camera to take another picture when he was hit with one of the flags. The flag struck Lane's hand, knocking the camera to the ground. As Lane was bending down to retrieve his camera, he was hit again with a flag across his upper left arm or shoulder, and the flag carrier stepped on Lane's camera. ^{12/}

11/ All the photographs taken by William Lane were admitted into evidence as Employer's Exhibits B through F. They show the progressive movement of the people as they entered the field from their cars on Anzar Road, moved across the field, and then left along the dirt farm road which parallels the ditch. Some of the people in the photograph carry red flags. Joseph Lane took one picture when the people first entered the field from Anzar Road, and that photograph, admitted into evidence as Employer's Exhibit G, shows a group of people in the field. As in the other photographs, some of the people carry red flags.

12/ Joseph Lane testified that he bent down partly to pick up his camera and partly from the force of the second blow.

As Lane stood up, he hit or pushed the man who had stepped on his camera. Ginnis McFadden then grabbed Lane, and one of the people who had entered the field grabbed the person who had hit Lane with the flag. All parties were quite angry by this time, but avoided any further violence.

At the same time that this incident occurred, Retiz was seated on his forklift approximately 80 to 100 feet from Joseph Lane. When Retiz saw what was happening to Lane, he yelled "Let him, leave him, leave him alone" in Spanish. As Retiz tried to get down from the forklift, several dirt clods were thrown in his direction. One hit the front of the forklift, and one hit Retiz on the right temple just next to his eye, causing a large cut which began to bleed profusely.^{13/} Retiz testified that he could not tell which individual threw the clod that hit him, but he knew it was one of the people who had entered the field.

Joseph Lane then went to help Retiz and took him to the hospital, where Retiz received eleven stitches for his cut. Retiz testified that the entire field-rushing incident, from the time the people entered the field until they had walked out along the dirt road, took about 10 to 15 minutes.

When Joseph Lane and Retiz went to the hospital, William Lane and McFadden remained in the field. About half an hour after the people with red flags left the field, most of

13/ William Lane testified that the ground in the field had a high clay content and broke into clods with sharp, ragged edges that could injure someone when thrown.

the crew members had returned to the area where they had been working, and William Lane talked to them about finishing the work for McFadden. Earlier, Lane had radioed his office from his truck, and the office had in turn notified the local police. A policeman arrived about the time the workers returned to the field and said that he would check back at the field every half hour. The workers agreed to return to work and fill a few more bins of garlic for McFadden. William Lane testified that the workers worked with reduced efficiency in the afternoon because they were nervous, and it took them longer to complete the same amount of work they had finished in the morning.

At about 5:00 p.m., Joseph Lane and Retiz returned to Anderson field, where three workers (Sam Villarreal, Enrique Ortega and Juan Caudillo) were waiting for them. The group discussed the field-rushing incident.

Juan Caudillo, who worked in the crew on August 7, was the only non-supervisory Gubser employee that testified at the hearing. Caudillo testified that he ran when the people with flags entered the field because they started throwing dirt clods and yelling bad words, and he was afraid that he would get hurt.

The Return to Work

On Monday, August 11, the Employer started a labor contractor crew working on one of its other properties, the Toro Ranch. The crew was provided by labor contractor Jesus Quintero. On Tuesday, August 12, the Employer hired about 20 or 30 workers to begin pulling garlic in Anderson field. During the next three days, the number of workers in the Employer's own crew increased to about 60. Retiz missed a week's work because

of his swollen eye, and when he returned on August 18, there were about 40 employees pulling and 150 topping in the Employer's crew. Because of the two-week shutdown in its operation, the Employer had fallen behind in its production schedule and had to hire more workers through a labor contractor than it normally would in order to complete its harvest. In addition to the Employer's own crew of about 200 employees, there were sometimes as many as three labor contractor crews of 75 to 100 employees working on the Employer's property in August, 1980.

ANALYSIS

Introduction

The Board has held that threats of violence and actual violence to workers violate the Act. Western Conference of Teamsters (V.B. Zaninovich) (Jan. 21, 1977) 3 ALRB No. 57. Where threats, including verbal threats, are made during the critical period prior to a representation election, the Board will consider whether or not the alleged misconduct created an atmosphere in which employees were unable to freely choose a collective bargaining representative. Patterson Farms, Inc., (Dec. 1, 1976) 2 ALRB No. 59.^{14/} The Board has also stated that it will follow National Labor Relations Board (NLRB) precedent and set aside elections where physical attacks and threats of physical attack on employees contribute to create an atmosphere which is not conducive to the expression of a free and untrammelled choice of a bargaining representative. Phelan and Taylor Produce (Jan. 29, 1976) 2 ALRB No. 22.

^{14/} See, for example, San Diego Nursery Co., Inc., (June 14, 1979) 5 ALRB No. 43; Triple E Produce Corporation (Aug. 21, 1980) 6 ALRB No. 46; Jack or Marion Radovich (Jan. 20, 1976) 2 ALRB No. 12.

In Phelan and Taylor Produce, the Board set aside an election because of unprovoked acts of violence by Teamster representatives against UFW organizers. These attacks occurred in the presence of workers, six days before the election and on the day before the election. The Board found violence or threats of violence by parties' representatives to be objectionable for several reasons. Such violent acts may improperly influence an employee to vote for the party associated with the violence out of fear of retaliation, or may deter representatives of other parties from campaigning for fear of the safety of their representatives or fear that the employees may unwillingly get involved in a dangerous situation. Condoning such violent acts in the course of an election campaign would risk elections being conducted in an atmosphere not conducive to free choice, and would also risk impairment of the integrity of the Board's election processes. Phelan and Taylor Produce, supra, 2 ALRB No. 22.

The issue presented in this case is whether the field-rushing incident on August 7 in Anderson field created an atmosphere of fear and confusion which deprived the employees of an opportunity to express a free and uncoerced choice of a collective bargaining representative in the August 26 election.

The Agency Question

The Employer alleges that the people who entered Anderson field on August 7 were authorized agents of the UFW, and their conduct is therefore attributable to the UFW. ^{15/} The Employer

15/ The burden of proof in determining union agency is on the party asserting the agency relationship. San Diego Nursery, Inc., supra, 5 ALRB No. 43.

argues that an agency relationship is proved by (1) the fact that some of the people who entered the field carried red flags bearing the UFW's black aztec eagle, and (2) the occurrence of four other incidents at other ranches on the same day.

The NLRB recognizes that it is necessary to consider whether conduct complained of was committed by the parties to the proceeding or by rank and file employees, since "the conduct of third persons tends to have less effect upon the voters than similar conduct attributable to the employer who has, or the union which seeks, control over the employees' working conditions." Owens-Corning Fiber glas Corporation (1969) 197 NLRB 219 (72 LRRM 1289). The ALRB has adopted this principle and, in determining whether an election should be set aside, accords less weight to the conduct of a non-party than to that of a party. Takara International, Inc., dba Niedens Hillside Floral (March 15, 1977) 3 ALRB No. 24.

William Lane testified that about one-fourth of the people who entered Anderson field from Anzar Road carried red flags bearing the UFW symbol. The Board has held that the fact that employees were active union proponents is not sufficient to attribute to the union responsibility for their misconduct, absent evidence that the union was aware of, authorized, approved or ratified the conduct. Tepusquet Vineyards (December 19, 1978) 4 ALRB No. 102; D'Arrigo Bros, of California (May 10, 1977) 3 ALRB No. 37; S. A. Gerrard Farming Corp. (August 26, 1980) 6 ALRB No. 49. An agency relationship is not established merely by evidence that employees solicited authorization cards and

distributed leaflets in support of a union, or functioned as an in-plant organizing committee. San Diego Nursery Co., Inc., supra, 5 ALRB No. 43. Therefore, the fact that the people who entered Anderson field on August 7 carried flags bearing the UFW symbol is by itself insufficient to establish an agency relationship.

The Employer alleges, however, that the UFW was in fact aware of and approved, if not ordered, the field-rushing incident on August 7. The Employer argues that the UFW, in an effort to revive the weakening garlic strike, mounted a concerted county-wide campaign of violence on August 7 to force the workers out of the fields and to maintain the strike. In support of this argument, the Employer cites Joseph Lane's testimony and Employer's Exhibits H through L.

Joseph Lane testified that, when he and Gilberto Retiz returned from the hospital where Retiz's cut was treated, they stopped at the San Benito County Sheriff's Office to register a complaint concerning the field-rushing incident. They spoke with Officer Boomer, who apologized for not being able to send someone to Gubser's field when called because the sheriff's office was busy responding to other complaints of violence received that day. Boomer indicated that picketing had been fairly quiet up until Thursday, August 7, which was the only day during the entire garlic strike when there was any real violence.

Admitted into evidence over the UFW's objection were Employer's Exhibits H through L, copies of five separate documents entitled "labor dispute incident report". One of the reports

describes the complaint filed by Joseph Lane and Retiz concerning the Anderson field incident; the other reports indicate occurrences on August 7 at fields operated by Bertuccio Farms, Castle Farms and B & R Farms. The reports concerning Bertuccio Farms and B & R Farms include a very brief description of some picket line activity, while the report concerning Castle Farms contains no description at all. For the following reasons, I find that these reports, even in conjunction with Joseph Lane's testimony, are insufficient to establish that the UFW was aware of, approved or ratified, the August 7 field-rushing incident.

First, Lane's description of his conversation with Officer Boomer and the copies of the labor dispute incident reports are hearsay and, under the Board's regulations, are not sufficient to support a finding of fact. ^{16/} No exception to the hearsay rule was cited by the Employer, nor was any exception established as applicable to either Lane's testimony or the police reports.

Assuming, arguendo, that the evidence offered by the Employer could support a finding, the evidence would still be insufficient to establish that the people who entered Anderson field were UFW agents. There is no indication of who participated in the other incidents on August 7 or their relationship to any of the parties; nor is there any detailed description of what happened at the other ranches, or any basis for finding that the UFW was aware of, approved or ratified such incidents. The Employer cited no legal precedent to support its argument that the

^{16/} 8 Cal. Admin. Code section 20370 (c).

occurrence of several incidents on the same day is itself sufficient to show that all incidents were authorized or approved

by the UFW. ^{17/}

None of the witnesses who were present on August 7 in Anderson field recognized any of the people who entered the field. None of the people who entered the field were identified at the hearing, nor was there any evidence of their prior activity on behalf of the Union or any action by the Union which would indicate a grant of authority to the group. The Employer has failed to show that the people who entered Anderson field on August 7 were agents of the UFW, and their conduct will therefore be treated as that of non-parties.

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^{17/} Although the Employer did not specifically argue that an agency relationship was established pursuant to the doctrine of apparent authority, I find there is insufficient evidence to establish agency pursuant to that doctrine. In S. A. Gerrard Farming Corp., supra, 6 ALRB No. 49, the Board stated that, in determining whether an agency relationship can be found under the principle of apparent authority, it will consider whether any act or omission of any party has given the employees reasonable cause to believe that any agency relationship exists. The fact that the people who entered Anderson field carried red flags bearing the UFW's symbol is insufficient cause to believe that they were UFW agents rather than union supporters, and there is no evidence that any Gubser employees knew of Officer Boomer's statements to Joseph Lane or were aware of any of the other incidents that allegedly occurred on August 7.

This agency determination does not end the inquiry, however. The NLRB has held that the fact that fear and disorder were created by individual employees or nonemployees whose conduct cannot be attributed to the union is not controlling. Rather, the significant fact is that such conditions existed and a free election was thereby rendered impossible. Al Long, Inc. (1968) 173 NLRB 447 (69 LRRM 1368); Diamond State Poultry Co., Inc. (1953) 107 NLRB 3 (33 LRRM 1043); The Gabriel Company Automotive Division (1962) 137 NLRB 1252 (50 LRRM 1369).

For example, in Sonoco of Puerto Rico, Inc. (1974) 210 NLRB 493 (.86 LRRM 1122), the NLRB set aside an election because, on four different occasions, employees were personally threatened with physical violence if they did not vote for the union. Three of the threats were made within two days before the election. In Al Long, Inc., supra, 173 NLRB 447 (69 LRRM 1368), the NLRB set aside an election which was conducted during an often violent and emotion-filled strike, and where events occurring during the critical period preceding the election included extensive property destruction, anonymous telephone threats to eligible voters, the report of a bomb threat and subsequent police investigations, and unruly conduct on the picket line which required the stationing of a full-time police officer and police car at the employer's premises. And in Poinsett Lumber and Manufacturing Company (1956) 116 NLRB 1732 (39 LRRM 1083), the NLRB set aside an election where, on four occasions during the week preceding the election, individual employees were threatened with physical violence or economic loss if they voted against the union. Two employees who heard one of the threats signed

authorization cards which they had previously refused to sign. One threat made two days before the election was commonly discussed among almost all the employees in the plant, and some employees were so frightened that they called the sheriff for protection. See also Gabriel Company Automotive Division, supra, 137 NLRB 1252 (50 LRRM 1369).

In Ciervo Blanco, Inc. (1974) 211 NLRB 578 (86 LRRM 1452), the NLRB disagreed with the regional director's conclusion that the effect of picket line misconduct was dissipated by the almost thirty-day lapse between the objectionable conduct and the election. The Board found that the conduct occurred during the critical period before the election and was grounds to set the election aside. However, the misconduct was quite serious, including the firebombing and damaging of employees' homes and automobiles. In addition, strikers, accompanied by a union organizer, visited employees' homes and warned them not to cross picket lines or their persons and families would be injured and their property damaged. See also Bloomington Brothers, Inc., (1949) 87 NLRB 1326 (25 LRRM 1242), where union organizers physically attacked two non-union employees a month before the election, and this violence was followed by a series of "threats of bodily harm and of individual economic disaster" made by union officials, paid organizers and shop stewards "against a background of the widely known physical attack."

I will now review the evidence presented at the hearing to determine, in light of the above cases, whether the August 7 incident resulted in an atmosphere of confusion and fear of

reprisal for failing to vote for or support the Union, which deprived the employees of the opportunity to freely express their choice of a collective bargaining representative in the August 26 election.

The Employer alleges that the August 7 field-rushing incident affected the outcome of the election in two ways: first, that the employees were threatened and intimidated by the violence and remained fearful of the UFW up to the time of the election; and second, that the fear created by the August 7 incident caused many of the Employer's regular employees not to return to work after Gubser resumed full operations, and the Employer was therefore required to hire an unusually high number of workers through a labor contractor in order to complete its garlic harvest. The Employer argues that the change in the composition of the workforce affected the outcome of the election because only a minority of the eligible voters were regular Gubser employees who return to work for the Employer year after year. For the reasons discussed below, I find that the Employer has failed to show that the August 7 field-rushing incident affected the August 26 election in a manner which requires setting the election aside.

Atmosphere of Fear and Coercion

At the hearing, the Employer attempted to demonstrate that its employees were already apprehensive when they returned to work on August 7. William Lane testified that the Employer decided to work the crew in the area of Anderson field farthest from any public roads to reduce the possibility of any non-employees entering the field. Lane could contact the Employer's

office immediately through his car radio if anything happened. Lane testified that, although the employees had not requested this protection, the Employer offered it on its own initiative. Joseph Lane testified that the crew was somewhat tense on August 7 because it was the first day back to work since the garlic strike began, and the employees looked toward the roads near the field as they worked.^{18/} Although Juan Caudillo, one of the employees working on August 7, testified at the hearing, he did not mention any threats he had received or any uneasiness he felt while working that day.

Joseph Lane also testified that, while he was checking on some workers in the field on some other day,^{19/} he found the workers in their cars. When Lane asked why they were in their cars, the workers responded that they were threatened and did not feel safe working. Although Lane testified that he spends most of his time in the fields and is familiar with the regular Gubser employees, he did not name the workers in the cars, describe when or where this incident occurred, or indicate who made the threats or the contents of any threats.

18/ Lane also testified that the people working on August 7 had been threatened by UFW members, who told them that they did not want to see any employees working in the fields. However, no worker testified concerning any threats, and no witness testified concerning specific threats.

19/ It is unclear from Lane's testimony whether he was referring to a day before or during the two-week shutdown in Gubser's operations. William Lane testified that a few employees may have worked during that two-week period, driving a truck or cleaning irrigation pipe.

I find that the above evidence is for the most part hearsay, and is vague and conclusory. As such, it is insufficient to establish that on August 7, prior to the field-rushing incident, any Gubser workers felt threatened or any general feeling of anxiousness or fear prevailed among the Gubser employees.

The Employer also attempted to establish that the fear and intimidation experienced by the employees who witnessed the August 7 incident persisted until the August 26 election. Joseph Lane testified that the employees working on August 7 have not forgotten the incident and still talk about it, although their fear lessens as time passes. Lane also noted that the worker's production rate suffered after the field-rushing incident, and the employees did not work with the same carefree attitude Lane associates with a garlic harvest. Instead, the harvest occurred amidst a dull, tense atmosphere.

When questioned concerning specific conversations about the August 7 incident, Joseph Lane testified that five of the employees who worked on August 7 approached him to talk about the incident at different times during the day when they returned to work on Tuesday, August 12. Lane remembered Sam Villarreal asking how Retiz was and wondering what would happen next. Lane thought that the incident probably came up again on Wednesday, August 13, but could not remember any specific conversations.

Lane also testified concerning a conversation he had with the Santanas, a family that had worked for Gubser almost steadily during the garlic harvest for five or six years, but

did not work August 7. Sometime during the week after August 7, Lane asked the Santanas why they were not working for Gubser. There was no testimony concerning their response, and Lane could not remember if anyone else was present. The Santanas did not tell Lane that they had talked with any of the Gubser employees who worked on August 7. Lane testified that the Santana family came back to work for the Employer before the election, probably the day after this conversation. ^{20/}

Joseph Lane also remembered a conversation which took place in the field after work about a week before the election. Present were Gilberto Retiz, Joseph Lane, Juan Caudillo, Caudillo's brother and two or three of his friends. All were Gubser employees. The August 7 incident was raised during the conversation, probably by Sam Villarreal. The field-rushing incident was described, and the workers commented on how scared they had been. Villarreal, a heavysset man, joked about discovering that he could run 100 miles an hour. Joseph Lane testified that there was laughter in the conversation, as everyone tried to find some humor in the incident. Although Juan Caudillo was present durina the conversation, he did not mention it when he testified at the hearing.

William Lane testified that, from August 7 to August 26, Gubser's employees talked about the field-rushing incident while they worked in the fields and discussed the fact that Retiz was not working. Retiz testified that, after returning

^{20/} However, no employee named Santana appears in Petitioner's Exhibit 1, employment records used to prepare the eligibility list for the election.

from the hospital on August 7, he talked to a few of the employees working that day, and they said they were scared and continued to express that feeling until the day of the election.

Juan Caudillo, the only non-supervisory Gubser employee who testified at the hearing, said that he ran out of the field on August 7 because he was scared, and he stayed scared for a long time, until the August 26 election. Caudillo also testified about a conversation he had with another Gubser employee named Santiago, who was working on August 7. The men talked about how scared they both were. On further questioning, Caudillo revealed the context of his conversation with Santiago. Both men served as company observers at the August 26 election and came from the Watsonville polling site to the Veteran's Memorial Park site, where Santiago was the observer. After the election was over, the two men were seated at a table, surrounded by Union supporters who had gathered for the election. ^{21/} Caudillo testified that he and Santiago talked about being scared of getting hurt and did not talk about the clod-throwing incident or about Retiz. Apparently, their fear was caused by the fact that they were surrounded by UFW supporters while they acted as the Employer's representatives at the election.

Caudillo also testified that he and Santiago were working together cleaning and hoeing lettuce about a week before

^{21/} Although it is not entirely clear from Caudillo's testimony, the conversation apparently occurred after the election, during the ballot count.

the election. Only the two men were working, and they drove their cars into the field because they were nervous. When they saw picketers driving through the fields, they ran to their cars and were prepared to drive off. ^{22/}

Not all nine employees who worked on August 7 returned to work for the Employer before the election. ^{23/} Seven of the nine employees either were employed by Gubser on a fulltime basis or have worked for Gubser seasonally for several years. The other two employees were new and were working for Gubser for the first time on August 7. The seven regular employees returned to work for the Employer after the strike ended. Joseph Lane testified that five came back as soon as the Employer resumed operations, and two returned about 10 days to two weeks before the August 26 election. ^{24/} The remaining two, the employees who had never worked for Gubser before, did not return after August 7. Lane further testified that the employees who returned, with the possible exception of one, were not pulling garlic when they came back. One was undercutting garlic, and two were behind

22/ This may be the incident Joseph Lane referred to when he testified that he found some workers in their cars. See p. 19 infra.

23/ At the hearing, the parties stipulated that the nine employees working on August 7, 1980, were Manual Accuna, Jose Barrientos, Juan P. Caudillo, Francisco Orosco, Enrique Ortega, Ignacio Quintana, Herberto Sanches, Agustin Trejo, and Sam Villarreal.

24/ However, the names of only five of the nine employees (Juan P. Caudillo, Francisco Orosco, Enrique Ortega, Agustin Trejo, and Sam Villarreal) appear on Petitioner's Exhibit 1, employment records used to prepare the voter eligibility list for the August 26 election.

the undercutter making sure that the garlic was not cut or damaged. These three employees did not work with other Gubser employees, since the undercutting takes place before any pulling or topping, and occurs in one part of a field while crews are working elsewhere. Lane testified that some of the other regular employees who returned were probably supervisors. Juan Caudillo testified that he did not work with toppers or pullers any time after the August 7 incident; instead, he thinned lettuce with Santiago.

I find that the Employer has failed to establish that the August 7 incident in Anderson field created an atmosphere of fear and anxiety among the Employer's workers which persisted until the August 26 election. At most, nine non-supervisory employees were working in the field on August 7. They were frightened and intimidated by the people who crossed the field and threw dirt clods at them, and Juan Caudillo testified that he ran out of the field because he was afraid of getting hurt. At most, seven of those employees returned to work with Gubser, but there is no evidence that they told more than a few other employees about the field-rushing incident,^{25/} or that they worked with other employees who were not present at the August 7 incident, except for an employee named Santiago, who worked with Juan Caudillo thinning lettuce during the week before the election. Given the Union's wide margin of victory in the election,^{26/}

25/ The incident was discussed in a conversation at which Juan Caudillo's brother and a few of his friends were present. However, these other employees were not identified by name.

26/ There were 116 votes for the UFW and 9 votes for "no union".

the number of eligible voters shown to have been aware of or affected by the August 7 incident is insufficient to have had an impact on the results of the election.

The testimony of William Lane and Joseph Lane concerning general tension and anxiety among the Gubser workers after the August 7 incident is for the most part hearsay and is too vague and conclusory to support a finding that a general atmosphere of fear and intimidation was prevalent among Gubser employees before the election. William Lane did not describe any specific conversations he witnessed during the period from August 7 to the election. Joseph Lane's testimony indicates that the workers who were working on August 7 discussed the incident and inquired about how Retiz was feeling after his injury. Although Caudillo testified that he and another employee named Santiago felt scared at the election, the evidence indicates that their fear was caused by the fact that they were surrounded by UFW supporters while they acted as the Employer's representatives at the ballot count. Caudillo specifically testified that he and Santiago did not discuss the August 7 incident or Retiz's injury. There is no evidence that either Caudillo or Santiago spoke to any other employees the day of the election.

Change in the Workforce

The Employer also argues that the election must be set aside because the August 7 incident in Anderson field deterred its regular employees from returning to work, resulting in a distorted eligibility list containing an unusually high

proportion of labor contractor employees. The evidence presented at the hearing indicates that, although there was some change in the workforce from previous years, this change was caused by a variety of factors, and there is no evidence that the change is attributable to the UFW or was the product of a Union plan to influence the outcome of the election.

Joseph Lane testified that, during a normal harvest season, the Employer completes the pulling operation with its own crew of about 60 workers. The Employer then starts topping with a larger crew, and, if it falls behind in its work schedule, hires a labor contractor crew, normally using one such contractor crew each season. During peak employment, the pulling is usually completed and the employees are topping. At this time, about 2/3 of the employees are hired directly by the Employer, and the remaining 1/3 are hired through a labor contractor. The Employer's crew and the labor contractor's crew work separately, with different supervisors.

In 1980, the Employer fell behind in its production schedule because of the two-week shutdown in operations and was required to hire more labor contractor crews than it normally would. Joseph Lane testified that the Employer usually ran its own crew of 150 to 200 people, and an additional 75 to 100 people in a labor contractor crew. In 1980, in addition to Gubser's own crew of about 150 people, there were as many as

three different contractor crews working at the same time, with 75 to 100 workers in each crew. During the payroll period that determined eligibility to vote in the August 26 election, the proportion of directly-hired employees to labor contractor employees was reversed from previous years, and the workforce was approximately 2/3 labor contractor employees and 1/3 directly-hired employees.

William Lane testified that most of the people working for the Employer before it shut down its operation for two weeks were employees who regularly return to work for Gubser year after year. However, the people who came to work when the Employer resumed operations after the garlic strike settled had not previously worked for Gubser. ^{27/} Joseph Lane testified that, when the Employer resumed operations, the employees in the Gubser crew were not regular employees who had previously worked for the Employer. Instead, the crew contained a high number of people from the Salinas-Watsonville-Aromas area. Lane testified that families who had worked for Gubser for several years were not working during the eligibility period, and, therefore, only about 40 percent of the employees eligible to vote in the August 26 election were "veterans" or persons who normally would have been

27/ William Lane testified that he was familiar with the composition of the workforce because the eligibility list for the August 26 election was prepared under his direction. Lane also testified that people in the Gilroy area were afraid to go back to work for the Employer after the strike settled because they had been threatened at their homes or at the labor camp. However, no witnesses testified as to any specific threats or the identity of anyone who made or received a threat. In fact, William Lane testified that there was abundant labor available after the strike ended. I find that Lane's testimony is too vague to establish that threats were made, or that threats accounted for the failure of any workers to return to work for Gubser.

in the Employer's own crew. ^{28/} However, Lane also testified that, although he knows some of the employees who work for the labor contractor, he is not as familiar with the labor contractor employees as he is with the regular Gubser employees. Lane is sure that some of the labor contractor employees return to work at Gubser year after year. ^{29/}

The Employer also alleges that Retiz's week-long absence caused a change in the workforce because Retiz was not able to supervise his regular crew. Since there was no supervision for the Employer's crew, the labor contractor crew started Monday, August 11, at Toro Ranch, ^{30/}and the Gubser crew started Tuesday, August 12, at Anderson field. Joseph Lane spent some time supervising in Anderson field during the week that Retiz was absent, and there were also two or three other people - supervising the crew. If Retiz had not been injured, he could have started the Gubser crew one day earlier. However, Lane testified that the pulling crew can only function effectively at a certain size, and that even if Retiz had been working, the crew would not have been larger. ^{31/}

28/ Joseph Lane testified that he looked at the eligibility list used in the election in order to arrive at his estimates concerning the composition of the workforce.

29/ Refugio Bravo, a garlic worker, testified that he has worked for several garlic growers through a labor contractor, and sometimes returns to work for the same grower more than once. Bravo said that he often works for more than one company in a season, and knows of other garlic workers who change employers during a season.

30/ Joseph Lane testified that the labor contractor crew was going to begin working for someone else if it did not start at Gubser on Monday.

31/ In addition, William Lane testified that work began at Anderson field with a small crew because some of the garlic had been undercut and was so brittle that the crew had to be extremely careful to get the whole garlic out and not just the stem.

I find that Retiz's absence caused, at most, one day's work to be lost for the pulling crew, and the Employer was able to start a labor contractor crew that day at another location. The Employer has failed to show that the composition of the workforce changed because of Retiz's absence.

Although the evidence indicates that this year there was some change in Gubser's workforce from previous years, I find that the Employer has failed to show that the change is attributable to the UFW or is sufficient grounds to warrant setting aside the election. The Employer fell behind in its production schedule this year because of its voluntary decision to shut down operations for two weeks. It was the Employer's practice to hire a labor contractor crew when its own crew could not keep up with the work, and this year, since it was further behind than usual, the Employer hired more labor contractor crews than usual. The Employer has failed to name any regular Gubser employees who did not return to work after the August 7 incident,^{32/} and has not produced persuasive evidence indicating why any regular employees did not return to work at Gubser. The Employer had no trouble getting workers after the August 7 incident, and William Lane testified that there was an abundance of people looking for work.

32/ According to Joseph Lane, the one family he mentioned, the Santanas, returned to work shortly after talking to him. Lane testified that, of the nine employees working on August 7, the only two who did not return to work were the two who had never worked for Gubser before. The Employer presented no payroll records or other employment records to support its allegation that regular Gubser employees did not return to work after August 7.

The Employer cites no legal precedent for its argument that the election should be set aside because of a change in the composition of the workforce ^{33/} The Employer does not allege, nor has it shown, that it was not at 50 percent of peak employment when the election occurred, as required by Cal. Lab. Code section 1156.4, or that any persons who were ineligible to vote voted in the election.

The Board clearly does not condone the type of violence that occurred on August 7 in Anderson field. Phelan and Taylor Produce, supra, 2 ALRB No. 22. However, section 1156.3 (c) of the Agricultural Labor Relations Act requires that the Board certify elections unless it determines that there are sufficient grounds to refuse to do so. See Chula Vista Farms, Inc. (December 16, 1975) 1 ALRB No. 23. The burden is on the Employer in this case to show that the August 7 incident created an atmosphere of fear and coercion which deprived the employees of an opportunity to express a free and untrammelled choice of a bargaining representative. TMY Farms (November 29, 1976) 2 ALRB No. 58. I find that the Employer has not shown that the

33/ I reject the Employer's suggestion in its post-hearing brief that garlic workers like Refugio Bravo, who work for various garlic growers through a labor contractor, vote differently in a representation election because they are not "loyal" to one employer. Such a consideration is inappropriate in determining whether the results of an election should be certified. Employees hired through a labor contractor have the same interest in their wages, hours and working conditions as workers hired directly by an employer, and the ALRA protects the right of all agricultural employees to choose a collective bargaining representative. The Employer's concern seems especially specious in light of Joseph Lane's testimony that some of the labor contractor employees return to Gubser year after year, and Refugio Bravo's testimony that, while working through a labor contractor, he has returned to work for the same garlic growers more than once.

August 26 election was conducted in an atmosphere of coercion and hostility.

The August 7 incident was an isolated event which occurred almost three weeks before the election ^{34/} and was not authorized, approved, or ratified by the UFW. There is no persuasive evidence that the incident was the culmination of a series of threats of that a continuing atmosphere of fear and hostility persisted until the election. The type of violence which occurred was neither as egregious nor as widespread as the violence which has prompted the NLRB to set aside elections. See, for example, Al Long, Inc., supra, 173 NLRB 447 (69 LRRM 1368); Poinsett Lumber and Manufacturing Company, supra, 116 NLRB 1732 (39 LRRM 1083). There is no evidence of widespread knowledge of the August 7 field-rushing incident among the large group of employees who worked for the Employer before the election, nor is there evidence that the workers involved in the August 7 incident worked with other employees who were not present on August 7 or discussed the incident with a significant number of employees before the election. ^{35/}

34/ See Bridgeport Castings Company (1954) 109 NLRB 749 (34 LRRM 1433).

35/ The NLRB has recently held that, in order to be sufficient to set aside an election, the conduct complained of must not only be coercive, but "must be so related to the election as to have had a probable effect on the employees' action at the polls." Hickory Springs Manufacturing Co. (1978) 239 NLRB 641 (99 LRRM 1715). There is no evidence that the people who entered Anderson field on August 7 made any statements which involved threats to employees based on how they would vote in an election, and no statements were made relating to events surrounding or concerning an election. It is unlikely that the incident would have coerced the employees into voting in a particular manner, and it thus could not have affected the outcome of the election. Firestone Steel Products (1979) 241 NLRB No. 57 (100 LRRM 1612).

Even if the August 7 incident coerced and intimidated those employees who were working on August 7 or who were shown to have been aware of the field-rushing incident, the number of such employees is insufficient to have affected the outcome of the election, given the UFWs wide margin of victory.

CONCLUSION

For all the above reasons, I conclude that the August 7 incident in Anderson field did not create an atmosphere of fear and coercion which deprived the employees of an opportunity to exercise their free choice in the August 26 election, and the August 7 incident therefore does not warrant setting aside the election.

RECOMMENDATION

Based on the findings of fact, analysis and conclusions herein, I recommend that the Employer's objection be dismissed and that the United Farm Workers of America, AFL-CIO, be certified as the exclusive bargaining representative of all the agricultural employees of the Employer in the State of California.

DATED: January 19, 1981

Respectfully submitted,



JANET VINING

Investigative Hearing Examiner