

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

DEBRUM-KNUDSEN DAIRY,)	
)	
Employer,)	Case No. 81-RC-1-F
)	
and)	
)	
DAIRY EMPLOYEES UNION, LOCAL NO. 17,)	8 ALRB No. 49
CHRISTIAN LABOR ASSOCIATION,)	
)	
Petitioner.)	
_____)	

DECISION AND CERTIFICATION OF REPRESENTATIVE

Following a Petition for Certification filed by the Dairy Employees Union, Local No. 17, Christian Labor Association (CLA or the Union), on June 23, 1981, a representation election was conducted on June 30, 1981, among the Employer's agricultural employees. The official Tally of Ballots showed the following results:

CLA	2
No Union	2
Unresolved challenged ballot	<u>1</u>
Total.....	5

Since the single challenged ballot was sufficient to determine the outcome of the election, the Delano Regional Director conducted an investigation and issued a Report on Challenged Ballot, in which he recommended that the ballot be opened and counted. In Debrum-Knudsen Dairy (Oct. 19, 1981) 7 ALRB No. 34, we upheld the Regional Director's recommendation, and, after the ballot was opened and counted, a revised Tally of Ballots issued which showed the following results:

CLA 3
No Union 2,
Total 5

After the election, the Employer timely filed post-election objections, and, on September 25, 1981, the Executive Secretary issued a Notice of Investigative Hearing for the purpose of taking evidence on the sole issue of whether the CLA observer at the election engaged in campaigning inside the polling area during the balloting, and if so, whether such conduct affected the results of the election.

A hearing was held before Investigative Hearing Examiner (IHE) Laura Arroyo on October 27, 1981. In her decision, which issued on February 22, 1982, the IHE found that the statements of the CLA observer in the polling area did not constitute electioneering and that, assuming there was campaign material present in the polling area, such material did not affect the outcome of the election. The IHE therefore recommended that the Employer's objection be dismissed and that the CLA be certified as the exclusive collective bargaining 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 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 Employer's exceptions and brief, and has

decided to affirm the IHE's rulings,— findings,— and conclusions and to adopt her recommendations.

The Employer contends that the election should be set aside because of CLA observer Avila's remarks to prospective voters Furtado and Mateus, citing Milchem, Inc. (1968) 170 NLRB 362 [67 LRRM 1395]. We affirm the IHE's finding that Avila's remarks did not constitute electioneering and do not warrant setting aside the election. As we recently noted in Vessey Foods, Inc. (Apr. 6, 1982) 8 ALRB No. 28, although the Milchem rule generally requires that conversations between parties and voters at the polling place will invalidate the results of an election, one recognized exception to this rule is where such conversations are innocuous. The NLRB

^{1/} At the hearing, the IHE denied the Employer's motion to reopen the hearing to allow the Employer to adduce testimony as to whether the card previously received into evidence as Joint Exhibit 3 was the card which Union observer Avila placed on the voting table during the election. We affirm the IHE's ruling, since we find that even if a card similar to Joint Exhibit 3 was visible on the voting table, it would not constitute sufficient grounds for setting aside the election. The NLRB has held that the presence of union insignia in the voting area is not prejudicial to a fair election. (Colfor, Inc. (1979) 243 NLRB 564 [101 LRRM 1495]—union observer wore a "yes" button on hat; The Nestle Company (1980) 248 NLRB 732 [103 LRRM 1567]—union observer wore a pro-union bumper sticker on his shirt; see also, NLRB v. Laney & Duke Co. (5th Cir. 1966) 369 F.2d 859 [63 LRRM 2552]; Chula Vista Farms, Inc. (Dec. 16, 1975) 1 ALRB No. 23.) Furthermore, as the IHE noted, employees Furtado and Mateus both testified that they did not notice the card, and no witness testified that he or she was able to read the card.

—The Employer has excepted to the IHE's credibility resolutions. To the extent that those credibility resolutions are based upon demeanor, the Board will not disturb them unless the clear preponderance of the relevant evidence demonstrates that they are incorrect. (Adam Dairy dba Rancho Dos Rios (Apr. 26, 1978) 4 ALRB No. 24, Rev. den., Mar. 17, 1980, Ct. App., 2nd Dist., Div. 3; Standard Dry Wall Products (1950) 91 NLRB 544 [26 LRRM 153].) Having reviewed the record, we find that the IHE's credibility resolutions are supported by the record as a whole.

will not set aside an election because a party's observer engages in innocuous conversations with voters at the polling place. (Century City Hospital (1975) 219 NLRB 52 [89 LRRM 1650].) Union observer Avila's remarks in this case were limited to asking Furtado about his new job, translating a Board agent's answer to Furtado's question about his eligibility to vote, and translating the Board agent's voting instructions. We have rejected a strict application of the Milchem rule in the agricultural context (Superior Farming Company (Apr. 26, 1977) 3 ALRB No. 35, certification subsequently withdrawn on other grounds (Apr. 28, 1980) 6 ALRB No. 21). But even under a strict application of the Milchem rule, Avila's innocuous remarks would not constitute grounds for setting aside the election. (Century City Hospital, supra, 219 NLRB 52; Resins, Solvents & Varnishes Corp. (1977) 227 NLRB 959 [94 LRRM 1698].)

We affirm the IHE's finding that the voters' confusion as to the identity of the Board agents did not tend to affect the outcome of the election. The evidence indicates that employees Avila, Furtado, and Mateus believed that the agents conducting the election were from the Union. Although their misconception presents an unusual situation, the IHE correctly noted that there was no evidence that any Board agent, or either of the parties, was responsible for the misunderstanding or that the misunderstanding tended to affect the outcome of the election. Most importantly, Furtado and Mateus clearly testified that no one told them for whom they should vote or asked them to support the Union on the day of the election.

The record in this case reveals that, although there were

some irregularities in the election, they were not of such a character as to have deprived the employees of their free choice in the election. The evidence indicates that all of the voters cast their ballots free from coercion or substantial interference. Accordingly, the Employer's objection is hereby overruled and the Union will be certified.

CERTIFICATION OF REPRESENTATIVE

It is hereby certified that a majority of the valid votes have been cast for the Dairy Employees Union, Local No. 17, Christian Labor Association, and that, pursuant to Labor Code section 1156, the said labor organization is the exclusive representative of all agricultural employees of Debrum-Knudsen Dairy in the State of California for purposes of collective bargaining, as defined in Labor Code section 1155.2 (a), concerning employees' wages, hours, and working conditions. Dated: July 16, 1982

JOHN P. McCARTHY, Member

ALFRED H. SONG, Member

JEROME R. WALDIE, Member

CASE SUMMARY

Debrum-Knudsen Dairy

8 ALRB No. 49

Case No. 80-RC-1-F

IHE DECISION

Following a representation election in which the Christian Labor Association received a majority of the votes, the Employer timely filed post-election objections, alleging that the CLA observer at the election engaged in campaigning inside the polling area during the balloting, and that such conduct affected the results of the election. The Investigative Hearing Examiner (IHE) recommended dismissal of the Employer's objections. The IHE found that the CLA observer did not have any discussions with voters about whether they should vote for the Union and that, even if the CLA observer placed a Union campaign card on the voting table during the election, such conduct did not tend to affect the voters' exercise of a free choice. The IHE also found that the employees' mistaken belief that the Board agents conducting the election were Union representatives did not tend to affect the results of the election or to prevent employees from exercising free choice.

BOARD DECISION

The Board affirmed the IHE's findings and conclusions, dismissed the Employer's objections, and certified the CLA as the exclusive bargaining agent of the employees. The Board noted that, even if it were to strictly apply the rule set forth by the NLRB in *Milchem, Inc.* (1968) 170 NLRB 362, the CLA observer's innocuous remarks at the election would not constitute grounds for setting aside the election.

This Case Summary is furnished for information only and is nor an official statement of the case, or of the ALRB.

* * *

STATE OF CALIFORNIA
AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of:

STEPHEN DEBRUM AND
KNUDSEN DAIRY,

Case No. 81-RC-1-F

Employer,

and

DAIRY EMPLOYEES UNION, LOCAL #17,
CHRISTIAN LABOR ASSOCIATION,

Petitioner.

Raymond W. Thomas, Esq. of
Nelson and Rixon for the
Employer.

Harold W. Wolkow
for the Petitioner.

DECISION

STATEMENT OF THE CASE

LAURA E. ARROYO, Investigative Hearing Examiner: This case was heard by me in Fresno, California, on October 27, 1981. Pursuant to Petition for Certification filed by the Dairy Employees Union, Local #17, Christian Labor Association (CLA) on June 23, 1981, a representation election was held among the employees of De Brum-Knudsen Dairy (referred to as the Employer) on June 30, 1981. The Tally of Ballots from the election revealed the following results:

CLA	2
No Union	2
Unresolved Challenged Ballots	<u>1</u>
Total	5

BACKGROUND

As the single challenged ballot was sufficient to determine the outcome of the election, the Delano Regional Director, conducted an investigation pursuant to 8 Cal. Admin. Code section 20363(a).^{1/}

On August 12, 1981 the Regional Director issued his Report on Challenged Ballots in which he concluded that there was no evidence to support the Employer's claim that the CIA willfully arranged Alberto Furtado's employment for the primary purpose of having him vote in the election. Additionally, the Regional Director concluded that Alberto Furtado worked at De Brum-Knudsen Dairy during the applicable payroll period and was therefore eligible to vote in the election.^{2/} The Employer timely filed exceptions to the Regional Director's recommendation and a brief in support thereof. The Employer argued that only employees who are employed by it at the time of the balloting should be eligible to vote. Subsequently, the Board reviewed the

^{1/} Section 20363 states in part:

(a) If the tally of ballots discloses that the challenged ballots are sufficient in number to affect the outcome of the election, the Regional Director shall conduct such investigation as he or she deems necessary to determine the eligibility of the challenged voters, including giving all parties an opportunity to present evidence on each of the challenges. Thereafter, the Regional Director shall issue to the Board a report containing his or her conclusions and recommendations and a detailed summary of the facts underlying them.

^{2/} The Regional Director's investigation revealed that the applicable payroll period for determining voter eligibility in the election was June 1 to June 15, 1981. Alberto Furtado was hired by the Employer on May 16, 1981 and worked until June 21, 1981 as a relief milker in the dairy. On June 21, 1981, Alberto Furtado quit his job and was later employed by a non-agricultural employer.

case and issued its decision in De Brum-Knudsen Dairy, (October 19, 1981) 7 ALRB No. 34, holding that Alberto Furtado was eligible to vote in the election, overruling the challenge to his ballot, and thereby, ordering the Regional Director to open and count the ballot of Alberto Furtado. I/

The Employer timely filed a petition alleging a variety of misconduct as grounds upon which to overturn the election. Pursuant to his authority under 8 Cal. Admin. Code section 20365 (c), the Executive Secretary dismissed some of these objections and set for hearing the following objections:

- I. Whether the Union's observer engaged in misconduct by conversing in Portuguese with voters, inside the polling area during balloting, and if so, whether such conduct affected the results of the election.
- II. Whether the Union's observer at the election engaged in campaigning inside the polling area by displaying a campaign card during balloting, and if so, whether such conduct affected the results of the election.

All parties were represented at the hearing and were given full opportunity to participate in the proceedings including the opportunity to present oral argument at the conclusion of the hearing. Additionally, parties were given leave to file written briefs.

3_/ The Delano Regional Director issued a revised Tally of Ballot pursuant to the Order issued on 7 ALRB No. 34 which showed the following results:

CLA.	3
No Union.	<u>.2</u>
Total.	5

Upon the entire record, including my observation of the demeanor of witnesses, and after consideration of the arguments made by the parties, I make the following findings of fact and conclusions of law.

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 CLA also stipulated that it is a labor organization within the meaning of Labor Code section 1140.4(f).

II

INTRODUCTION

Seven witnesses testified, four on behalf of the Employer and three were called were called by the undersigned IHE.^{4/} From their testimony, the stipulations reached, and the exhibits in evidence, a description of the voting area and the mechanics of the election is possible.

There were five eligible voters involved in the election: Joe Van Lierop, (referred to as Mr. Van Lierop) who was designated to act as the Employer's observer; Merrily Van Lierop, (referred to as Mrs. Van Lierop); Joe Avila, (referred to as Avila) who was designated to act as the union's observer; Frank Mateus, (referred to as Mateus) and Alberto Furtado, (referred to as Furtado). Furtado and Mateus spoke only Portuguese. Furtado could not read English or Portuguese. There were two ALRB agents conducting the election.

4/ The Employer called Merrily Van Lierop, Joe Van Lierop, Lawrence DeBrum and Joe Avila. The IHE called Frank Mateus, Alberto Furtado and Vicente Paala.

Vicente Paala (referred to as Paala), who was the agent in charge; and David Caravantes (referred to as Caravantes) who was responsible for giving the instructions to the workers on the mechanics of how to vote.

The election took place outside the barn at the Employer's premises. A table at which the voters received the ballots, was placed outside the barn facing west and the ballot box was placed on top of the table on the south west end. A voting booth was located on the south side across from the table. Sitting at the table in order from south to north were Mr. Van Lierop, ALPS agent Paala, Avila and ALRB agent Caravantes. During the election Caravantes moved around the election area. He stood and talked to the voters at the north end of the table as the prospective voters approached the table to vote. The prospective voters proceeded into the voting area, stopped in front of the table to receive the ballot; and instructions and then went to the voting booth. The balloting took place between 11:00 and 11:30 a.m.

III

First OBJECTION

- I. Whether the Union's observer engaged in misconduct b" conversing in Portuguese with voters inside the polling area during balloting, and if so, whether such conduct affected the results of the election.

Employer Allegations

The Employer alleges that Avila's continuous conversation with the Portuguese-speaking voters (Mateus and Furtado) prejudiced the results of the election and such conduct warrants setting aside the election. It is contended that Avila acted as the official translator and agent of the Board, and while acting in that

capacity Avila not only instructed the voters as to the voting procedures but also urged them to vote for the union during the polling period and in fact marked the "yes" box on the sample ballot.

(A) Summary of Testimony

Testimony of Merrily Van Lierop

Mrs. Van Lierop testified that Avila gave the instructions to Furtado and Mateus. While giving instructions on how to vote, Avila grabbed a ballot and marked one of the boxes. Caravantes then proceeded to instruct Avila not to use that ballot and not to make marks on the ballot. Caravantes then took the ballot away from Avila, drew a line through it and marked it "Void". Avila was then given a new ballot to utilize for giving instructions.

When Mrs. Van Lierop was pressed to explain which box Avila had marked while giving the instructions she indicated that he had marked the "No" box. At this point, counsel for the Employer requested a recess in order to get a sample of the ballot used in the election. A facsimile of the ballot used at the election was authenticated and introduced into evidence. Mrs. Van Lierop then testified, contrary to what she had stated before, that Avila had marked the box on the left of the ballot which contained the symbol of the "Christian Labor Association of U.S., Dairy Employees Local No. 17, or the "Yes" box.

Mrs. Van Lierop further testified that during the time Avila was giving the instructions, Mateus and Furtado were standing at the end of the table where Avila was sitting and clearly watched Avila mark the ballot. Though Mrs. Van Lierop at that time was leaning up against a car parked in front of the table about five feet

away, she could see the mark on the ballot Avila made and could hear the conversation between Avila, Furtado and Mateus who were speaking in Portuguese. When she was asked if she was able to understand^{5/} any of the words used during? the conversation she indicated that all she could understand was the "instructions [to] vote."^{6/}

Testimony of Mr. Van Lierop

Mr. Van Lierop testified that Caravantes attempted to instruct the first Portuguese speaking voter who arrived to vote, but was unable to communicate with him.^{7/} Caravantes then asked Avila to translate for him and instruct the Portuguese speaking voters. When instructing the voters, Avila used a ballot which he marked on the "Yes" box as he was showing the voters the "Yes" and "No" boxes on the ballot. Furtado and Mateus were standing right at the edge of the table as Avila gave the instructions, and they could clearly see which box Avila marked.^{8/} Caravantes took the marked ballot away from Avila and marked it "Void".

Mr. Van Lierop further testified that through 70% to 80% of the time during balloting Avila was conversing with Furtado and

5/ The testimony given by Mateus showed that Mrs. Van Lierop was never heard speaking in Portuguese, and she was heard speaking only; in English.

6/ This is the precise text from the transcript.

Q. (by Mr. Thomas, Employer's Attorney) Were you able to understand any of the words used during the conversation? A. Instructions, vote. That was about it.

Q. .Okay. Did you hear any other words used that you recognized? A. Vote. Just, like I say, those.

2/ The first voter to arrive at the election table was Furtado who was followed by Mateus.

8/ Mr. Van Lierop was sitting at his designated chair (Employer observer) and from his vantage point he said he could see which box Avila marked.

Mateus. As he does not understand or speak Portuguese he "... couldn't really understand what was said," nonetheless, he recognized the word "union" or something that sounded like it and maybe one or two Portuguese words that he couldn't recall at the hearing. According to Mr. Van Lierop, the ALRB agents did not make any efforts to stop Avila from continually conversing with the voters.

Testimony of Alberto Furtado

Furtado testified that on the day of the election he arrived at the dairy at approximately five to ten minutes before eleven o'clock and remained there approximately fifteen to twenty minutes. Before the election started, he spoke to the workers, Mr. DeBrum, and Avila who asked him how he was liking his new job. After the election started, he voted, placed the ballot in the box and left.

He also testified that when he arrived to vote he asked if his vote was valid as he had already quit his job at the dairy, and he was told that he could vote so he "voted yes."

Since he does not read English or Portuguese, he asked which was the "Yes" box and the "No" box. Furtado Couldn't remember whether it was the Board agent Caravantes or Avila to whom he directed
I/
his questions.

9/ In his post hearing brief the Employer representative alleges that voters Furtado and Mateus were confused as to the identity of the ALRB agents as being "union men." This issue was not raised as an objection to the election by the Employer and it was therefore not set for hearing. Though at the hearing the testimony indicated some confusion as to the identity of the ALRB agents at the election, I find that whatever confusion did exist did not affect the voters' exercise of their free choice of the collective bargaining representative. The testimony from Furtado and Mateus indicated clearly that no one at the election told them for whom to vote or otherwise interfered with their free choice of a collective bargaining representative.

The Employer's representative asked Furtado if anyone asked him to help the union on the day of the election and Furtado replied in the negative. Furtado explained that before the day of the election Avila had called him to encourage him to come to the dairy and vote because the union needed his help. In regards to the content of his conversation with Avila on election day, Furtado consistently

indicated that the content of their conversation was about his new
10/ job. This conversation regarding his new job had taken
place
before the election began.

Nothing in Furtado's testimony demonstrated that Avila at any point during the election told Furtado which choice he should make when voting. Testimony of Vicente Paala

Paala testified that Caravantes handed out the ballots and gave the instructions on mechanics of how to vote. Caravantes held in his hand a sample ballot marked "Muestra" or "Sample."^{11/}

When Furtado arrived, he inquired if he could vote and was informed by Caravantes that he could. In giving the instructions to the voters, Caravantes spoke in English and Spanish and also read the voting instructions in Portuguese. Nonetheless, Caravantes had problems communicating with the Portuguese-speaking voters.^{12/}

10/ This conversation took place when Furtado first arrived at the dairy and before the election started.

11/ Paala explained that as a matter of procedure this sample ballot Ts marked "Void" and is discarded after it's been used to give instructions, as was also done in this case. Paala denied in his testimony that in giving the instructions Avila marked the "Yes" box in the sample ballot.

12/ According to Paala, Caravantes read in Portuguese from the sample ballot which was in Portuguese. However, the voters were still unable to understand him. At that point he requested Avila to assist him in translating.

Caravantes then proceeded to utilize Avila as an interpreter because he was bilingual and spoke Portuguese. Caravantes would read the instructions and Avila would translate after him, on a point-by-point basis. Paala indicated that the translation of the instructions lasted approximately less than a minute.

Paala denied that Avila ever showed a ballot to the voters as they were coming in. As a matter of procedure the Board agents usually take one ballot and mark "Sample" or "Muestra" on it and the only ones that are allowed to handle this sample are the Board agents. The only time that anyone other than the Board agent is allowed to handle a ballot is after a prospective voter is given a ballot to vote.

Finally, Paala testified that for the most part the election was conducted in an orderly manner, and there was minimal communication among the voters during balloting.

Testimony of Joe Avila

Avila testified that on the day of the election he was asked to translate the voting instructions to Furtado and Mateus who could not speak English.

When Avila was asked if he recalled speaking with Furtado during balloting, Avila responded that while in front of ALRB agent Caravantes, he remembered explaining the ballot to Furtado. Furtado had asked for an explanation of specifically which was the "Yes" and "No" box on the ballot because Furtado could not read or speak in English and could not read in Portuguese.

The Employer's representative repeatedly asked Avila if he instructed the voters on what choice to make and throughout his

testimony Avila repeatedly denied instructing the voters on what choice to make. According to Avila he just translated what Caravantes asked him to explain;^{13/} that is, that the voters were supposed to mark only one of the boxes. The testimony giver, by Furtado, Paala and Avila revealed that Avila also translated Furtados' concerns on whether he could vote at the election.

He further testified that he may have touched the sample ballot, he was not sure if he held it in his hand or not when he was explaining it to Furtado. However, he denied having marked the ballot.

Avila acknowledged having spoken to Furtado before the election started and asking him "how he was doing on his [new] job."

Testimony of Frank Mateus

Mateus testified that when he arrived to vote there was one man ahead of him, (referring to Furtado) who went in, voted, placed the ballot in the box and left. He too voted, placed the ballot in the box and left. He explained that Caravantes said to him "Go over there, put [the ballot] in the box." Although, Mateus does not speak English, nonetheless, he was able to understand the limited instructions given to him by Caravantes. According to

13/ This is the response to the question of what was explained to the voters. A. "And I showed them, because they didn't know what was what, and one of them guys [Caravantes] told me what it was, and I told them what it was, and he told me that for them to mark one of them, and I told them that, to mark one of them."

Avila also stated that Caravantes explained "how they had to just put a line in one of the boxes, they had to fold it up and put it inside of [an] envelope or something like that."

He also reiterated that he translated exactly what Caravantes was saying and he did not "add anything else."

Mateus no one spoke to him in Portuguese during balloting. In fact, everyone at the election table was quiet.

He explained that when he was given the ballot he knew what to do with it. Caravantes did not tell him what to do, but rather gave him the ballot in such a manner which he interpreted to mean "go ahead and do what you want to do."

Mateus throughout his testimony appeared to be very nervous, uneasy and reluctant to answer questions. Pie also protested that he was forced to take a day off from his job to come and testify at the hearing.

(B) Finding of Fact

I credit the testimony given by Avila, Furtado and Paala, in regards to the content of the communications between Avila and the voters during balloting. Their testimony establish that Avila's communications with Furtado and Mateus at the voting table was limited to translating the voting explanations for Caravantes, and answering Furtado's inquiry on whether or not he could vote.

I believe Avila's testimony since throughout the hearing he consistently denied that he specifically instructed the voters on who to vote for, after repeatedly being asked by the Employer's representative. He repeatedly indicated that at the voting table he limited himself to translating what Caravantes was saying to the voters. He also emphasized that he translated the instructions only upon Caravantes' request for him to do so. His testimony was also credible when he indicated that it was possible that he might have touched the ballot when giving the instructions but denied that he marked the ballot.

Furtado's testimony corroborated Avila's testimony as Furtado admitted that he asked for instructions and wanted to know which was the "Yes" and "No" box since he could not read English or Portuguese. Furtado also indicated that he had asked if his vote was valid and after he was told he could vote he "voted yes." Furtado admitted that Avila had encouraged him to help the union before the election day, but he denied that anyone asked him to keep the union or told him to vote for the union on election day.

Paala testified that Furtado asked whether he [Furtado] could vote when he first arrived at the voting table. Paala also corroborated Furtado's and Avila's testimony that Avila interpreted for Caravantes who was unable to communicate with Furtado in Portuguese. According to Paala it appeared that Avila was translating point-by-point what Caravantes was saying. Paala also denied that Avila wrongfully marked the sample ballot on the "Yes" box.

I believe Paala's testimony that, as a matter of usual procedure, the ALRB agents use a sample ballot when giving the instructions which is later marked void and discarded as was done in this case. Paala explained that he was responsible for conducting the election and denied that a wrongfully marked ballot was recovered from Avila.

I give more weight to the Avila's and Furtado's testimony in regards to the content of the communication that took place at the election table. Both Avila and Furtado appeared to be credible witnesses. Both were cooperative and indicated that they were answering the questions as fully as their recollection allowed them. They did not refuse to elaborate on specific points when they were asked to do so.

In contrast, Mateus' testimony is given less credence as he was reluctant to answer the questions posed, and generally was reluctant to elaborate on specific points. He testified that he understood the limited instructions given to him in English when he was handed the ballot, yet at the hearing he admitted he did not speak English. He denied that anyone spoke to him in Portuguese or that anyone spoke Portuguese while he was there, yet the testimony of the other witnesses indicated that Avila translated the instructions for Caravantes from English to Portuguese.

After taking into consideration all of the testimony given, it appears that the interaction that took place at the election table was primarily between Avila, Furtado and Caravantes, even though, Mateus was standing in the area when Avila was translating the instructions. Additionally, Mateus, unlike Furtado, indicated that he knew what to do with the ballot when he got there inferring that he did not need instructions. From his testimony it is difficult to ascertain to what extent he felt that the instructions were directed at Furtado and not at him, as he refused to elaborate on what was said to whom and by whom it was said. Nevertheless, he was clear and definite on the point that nobody told him what to do or who to vote for at the election.

The Employer's witnesses, Mr. & Mrs. Van Lierop, were the only two who testified that Avila specifically instructed the voters to vote for the union, even though the evidence established that they do not speak or understand Portuguese themselves. They were unable to testify as to the exact content of the conversation between Avila Furtado, Mateus and Caravantes, although, they testified that they

were able to understand only selective words of what was said. I find their testimony to be unreliable in regards to what in fact Avila said as their selective memory excludes everything not selected and in this case everything not understood.

Further, Mrs. Van Lierop's testimony was inconsistent. First she indicated that Avila had marked the "No" box. However, after the hearing recess, Mrs. Van Lierop claimed to have clear recollection of exactly what box on the ballot Avila had marked and contradicted her prior testimony by stating that in fact Avila had marked the "Yes" box.

The Employer's arguments imply that in this case translating the instructions on the mechanics of voting was synonymous with telling the employees who to vote for. The evidence, however, established that Avila, while acting as the union observer, limited himself to translating Caravantes' explanations and responding to Furtado's question as to which was the "Yes" and "No" box. The preponderance of the evidence did not support the Employer's allegation that Avila instructed the voters on what choice to make, nor that the sample ballot had been voided because Avila marked it.

The testimony of the two voters affected does not support a finding that the voters were coerced in making their free choice at the election.

(C) Analysis and Conclusion

The Board has established that the standard to be applied to objections to the conduct of elections or to conduct affecting the results of the elections is that an election will not be overturned unless such misconduct reflects an atmosphere in which employees

are unable to freely choose a collective bargaining representative. Harden Farms of California, Inc., (February 1976), 2 ALRB No. 30 Kawano Farms, Inc., (March 1977), 3 ALRB No. 25, D'Arrigo Bros., (May 1977), 3 ALRB No. 37. In a more recent decision the Board emphasized its policy to "...scrutinize all the factors which tend to restrain the employees' exercise of free choice." S.A. Gerrard Farming Corp. , (August 1980), 6 ALRB No. 49.

In order to determine whether Avila's statements were of such nature as to affect the voters' free choice, one must inquire into the content of the conversation. Under the Milchem rule, Milchern, Inc. , (1968) 170 NLRB No. 46, the NLRB sets aside an election when a party engages in a sustained conversation with voters in the polling area during the election. The ALRB has refused to apply the Milchem rule as a per se rule in the agricultural context, Superior Farming, (April 1977), 3 ALRB No. 35. Nonetheless, when the alleged statements are made by observers, both the NLRB and the ALRB inquire into the content of the statement and determine if the statements were of such character as to affect: the free choice of the voters. Harden Farms, (February 1976), 2 ALRB No. 30, Kawano Farms, Inc., (March 1977), 3 ALRB No. 25, Century City Hospital, (1975) 219 NLRB No. 6, Modern Hard Chrome Service Co., (1970) 187 NLRB 82, General Dynamics Corporation, (1970) 181 NLRB 874.

In this case the Employer urges that Avila's conduct in translating the instructions on voting compels the conclusion that Avila's conversation was not restricted to greetings and therefore it must be inferred that Avila also told the employees to vote for the union.

In a factually similar case the NLRB held that "Remarks made in Spanish by [the] union's election observer to a number of Spanish-speaking voters do not warrant setting an election aside since the union observer claimed he merely translated the Board agent's explanation of voting procedures and there was no evidence to the contrary." Deeco, Inc./ (1956), 116 NLRB No. 102. In Deeco, Inc., a number of voters of Mexican origin spoke little or no English and the Board agent tried to explain the procedures to them in English, but the voters did not understand the Board agent's instructions in English. The observer then translated the explanation into Spanish for the non-English speaking voters. The [NLRB] stated that "in the absence of any evidence that the observer did anything more than translate the Board agent's instructions, we (the Board) are not justified in inferring that during this brief conversation he engaged in electioneering," 116 NLRB, No. 102 at page 991. The NLRB has also recognized that election observers, "...are in effect, dual agents as agents for their respective parties and for the Board." As observers, "...they are required, in the course of their duties...to engage in conversations with the voters." General Dynamics, Corporation and International Union of Electrical, Radio & Machine Workers, AFL-CIO-CLC, March 1970, 181 NLRB No. 142.

The credible evidence in this case established that Avila limited his conversation with the voters to translating the explanations of ALRB agent Caravantes in response to Furtado's questions. Having found that the preponderance of the evidence in this case did not establish that in fact Avila also instructed Furtado and Mateus to vote for the Christian Labor Association, Dairy Employees Local 17,

I conclude that Avilas' statements did not constitute electioneering requiring the Board to set aside the election.

Therefore the objection must be dismissed.

IV

Second Objection

II. Whether the union's observer at the election engaged in campaigning inside the polling area by displaying a campaign card during balloting/ and if so, whether such conduct affected the results of the election.

Employer Allegations

The Employer contends that the union observer, Joe Avila, engaged in misconduct during balloting by campaigning inside the polling area in violation of 3 California Administrative Code section 20350(b)^{14/} of the Board's regulations. According to the Employer the union observer's misconduct consisted of displaying a "union campaign card" on the voting table during balloting.

(A) Summary of Testimony

Testimony of Mrs. Van Lierop

Mrs. Van Lierop testified that during balloting, Avila reached into his back pocket, pulled out his wallet and pulled a card from it which he placed on the middle of the election table. The card remained in the plain view of Furtado and Mateus who were standing in front of the election table.

Mrs. Van Lierop described the card as being larger than a business card, approximately "three inches high and four inches wide," and "kind of a cream color."

IV Section 20350 (b) states in part that observers so designated should not wear or display any written on printed campaign material or otherwise engage in any campaign activities on behalf of any party while acting as observers.

Upon questioning by the undersigned IHE regarding whether the card had any identifiable union symbols, Mrs. Van Lierop responded "I didn't see any" and "I don't think so." She also indicated that she could not read the writing on the card from the place where she was standing, five feet away, and she did not know what the card was all about.

Testimony of Joe Van Lierop

Mr. Van Lierop testified that during balloting Avila pulled out a card and placed it on the table in front of him. He identified the card as being of an off-white color printed and larger than a business card approximately two by three inches. According to Mr. Van Lierop the card remained on the election table until just before the polls closed in plain view of Furtado and Mateus.

Upon questioning by the undersigned IHE regarding the characteristics of the card Avila pulled out, Mr. Van Lierop responded that from the angle he was sitting he "couldn't really read it." He "felt it was a union card or something like that because the ALRB agent had looked at it and told Avila to get it off the table." He did not see any identifiable symbols on the card that would allow him to testify with certainty that the card Avila pulled out was in fact a union campaign card.

Testimony of Frank Mateus

Mateus testified that when he approached the voting table he observed a man sitting at the table, who had a lot of papers in front of him, but he did not know what those papers were. His testimony did not make any specific reference to having observed the alleged union campaign card that Avila displayed during balloting.

Testimony of Alberto Furtado

Upon questioning by the undersigned IHE as to what he saw on the election table when he came to vote, Furtado responded by stating that he saw "papers," a box where to place the ballots, and the people who were sitting down at the table. When pressed to explain what sort of "papers" he responded that he couldn't explain what they were as he did not know how to read in English.

Testimony of Vicente Paala

Paala testified that after the observers were given instructions and before any ballots had been cast, he noticed that Caravantes asked Avila to keep a card out free the view of the voters which Avila had put on the table. He described the card as being ten by six inches in size, with manuscript writing on it. He indicated that he did not actually see when Avila place the card on the table, but assumed that Caravantes instructed Avila to get it off the table as soon as Caravantes noticed the card.

Testimony of Joe Avila

When asked if he recalled having pulled a union card from his pocket and placing it on the table during balloting, Avila replied that he did not remember having pulled out a card nor placing it on the table. He did remember a Board agent asking him to remove something from the table, but he couldn't recall what it was, though he was under the impression that the Board agent was referring to a ballot.

(B) Finding of Fact

While there was testimony establishing that Avila placed some sort of paper on the election table during balloting, the totality of the evidence did not establish that the paper displayed

Avila was in fact a union campaign card as alleged by the Employer. The evidence showed that none of the witnesses were able to identify the content or any identifiable union symbols or insignia of the paper displayed by Avila.

Mrs. Van Lierop was unable to see any identifiable symbols or insignia on the card that would establish that the paper Avila placed on the table was in fact a union campaign card. Mr. Van Lierop also was unable to identify the content or any union symbols as he couldn't read the card from the angle where he was sitting. Mr. Van Lierop assumed that the paper was a union card because of the remarks made by the ALRB agent when instructing Avila to remove it from the election table, but he could not identify the alleged card as a union campaign card.

Furtado and Mateus referred to having seen papers on the table. However, their testimony failed to establish that they specifically observed the alleged union campaign card on the election table during balloting. Avila did not remember placing a union campaign card on the election table.

(C) Analysis and Conclusion

It is well established that the burden of submitting evidence in support of its objections to an election rests upon the person filing such objections. Foremost Dairies of the South, (1968) 172 NLRB 1242, Mattison Machine Works, (1958) 120 NLRB 58, affd. 365 U.S. 123, The Sheffield Corporation and District 13, International Association of Machinist, AFL-CIO, (1959) 123 NLRB 1454, Bufkor-Pelzner Division, Inc., (1968) 169 NLRB 998. In this case the Employer failed to meet his burden of proof as the evidence presented

did not establish that the paper which Avila placed on the election table during balloting was in fact a union campaign card.

In Western Electric, Inc. (1949) 87 NLRB 183, the employer had objected to the election on the basis that the union observer wore a button bearing the initials of the union during the election alleging that such conduct unfairly influenced the results of the election.

The NLRB held that the wearing of buttons or similar insignia at an election by participants therein is not prejudicial to the fair conduct of the election. The Board reasoned that "the identity of election observers, as well as the fact that they represent the special interest of the parties, is generally known to the employees."

Even assuming that the alleged card was a union campaign card the ALRB has held that the presence of campaign materials inside the polling area are not a ground for setting aside the election unless the presence of such material caused a disruption of voting or otherwise interfered with the election. Harden Farms, (February 1976), 2 ALRB No. 30, Veg-Pak, (October 1976), 2 ALRB No. 50, John Elmore Farms, (February 1977), 3 ALRB No. 16, P.P. Murphy s Sons, (March 1977), 3 ALRB No. 26.

In the present case no evidence was presented which suggests that the presence of campaign material in the polling area, assuming that the paper Avila placed on the table was a union campaign card, had any effect whatsoever on the exercise of free choice by the voters. The evidence established the contrary, in that none of the voters were able to verify the content of the card and none observed any union insignia that would have influenced their free choice or interfered with the election process. Additionally, in this case

it was well known to all the employees that Avila was a pro-union man. Moreover, there was no evidence of any disruptive conduct in the election process caused by the presence of the paper which Avila placed on the table. Therefore, under the facts and circumstances of this case, I conclude that the conduct complained of by the Employer is not sufficient to have affected the results of the election.

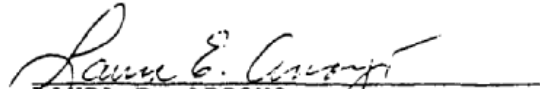
Therefore, the objection is hereby dismissed.

RECOMMENDATION

Based on the findings of fact, analysis and conclusions herein, I recommend that the Employer's objections be dismissed and that the Dairy Employees Union, Local No. 17, Christian Labor Association, be certified as the exclusive bargaining representative of all of the agricultural employees of the employer in the State of California.

DATED: February 22, 1982

Respectfully submitted,


LAURA E. ARROYO
Investigative Hearing Examiner