

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

ADAMEK & DESSERT, INC.,)	
)	
Employer,)	Case No. 80-RC-1-EC
)	
and)	
)	
UNITED FARM WORKERS)	8 ALRB No. 27
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 December 8, 1980, a representation election was conducted on December 15, 1980, among the Employer's agricultural employees. The Official Tally of Ballots showed the following results:

UFW.	38
No Union	33
Challenged Ballots	<u>8</u>
Total.	79

The El Centro Regional Director concluded that the eight challenged ballots should not be counted because those voters were not employed during the voter eligibility period. Neither party objected to that determination which then became final.

The Employer timely filed three post-election objections all of which were dismissed by the Executive Secretary. The Employer sought review by the Agricultural Labor Relations Board (ALRB or Board) of the decision to dismiss its post-election

objections. The Board granted in part the Employer's Request for Review and directed a hearing on the following issue:

Whether the UFW engaged in coercive and intimidating conduct during its election campaign by assembling large numbers of people during the early morning hours at the residence of prospective voters and, if so, whether such conduct affected the outcome of the election.

The hearing was held on July 28 and 29, 1981. Investigative Hearing Examiner (IHE) Ismael A. Castro issued his Decision on November 13, 1981. Thereafter the Employer filed timely exceptions to the IHE's Decision, with a supporting brief, and the UFW filed a timely reply brief.

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

The Board has considered the record and the attached IHE Decision in light of the exceptions and briefs of the parties and has decided to affirm the IHE's rulings^{1/} and findings, as modified herein, and to adopt his recommendations.

^{1/}Oscar Mondragon was the UFW El Centro field office director during the 1980 organizational campaign. The Employer introduced evidence establishing Oscar Mondragon's conviction of arson of 11 buses at El Hoyo during a 1974 organizational campaign in El Centro and newspaper accounts for 1974 and 1975 covering the incident and his role therein. The evidence was admitted over UFW objections that the evidence was irrelevant. The IHE took the UFW motion to strike the above evidence under submission for a ruling. In his Decision, the IHE granted the motion to strike and ruled that the pre-petition activity of Mondragon was too remote in time to have affected the employees' free choice in this election and that no testimony was presented by Employer's witnesses connecting that activity with the 1980 election. The Employer also sought to introduce this evidence on the basis of attacking Mondragon's [fn. 1 cont., on p. 3]

We find that the evidence presented at the hearing on the single objection at issue was insufficient to carry the burden of the Employer to show that the UFW engaged in coercive or otherwise objectionable pre-election conduct which reasonably tended to affect the outcome of the election.

Specifically, on the issue of the UFW assembling large numbers of people during the early morning hours at the residence of prospective voters, we find no involvement of the UFW in that incident. The only incident referred to in this matter occurred at the residence of employee Jesus Torres Lizarraga, who presented the only credible testimony concerning such incidents,

Lizarraga testified that 12-14 people were observed by him on the street outside his home as he left for work. The unidentified persons were not carrying signs, nor were they chanting slogans or marching, Lizarraga testified that two or three individuals spoke to him as follows:

When they approached me, they asked me, 'What is happening with you?' I answered that I did not know. I asked why and he said because I see you unhappy. And I said that I cannot talk any longer, I had ... its a little late and I have to go to work. And that is all.

Lizarraga had executed an affidavit in support of the Employer's Objections to the Election, admitted in evidence at the hearing, that was inconsistent with his direct testimony to the nature of the assembly in front of his residence. The IHE resolved

[fn. 1 cont.]

credibility. The IHE ruled that Evidence Code section 788 permits use of prior convictions for impeachment purposes only when the basis of the prior felony relates "to dishonest conduct" and that, as the crime of arson does not involve conduct related to truthfulness, the evidence is inadmissible on that basis. We affirm these rulings of the IHE.

such inconsistencies by crediting Lizarraga's testimony at the hearing over the affidavit and we affirm his finding. Adam Dairy dba Rancho Dos Rios (Apr. 26, 1978) 4 ALRB No. 24.

Given the failure of the Employer to establish in this record that a residential visit in the early morning hours of large numbers of people as a part of the UFW organizing campaign occurred herein, we need not address its contention that such visits are per se intimidating and coercive and sufficient to affect the outcome of the election. We therefore dismiss that objection and uphold the election, and we shall certify the UFW as the bargaining representative.

CERTIFICATION OF REPRESENTATIVE

It is hereby certified that a majority of the valid votes has been cast for the United Farm Workers of America, AFL-CIO (UFW), and that, pursuant to Labor Code section 1146, the said labor organization is the exclusive representative of all the agricultural employees of Adamek & Dessert, Inc., in the State of California for the purpose of collective bargaining as defined in California Labor Code section 1155.2(a), concerning wages, working hours, and other terms and conditions of employment. Dated: April 1, 1982

HERBERT A. PERRY, Acting Chairman

JEROME R. WALDIE, Member

JOHN P. MCCARTHY, Member

CASE SUMMARY

Adamek & Dessert, Inc. (UFW)

8 ALRB No. 27

Case No. 80-RC-1-EC

IHE DECISION

The IHE dismissed the Employer's objection to the election which alleged that visits by large numbers of UFW supporters to the homes of potential voters coerced or intimidated those votes to the extent that the election should be set aside. The IHE found no showing by the Employer that home visits in mass numbers ever occurred and further found irrelevant, evidence offered by the Employer that a UFW organizer had been convicted of arson seven years prior to the election. The IHE therefore concluded that there was insufficient evidence to conclude that the election did not reflect the free choice of the voters and recommended that the UFW be certified.

BOARD DECISION

The Board affirmed the IHE's rulings, findings, and conclusions, and adopted his recommendation to certify the UFW as exclusive bargaining representative of the employees of Adamek & Dessert, Inc.

STATE OF CALIFORNIA
AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of:

ADAMEK AND DESSERT, INC.,

Employer,

Case No. 80-RC-1-EC

and

UNITED FARM WORKERS OF
AMERICA, AFL-CIO,

Petitioner.

William F. Macklin, Esq. of
Ewing, Kirk and Johnson for the
Employer.

Ned Dunphy, for the United
Farm Workers of America, AFL-CIO,

DECISION

STATEMENT OF THE CASE

ISMAEL A. CASTRO, Investigative Hearing Examiner: This case was heard before me on July 28 and 29, 1981, in El Centro, California. On December 8, 1980, the United Farm Workers of America, AFL-CIO (hereinafter referred to as "UFW") filed a Petition for Certification^{1/} in Case No. 80-RC-1-EC, in order to obtain a representation election for the bargaining unit of all of the agricultural employees of Adamek and Dessert, Inc. (hereinafter referred to as "Employer"). An election was

^{1/} Investigative Hearing Examiner's ("IHE") Exhibit 1.

conducted on December 15, 1980.^{2/} The Tally of Ballots from the election revealed the following results:

United Farm Workers	38
No Union	33
Number of Unresolved Challenged Ballots	<u>8</u>
Total Ballots	79 ^{3/}

On February 23, 1981, the El Centro Regional Director issued his challenged ballot report in which he concluded that the eight (8) challenged ballots should not be counted because these voters were not employed during the voter eligibility period. Neither party filed objections or appealed this determination which then became final.

On December 19, 1980 the Employer filed its objections to the election and the Executive Secretary, by order dated January 26, 1981, dismissed all three (3) of these objections. The Employer thereafter filed its request for review with the Agricultural Labor Relations Board (hereinafter referred to as "ALRB" or "Board") on February 6, 1981. On March 26, 1981, the Board granted in part and denied in part the Employer's request for review directing that the Executive Secretary conduct an investigative hearing on the Employer's objection number 2, and affirmed the Executive Secretary's order dismissing the Employer's objection numbers 1 and 3.^{4/} The

2/ IHE Exhibit 2.

3/ IHE Exhibit 3.

4/ IHE Exhibit 4.

Employer timely filed a Motion for Reconsideration of the Board's order on April 3, 1981, and the Board denied the Employer's Motion on May 18, 1981. Thereafter, by order of the Executive Secretary dated June 11, 1981, the Employer's objection number 2 was set for hearing.^{5/} Evidence at the hearing was limited to the following issue:

"Whether the United Farm Workers of America, AFL-CIO, engaged in coercive and intimidating conduct during its election campaign by assembling large numbers of people during early morning hours at the residences of prospective voters and, if so, whether such conduct affected the outcome of the election."

On June 22, 1981, the Employer filed with the Executive Secretary a Motion for Continuance of hearing which was denied by order dated July 6, 1981. The Employer did not seek review of this denial with the Board.^{6/}

All parties were represented at the hearing and were given full opportunity to participate in the proceedings. Both parties submitted post-hearing briefs on August 18, 1981. At the hearing, the UFW objected to various testimony and documents introduced by the Employer on the ground that such evidence was irrelevant. The UFW also moved to strike

5/ IHE Exhibit 5.

6/ At the hearing upon request by the Employer, I took administrative notice of all of the pleadings contained in the Executive Secretary's Master File in this case and ordered that all such documents be included in the record for review by the Board. 8 Cal. Admin. Code section 20370(o), however, directs which documents shall be included in the record on review by the Board. It appears, therefore, that I transgressed authority of this regulation section. Accordingly, I reverse my order in this matter. If the Employer wishes to renew its request, it should direct itself to the Board.

such testimony from the record. At the conclusion of the hearing, I ordered both parties to brief the issues and submit them with their post-hearing briefs thereby taking the UFW's objections and motion under submission. The Employer also filed a written motion, dated August 25, 1981, to strike a paragraph of the UFW's post-hearing brief and the UFW filed a written motion, dated September 28, 1981 to strike all of the Employer's post-hearing brief.^{7/}

Upon the entire record, and after consideration of the arguments made by the parties, I make the following findings of facts, conclusions of law, and recommendation.

FINDINGS OF FACT

I. Jurisdiction

At the hearing, the Employer stipulated that it is an agricultural employer within the meaning of Labor Code section 1140.4 (c). The UFW also stipulated that it is a labor organization within the meaning of Labor Code section 1140.4(f).

II. The Alleged Misconduct

A. The Testimony of Oscar Mondragon

Mr. Mondragon testified that he is currently the UFW's field office director in Salinas, California. He is also a national board member of the United Farm Workers Union and at one time was also a national representative. Moreover, in the past ten (10) years he has been an organizer for the UFW,

^{7/} All of these motions and objections will be decided in this decision.

although not now. From September 1980 to June 1981, including the time of the election in this case, Mr. Mondragon was the UFW field office director in Calexico, California, commonly referred to as "El Hoyo" (the hole).

His duties as director included supervision of office personnel and two organizers, and administering the collective bargaining agreements in the Imperial Valley. Mr. Mondragon also participated in negotiating sessions and supervised representation election campaigns in the area. As part of his duties supervising election campaigns, Mr. Mondragon made sure proper procedures were followed. He would make sure that there were sufficient authorization cards, that the proper forms were completed and that "any violations" were not being committed. As to the sufficiency of the authorization cards, Mr. Mondragon testified that he would ask the organizers the amount of cards they had. He would not gather signatures himself.

During the Adamek and Dessert election, Mr. Mondragon supervised and met with UFW organizer Gilbert Rodriguez who was involved in the election campaign. During the campaign, Mr. Mondragon met and addressed the Employer's employees once or twice before the election and a couple of times after the election. All of these meetings would take place at the Calexico field office. Mr. Mondragon could not remember the exact times he met. However, he did recall that at these meetings there were approximately 15 employees present.

Mr. Mondragon further testified that in this campaign the workers came to the UFW field office and requested that the UFW represent them. The workers were told that they would have to form an organizing committee first, which they did. The workers were also told that they would have to talk to their fellow workers and get authorization cards signed, which they also did. Mr. Mondragon then checked to see if there were sufficient authorization cards signed to file the petition for certification.

Mr. Mondragon also testified that there was a program for visiting workers at their residences. This program was a "standard procedure" that the UFW followed in elections. The program would be initiated after the filing and acceptance of the petition for certification. At that time they would review the employee list submitted by the company, meet with the organizing committee of workers and delegate some people to visit the employees. The visitors would be in groups of two (2) or three (3) at the most. Mr. Mondragon and the UFW organizer, however, would not go to any workers' house as part of this program and in the Adamek & Dessert election campaign, they also did not visit any workers at their residences.

As to the visits, the organizer would first ask the workers who they thought should be visited. The workers to be visited were mainly those people who couldn't be reached because they were working in a far location, such as tractor drivers, or irrigators. Mainly workers who didn't work in a group or who didn't know about the union would be visited.

All of the information about the workers were provided by the workers themselves. Also, as part of this program, both union and nonunion supporters would be visited.

As to the initiation of this program, organizer Rodriguez would meet with the organizing committee and the UFW would decide how to implement the program. That decision was not for the committee to decide. Mr. Mondragon, however, testified that he did not directly take part in that process. He would meet with organizer Rodriguez and review the work that had to be done according to the committee. If needed, Mr. Mondragon would make recommendations. He would not necessarily review with the organizer which individuals would be visited. In the instant election, Mr. Mondragon testified that he did not know who was visited, although he did know that people were being visited.

In visiting other employees, the workers would divide into small groups and visit different people. Only Adamek & Dessert employees would do the visiting. At times employees not known to the visiting workers would be visited because workers' names would appear on the employee list not known by other workers. These visits would usually occur after work hours, although Mr. Mondragon, to his knowledge, did not know if visits occurred before work hours. Mr. Mondragon also testified that he did not know if ever a group in excess of two (2) or three (3) workers made visits, although it could have been possible that

such a visit occurred during the election campaign.^{8/}

B. The Testimony of Jesus Torrez Lizarraga

Mr. Lizarraga testified that he resides in Calexico, California, and is employed by the Employer as a tractor driver. He has worked for the Employer for the past ten (10) years with a brief absence prior to 1979. Since 1979, however, he has worked continuously for the Employer. Mr. Lizarraga further testified that at the election conducted on December 15, 1980, he participated as the UFW observer and also voted.

Approximately ten (10) days prior to the election, as Mr. Lizarraga was leaving his residence to go to work at 5:15 or 5:20 a.m., he observed for the first time 12 to 14 people outside his residence. He first saw these people as he was approaching his car. Aside from the 12 to 14 people who approached him, he thought he observed 4 to 5 individuals who stayed in their cars. This encounter took place in daylight and in the street situated approximately 60 to 80 feet from his house. No one entered onto his property. Two or three of these individuals spoke with Mr. Lizarraga. "They asked me what was happening with us because we see that I see you very unhappy." (sic) Mr. Lizarraga responded that he did not know anything and that he had to go to work because it was getting late. He then left for work and arrived on time for work at 6:00 a.m.

8/ The remaining testimony of Mr. Mondragon involves his 1974 arrest and 1975 conviction of multiple counts of arson in Calexico, California. Along with such testimony the Employer introduced into evidence Employer's Exhibit 1, 2, 3, 4, 5, 6, 7, 8, and 9 which establishes the conviction and the fact that this incident received wide notoriety during that time. This testimony and evidence will be discussed in part III(B) of this decision.

Mr. Lizarraga further testified that he did not recognize any of the people whom he had encountered in front of his residence. He did not recognize any of them as fellow workers, nor did he recognize any of them as UFW staff members. Moreover, these people did not carry any flags, banners, or picket signs. Nor did they march, walk in circles, chant or yell any slogans.

After Mr. Lizarraga arrived at work, he thought about the persons he met outside his house. Mr. Lizarraga was concerned about a newspaper article which he had read in 1980, which reported an incident in which a man's camper was damaged and broken. This article had blamed the UFW for this incident. He then called his wife who had a nervous condition and asked her "what had happened" without explaining to her about this encounter because he did not want to worry her. She responded that nothing had occurred. A few days after this encounter, Mr. Lizarraga talked about his incident with three (3) or four (4) of his fellow workers at the Employer's shop.^{9/}

At the election Mr. Lizarraga acted as the UFW's observer and he testified that he had been a union member for a long time, having signed UFW membership cards in 1973 and 1980. At the hearing he testified, however, that he did not currently

^{9/} At the hearing Mr. Lizarraga testified that these workers were Margarito Lopez, Jose Enriquez and Margarito Garcia Mr. Lizarraga is not sure if Juan Gomez was involved in this discussion.

support the union.^{10/}

10/ Both the UFW and the Employer introduced Joint Exhibit "A" which is the declaration of Mr. Lizarraga which was attached to the Employer's Election Objections Petition. A portion of the declaration was stricken by stipulation of the parties beginning from "At approximately 6:00 p.m..." which begins from the third sentence in the third paragraph of the declaration, until the end of the declaration. This declaration, however, contradicts the testimony of Mr. Lizarraga at the hearing in three (3) respects. One, is his statement in the declaration that " I went out to see what they wanted." His testimony at the hearing revealed, however, that Mr. Lizarraga first saw the group of people outside his residence when he had left his house and was approaching his car. Second, is the statement "they stated that they were union members and that they had come to talk to me about the union." At the hearing Mr. Lizarraga testified that "they asked me what was happening with us because we see that I see you very unhappy. I (Mr. Lizarraga) said I did not know anything and that I had to go to work because it was getting late. That is all." No testimony was introduced showing that these people identified themselves as union members or that they were there to talk to Mr. Lizarraga about the union. Lastly, is the statement in the declaration that "I was afraid and fearful, because there were so many people there. I felt intimidated, and did not appreciate their presence at my personal residence." At the hearing, Mr. Lizarraga did not testify that he was afraid or fearful. Nor did Mr. Lizarraga testify that he was intimidated. Mr. Lizarraga did testify, however, that he was concerned about his wife which resulted in his calling her from work. Additionally, Mr. Lizarraga testified that he was not threatened verbally or physically by these visitors.

Despite the fact that this declaration was introduced jointly by the parties, I give it no weight as evidence of what actually occurred. If anything, the declaration arguably serves to show that Mr. Lizarraga is not a credible witness in view of the contradictions between his testimony at the hearing and his sworn statements contained in the declaration. Moreover, the declaration was written in English then translated into Spanish to Mr. Lizarraga which may have caused Mr. Lizarraga to misunderstand the statements contained therein. In any event, Mr. Lizarraga's testimony at the hearing, subject to direct and cross-examination, and in view of the hearing examiner, is of greater value than statements contained in a declaration.

Mr. Lizarraga also testified that prior to the election and prior to his encounter with the group of people in front of his residence he was visited at 4:00 a.m. by two (2) friends whom he had known for many years. These friends wanted to discuss problems they had with one of the foremen at the company, to discuss a pay raise that they wanted, and they also wanted Mr. Lizarraga to join the union. Mr. Lizarraga testified that he was not threatened by their visit nor did he feel threatened.^{11/}

C. Testimony of Juan Gomez

Mr. Gomez testified that he resides in Seely, California, and has lived in the Imperial Valley since 1961. He works for the Employer as a truck driver, welder, mechanic, and he moves equipment. He has been employed with Adamek and Dessert, Inc. for the past eight (8) years. He also testified that he had a conversation with Mr. Lizarraga at the company shop about a month before the election in which Mr. Lizarraga stated that approximately 12 to 13 people came to his house at 5:00 or 5:30 a.m. and wanted to talk about the union. Mr. Gomez

^{11/} At the hearing the UFW objected as hearsay the testimony of Mr. Lizarraga that prior to the election his mother-in-law received approximately six (6) telephone calls all within a week and that in one of those calls a man from the union wanted to talk to Mr. Lizarraga. I overruled the objection on the ground that hearsay evidence is admissible in investigative hearings but that such evidence would not be sufficient in itself to support a finding. There being no direct evidence of such telephone calls nor of the content of the conversations between the caller and Mr. Lizarraga's mother-in-law, I cannot make a finding that in fact those calls occurred, or as to the content of the conversations of those calls. 8 Cal. Admin. Code section 20370(c).

further testified that he was not concerned about the visit and was not afraid about what Mr. Lizarraga had told him. He also testified that he was not afraid of physical harm from the UFW at the election. Lastly, Mr. Gomez testified that tractor drivers do not come into much contact with the weeding and thinning crew employed by the Employer. ^{12/}

D. Testimony of Jose Enriquez Tovar

Mr. Enriquez testified that he lives in Mexicali, Mexico, and that he has worked for the Employer for four (4) years. He works as a tractor driver and a truck driver. He also testified that he was present when Mr. Lizarraga, before the election, told six (6) or seven (7) employees at the Employer's shop that prior to coming to work a "bunch" of people had come to his house. Mr. Lizarraga told them that these visitors had gone to his house to ask him to go into the union. Mr. Enriquez also stated that Mr. Lizarraga did not specify how many people had gone to his house, nor did he say that he was frightened as a result of this meeting. Mr. Enriquez further testified that he did not feel threatened about what Mr. Lizarraga had told him, nor was he afraid in any way that the union would physically harm him during the election.

12/ Over the objection by the UFW on the ground that such testimony was irrelevant, Mr. Gomez testified that five (5) or six (6) years back he had heard over the radio station "KEAO" in Spanish about the incident of UFW violence in which buses were burned at "El Hoyo". Mr. Gomez also testified that he became aware of an incident where "they dumped the broccoli on Dogwood and Eight. And also through the television from the capitol of Mexico I saw at the lettuce fields they hit a sheriff officer in Holtville. So many things that I have seen and heard." I took the UFW's objection under submission, and hereby sustain the objection and strike such testimony on the same grounds as specified in part III (B) of this decision.

Mr. Enriquez also testified, that, prior to the election, a man and his wife had visited his house about 4:00 p.m. and spoke to his wife. She told them that Mr. Enriquez was not there but he would return at 7:00 p.m. At 8:00 p.m., the visitors returned. The man spoke to Mr. Enriquez while his wife stayed in the car. Mr. Enriquez did not recognize the visitor as a worker or from the union. This visitor stated that he had a card for Mr. Enriquez to sign so that he could belong to the union. The visitor then gave the card to Mr. Enriquez to sign, but he did not sign it. The visitor then stated that it was not necessary to sign it but that he had only given the card to Mr. Enriquez for him to keep, and that if he wanted to sign it, he should take it in the next day. Mr. Enriquez further testified that he was not threatened by this visit nor was he afraid for his family.

Lastly, Mr. Enriquez testified that he voted at the election.

E. Testimony of Espirideon Betancourt Ibarra

Mr. Ibarra was called by the UFW as their only witness. He testified that he works for the Employer and has worked for them for 13 to 14 years. Mr. Ibarra testified that he was a member of the organizing committee at Adamek & Dessert for the December 1980 election. He also states that there was a program whereby workers would visit other workers in groups of two (2) or three (3) at their homes. The reason for the program was to visit those workers who would not be seen in the fields since they would work at different locations.

They were tractor drivers or no other form of communication existed to let them know about the union. Mr. Ibarra also testified that he knows Mr. Lizarraga and has known him for approximately 13 to 15 years. Prior to the election, Mr. Ibarra visited Mr. Lizarraga with another co-worker at the approximate hour of 4:00 a.m.

Mr. Ibarra's subsequent testimony was somewhat confused and it appeared that he did not have personal knowledge of how many people were engaged in the home visitation program. He did testify, however, that although there was no rule with regards to the number of people going on home visits, "the only thing that I know is that the least of us that went, the smallest number of us that went to each house would extend more of us to visit more houses." As to the reason for the home visits, Mr. Ibarra testified that "we were trying to organize -- to unite ourselves to a union so that we would have the support of better benefits, of doctor care, salaries, and better treatment."

III. Analysis

A. Introduction

As the basis for its objection to the election which was conducted in this case, the Employer asserts in its post-hearing brief that:

"The union's policy of sending out individuals to visit employee's homes and it's prior history of violence created a matrix of fear and intimidation which would not allow for a free and unfettered representation election."

The Employer additionally asserts that:

"It is the position of the company that these visits are coercive per se, and unnecessary in light of the avenues of communication made available to unions in the California agricultural context."

Lastly, the Employer argues, that:

"The focal point of this case is the disturbing policy by the Union of invading the privacy of the individual's home during election campaigns, and the surrounding atmosphere in which these visitations took place."

In support of it's assertion that the UFW's "prior history of violence created a matrix of fear and intimidation", the Employer proffered the testimony of Oscar Mondragon. This testimony established that Mr. Mondragon was accused in 1974 of multiple counts of arson and attempted arson as a result of an incident in Calexico, California, in which several buses were burned. The Employer, also introduced into evidence the 1975 Imperial County Superior Courts Minute Order^{13/}finding Mr. Mondragon guilty of arson and attempted arson.

^{13/}See Employer's Exhibit 2.

At the hearing, the Employer also proffered in support of it's assertion that the 1974 incident and the subsequent conviction was the subject of widespread media coverage, ^{14/}copies of newspaper articles which reported the 1974 incident. The Employer also introduced evidence that Mr. Mondragon, through his counsel, filed a motion for change of venue as a result of this widespread media coverage.^{15/}

The UFW strenuously objected to the introduction of this evidence as irrelevant to the issues presented at the hearing, and moved to strike this evidence from the record. I took the motion under submission in order to allow both parties to submit briefs in support of their respective positions.^{16/}

The UFW's motion to strike begins my analysis in this case so that a determination can be made initially whether such evidence should be considered as relevant to the issues here. This motion and by ruling is the subject of Part "B" of this analysis.

The Employer, in support of it's assertion that the UFW's policy of engaging in home visitations was coercive per se, proffered the testimony of Mr. Mondragon as the UFW's field office director in Calexico at the time of the election, the testimony of Mr. Lizarraga whose home was visited, the testimony of Mr. Gomez and the testimony of Mr. Enriquez whose home was also visited.

14/See Employer's Exhibit 3, 4, 5, 6, 7, 8, and 9.

15/See Employer's Exhibit 9.

16/See Evidence Code section 403.

My decision as to whether these visits were coercive and sufficient to set aside the election is the subject of Part "C" of this analysis.^{17/}

B. The UFW's Motion to Strike

At the hearing, the Employer introduced evidence of the 1974 arrest and the 1975 conviction of UFW official Oscar Mondragon for arson. This incident occurred in Calexico, and accounts of this incident were reported by the news media. Over the strenuous objection by the UFW representative that such evidence was irrelevant, I admitted this evidence conditionally upon the Employer's representation that such evidence would be connected with the home visitations which occurred during the UFW's election campaign at issue here. At the hearing the Employer asserted that according to Mr. Mondragon's testimony:

"he is an officer in the Union, he is in charge of organizing activities down here, and I think it is very probative if an employee is receiving home visitations and he knows that the person that's directing those home invitations (sic) is a convicted arsonist...." (emphasis added)

However, the subsequent testimony of Mr. Lizarrago did not establish that Mr. Lizarrago knew Mr. Mondragon was directing the home visitations or even that he knew Mr. Mondragon or his criminal

^{17/}The Employer's motion to strike a paragraph of the UFW's post-hearing brief dated by letter August 25, 1981, is granted on the ground that the UFW's assertion is not part of the record in this case.

The UFW's motion to strike the Employer's entire brief is denied. The motion received by letter dated September 28, 1981, would impose too harsh a remedy for the Employer's apparent disregard of my ruling limiting use of the Employer's news media exhibits.

background. Moreover, the Employer failed to establish through the testimony of Mr. Lizarraga, that he was aware of the bus burning of 1974, and also failed to establish that such an incident affected his vote at the election in December of 1980. The only testimony elicited regarding incidents of union violence that Mr. Lizarraga was aware of, was a 1980 incident in which it was reported that the UFW was responsible for a man's camper being damaged. Therefore, as to Mr. Lizarraga and the visitation which occurred at his residence, Mr. Mondragon's criminal background is irrelevant.

As to Mr. Gomez, his awareness of the incidents of union violence is irrelevant because he was not the subject of a home visitation. The policy of home visitations is the basis for the Employer's election objection, and Mr. Gomez' knowledge of incidents of violence in the Imperial Valley 5, 10 or 15 years from the date of the election in this case is irrelevant since incidents of pre-petition violence alone are not the basis for the Employer's election objection.

As to Mr. Enriquez, although his residence was visited by a man and his wife, testimony was not introduced showing that Mr. Enriquez knew Mr. Mondragon's background. As with Mr. Lizarraga, the essential connection between the home visitations and Mr. Mondragon was not established. Therefore, Mr. Mondragon's background is likewise irrelevant in this instance.

It should also be noted that the Employer asserts in his brief that Mr. Mondragon "oversaw the home visit program. He and organizer Rodriguez decided which employees were to be visited." This assertion mischaracterizes the evidence. At the hearing

Mr. Mondragon testified that he would not necessarily review with the organizer which individuals would be visited. In the election which was conducted at Adamek & Dessert, Mr. Mondragon testified that he did not know who was visited, although he did know that people were being visited.

In Hickory Springs Mfg. Co. (1978) 99 LRRM 1715, the NLRB held that "for conduct to warrant setting aside an election, not only must that conduct be coercive, but it must be so related to the election as to have had a probable effect on the employees' action at the polls." In that case, the union's conditional threat of a strike and threats of misconduct in the event of such a strike after certification, was held not to have involved threats to employees "based on how they would vote in the upcoming election. Thus the remarks neither relate to events surrounding or concerning the election nor were they calculated to coerce employees to vote for the Petitioner." The National Board thus concluded that "the conduct complained of was not likely to have coerced the employees into voting in a particular manner and thus could not have affected the outcome of the election."^{18/}

In the instant case, it was not established that the 1974 incident of violence or other alleged periods of violence attributed to the UFW were related to the election of December 1980.

18/See also Prince Mfg. Co. (1979) 240 NLRB 388 (100 LRRM 1217); KMS Corp. (1979) 242 NLRB 91 (101 LRRM 1256); Weyerhaeuser Co. (1979) 244 NLRB 178 (102 LRRM 1222); Burris Chemical, Inc. (1979) 246 NLRB 34 (102 LRRM 1509); Loose Leaf Hardware, Inc. (1979) 246 NLRB 46 (102 LRRM 1551); Weyerhaeuser Co. (1980) 247 NLRB 147 (103 LRRM 1271)

The Employer also failed to establish that such pre-petition conduct was likely to have coerced the employees of Adamek & Dessert into voting in a particular manner.^{19/} Therefore, such incidents of pre-petition conduct are not related to the election nor could such conduct have affected the outcome of the election in this case.

Additionally, in Toste Farms, Inc., (1975) 1 ALRB No. 16, the Board held that an incident of union misconduct cited by the Employer which occurred one (1) year before the election was too remote to be regarded as conduct affecting the election. In that case, UFW pickets were alleged to have thrown rocks at employees which allegedly caused these employees to refuse to return to the following years harvest and to vote against the union. As with Toste Farms, the 1974 incident in this case, alleged to have affected the outcome of the election six (6) years later, is too remote to be

19/ The Employer cites Tyler Pipe Industry, Inc. (5th Cir. 1971) 77 LRRM 2416, for the NLRB rule that direct evidence need not be presented to establish the effect of the union's misconduct in order to set aside the election. However, in that case the union was accused of making deliberate misrepresentations, producing false figures to support their assertion that the employer was getting wealthy by exploiting its wage earners, and deliberately breaching the parties' pre-election agreement prohibiting electioneering a day before the election. All this activity occurred within days of the election. In the instant case, the union activity complained of occurred six years prior to the election. The Employer also cites NLRB v. Trinity Steel Co. (5th Cir. 1954) 34 LRRM 2377, for the assertion that glaring misconduct is almost certain to impair the employees' freedom of choice. However, that case is distinguishable in that the union's misconduct occurred at different occasions "immediately preceding the election." Here, the misconduct alleged to have impaired the employees' freedom of choice, occurred six years prior to the time the Adamek & Dessert employees exercised their vote.

regarded as having an effect on the election in 1980.^{20/}

The Employer also asserts that "with respect to the fifteen (15) felony convictions that Mr. Mondragon received, they were admitted for the dual purpose of attacking his credibility as well to establish (sic) in that he was involved in labor related violence." Having found that such pre-petition activity of Mr. Mondragon is irrelevant to the issues presented at the hearing, I will next consider the issue of the admissibility of such evidence to attack the credibility of Mr. Mondragon as a witness.

Evidence Code section 788 provides that "for the purpose of attacking the credibility of a witness, it may be shown by the examination of the witness or by the record of the judgment that he has been convicted of a felony..." In construing this Evidence Code section, the Supreme Court in People v. Beagle (1972) 6 C.3d 441, 453, 99 Cal. Rptr. 313, held that the trial court in considering whether to exclude evidence of a prior felony conviction must consider whether the prior felony conviction rests upon dishonest conduct which relates to the credibility of the witness. "A 'rule of thumb' thus should be that convictions which rest on dishonest conduct relate to credibility whereas those of violent or assaultive crimes do not..." Moreover, in People v. Woodard (1979) 23 C.3d 329, 335, 152 Cal. Rptr. 536, the Court held that:

20/The UFW cites in its post-hearing brief Ideal Electric Co. (1961) 134 NLRB 1275, for the NLRB rule that misconduct that occurs prior to the filing of an election petition is irrelevant and cannot be considered in representational proceedings. The ALRB, however, has not considered nor adopted this NLRB rule based on administrative convenience.

"The Legislature has provided that the sole trait relevant to impeaching credibility is truthfulness: 'Evidence of traits of his character other than honesty or veracity, or their opposites, is inadmissible to attack or support the credibility of a witness.¹ (Section 786.) While a prior felony conviction may be probative of one or more 'separate traits' of character, it may not involve the one trait—truthfulness—which is relevant to impeaching credibility. If a prior felony conviction does not involve the character trait of truthfulness, it must be excluded as irrelevant at the outset, since section 350 unequivocally provides that '[n]o evidence is admissible except relevant evidence.'"

In the instant matter, the Employer seeks to impeach the credibility of Mr. Mondragon by introducing his prior felony conviction of arson. The crime of arson, however, does not involve the character trait of truthfulness. Penal Code section 449a. Therefore, evidence of this prior felony conviction is irrelevant to impeaching the credibility of Mr. Mondragon as a witness.^{21/} Accordingly, the UFW's¹ objection to this evidence is sustained and the motion to strike is granted.^{22/} (See 8 Cal. Admin. Code section 20370(c) "Irrelevant...evidence shall be excluded.")

C. The Home Visits

The issue scheduled for hearing in this case is "whether the UFW engaged in coercive and intimidating conduct during its election campaign by assembling large numbers of people during early morning hours at the residences of prospective voters and, if so, whether such conduct affected the outcome of the election."

21/See also *People v. Fries* (1979) 24 C.3d 222, 155 Cal. Rptr. 194, where the court held that a conviction, even one involving fraud or stealing, if it occurred long before and has been followed by a legally blameless life, should generally be excluded from use for impeachment on the ground of remoteness.

22/Mr. Mondragon's testimony relating to his arrest in 1974 for arson and subsequent convictions in 1975 is stricken. The Employer's Exhibits 1, 2, 3, 4, 5, 6, 7, 8, and 9 are also stricken.

As the objecting party, the Employer has the burden of establishing that the UFW engaged in coercive and intimidating conduct and that such conduct affected the outcome of the election. TMY Farms (1976) 2 ALRB No. '58; NLRB v. Golden Age Beverage Co. (5th Cir. 1969) 415 F.2d 26 (71 LRRM 2924); see also California Lettuce Co. (1979) 5 ALRB No. 24, the "Legislature has in effect established a presumption in favor of certification and indicated that the burden of proof rests upon the party objecting thereto." Moreover, the Employer has the burden of proving that the UFW and its agents engaged in the alleged misconduct. San Diego Nursery, Inc. (1979) 5 ALRB No. 43. Proof of this agency relationship is an important determination because the Board accords less weight to the conduct of a non-party than to that of a party. Takara International, Inc. (1977) 3 ALRB No. 24; see also Owens-Corning Fiberglass Corp. (1969) 197 NLRB 219, 72 LRRM 1289; cf. Joseph Gubser Co. (1981) 7 ALRB No. 33.

In the instant case, the Employer has failed to establish that the UFW engaged in the home visitation of Jesus Lizarraga in which 12 to 14 individuals visited his residence. Although the UFW field director Oscar Mondragon testified that the UFW had a program of visiting employee's homes, these home visitations were limited to two (2) or three (3) workers. This program did not, however, include a visitation program of workers numbering 12 to 14. ^{23/}In any event, the Employer in it's post-hearing brief

23/At the hearing Mr. Mondragon was a credible witness. His demeanor exhibited a good faith attempt to answer the questions posed to him regarding his duties and responsibility as a field office director in Calexico, California.

apparently concedes that these visitors were union adherents rather than union agents. In its brief, the Employer asserts that "union adherents" gathered at the personal residence of Mr. Lizarraga. (see page 13, line 10 of Employer's post-hearing Brief). Assuming that there is evidence that these individuals were union adherents, the fact that workers are union proponents is not sufficient to attribute to the union responsibility for their misconduct, if any. Tepusquet Vineyards (1978) 4 ALRB No. 102; D'Arrigo Bros., of Calif. (1977) 3 ALRB No. 37; S.A. Gerrard Farming Corp. (1980) 6 ALRB No. 49

Moreover, there appears on the record a contradiction between the declaration of Mr. Lizarraga submitted as part of the Employer's Election Objection's Petition and his testimony at the hearing. In his declaration Mr. Lizarraga states that the persons who gathered at his residence stated that they were union members and that they had come to talk about the union. At the hearing, however, Mr. Lizarraga testified that these people had merely asked what was happening with him because they saw he was unhappy. Mr. Lizarraga did not testify that they had identified themselves as union members or even as workers of the Employer. In fact, Mr. Lizarraga testified that he did not know who they were.

Therefore, based on the evidence presented, I do not find that the 12 to 14 individuals that visited Mr. Lizarraga were union agents or adherents.

Even assuming that these people were union agents or adherents, their conduct does not warrant setting aside the election. Here, the Employer asserts that the gathering of people at the residence of Jesus Lizarraga at approximately 5:00 a.m. was coercive

and intimidating. The Employer cites United Farm Workers of America, AFL-CIO (Marcel Jojola) (1980) 6 ALRB No. 58, for the Board's holding that residential picketing is coercive and intimidating. That case, however, is distinguishable from the present case. Mr. Lizarraga testified that the people who gathered on the street were situated approximately 60 to 80 feet from the front of his residence. Moreover, these people did not carry picket signs, flags or banners. These people did not engage in marching, walking in circles, chanting or yelling slogans, or engage in any other activity which in any manner resembles picketing or demonstrating.

The evidence presented establishes that Mr. Lizarraga did not become aware of the presence of these people until he had left his house and began to approach his car. Moreover, from the evidence presented it can be inferred that Mrs. Lizarraga and her mother, who were inside the residence, did not become aware of these visitors at all, even after Mr. Lizarraga had left his residence and had gone to work that morning. The only conversation that took place that morning was between Mr. Lizarraga and two or three of these visitors. It was the visitors who expressed concern for Mr. Lizarraga because they had heard that Mr. Lizarraga was not happy. After Mr. Lizarraga responded that he did not know anything, he left for work arriving on time at 6:00 a.m. Mr. Lizarraga was not prevented from leaving his residence nor was he challenged for his failure to continue conversing with these visitors. Mr. Lizarraga was not asked to join the union or to vote for the union at the upcoming election, nor was Mr. Lizarraga asked to refrain from doing anything.

By contrast, in the UFW (Marcel Jojola) case, the

residences of several farmworkers were picketed in an effort to convince them to join the strike. In one incident, approximately 50 picketers marched along the sidewalk in front of a worker's residence. The picketers chanted slogans and directed various epithets and obscenities at the residences. In defining the term coercion or restraint in the context of determining whether the UFW violated section 1154(a)(1) of the Agricultural Labor Relations Act, the Board held that:

"The essence of coercion or restraint is that a person is forced according to the dictates of another and against his or her own judgment and will, to act or to refrain from acting in a certain way."

Assuming that the individuals that visited Mr. Lizarraga were UFW agents or adherents, their purpose appears not to have been to persuade Mr. Lizarraga to join the union since Mr. Lizarraga was a union member during calendar year 1980. Moreover, Mr. Lizarraga was the UFW's observer at the election. ^{24/}Therefore, none of the acts which prompted the Board to hold that the UFW violated the Act in the UFW (Marcel Jojola) case is present here. Moreover, at the hearing, Mr. Lizarraga testified that he was not threatened by the presence of these people at his residence. Therefore, the conduct complained of here by the Employer does not constitute coercion or intimidation. Accordingly, the conduct complained of here by the

24/In its post-hearing brief the Employer asserts that "it is the position of Adamek & Dessert, Inc. that it was not mere happenstance or capriciousness that excessive pressure was brought to bear upon Jesus Torres Lizarraga. He was 'convinced' to be an election observer for a particular reason." (emphasis added) However, no evidence was presented showing that Mr. Lizarraga was pressured excessively or convinced to be an election observer. The Employer's assertion, therefore, assumes a fact not in evidence and is rejected on that basis.

Employer did not affect the outcome of the election.^{25/}

As to Mr. Jose Enriquez and the visit made to his residence by one person who asked him to sign a union card, such conduct can hardly be characterized as coercive or intimidating. Moreover, this home visit by one individual does not fall within the issue scheduled for hearing in this case in that one individual does not constitute a large gathering of individuals at the residences of prospective voters. In any event, such conduct did not have an affect on the outcome of the election.

IV. Conclusion

Having found that the conduct complained of here was not coercive or intimidating, such conduct therefore does not warrant setting aside the election.

^{25/}The Employer cites three (3) cases for the NLRB' s holding that where conduct is so outrageous and aggravated an election will be set aside. These cases are distinguishable. In Steakhouse Meat Co., Inc. (1973) 206 NLRB No. 28, the conduct complained of was an employee telling another employee while brandishing a knife that if he voted against the union he would kill him. In Sonoco, Inc. (1974) 210 NLRB No. 493, union adherents before the election told other employees that they were expected to vote for the union, otherwise there would be "blows and slaps", that they would be beaten up, and stated that there would be blows on election day. In Diamond State Poultry Co., inc. (1954) 107 NLRB No. 3, three individuals wielded a knife and told an employee to vote the right way or he would get hurt. These persons also told other employees to vote CIO, that there had better be a good election or something would happen to them. None of the actions discussed in these cases resemble in any fashion the acts complained of here. Indeed, no threats were made, nor was Mr. Lizarraga told to vote in any particular manner which would evidence any form of implied threat. Moreover, the employees that heard Mr. Lizarraga's account of the incident testified that they were not threatened or fearful and they voted in the election.

RECOMMENDATION

Based on the findings of facts, analysis and conclusion 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: November 13, 1981

Respectfully submitted,



ISMAEL A. CASTRO

Investigative Hearing Examiner