Oxnard, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

PLEASANT VALLEY VEGETABLE CO-OP., Employer, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Petitioner.	)	Case No. 81-RC-4-OX 8 ALRB No. 82

DECISION AND CERTIFICATION OF REPRESENTATIVE

Following a Petition for Certification filed by the United Farm Workers of America, AFL-CIO (UFW) on April 2, 1981, a representation election was conducted on April 9, 1981, among the Employer's agricultural employees. After 3 challenges were sustained, and 45 challenged ballots were opened and counted, the revised Tally of Ballots, which issued on July 29, 1981, showed the following results:

UFW	100
No Union.	71
Unresolved Challenged Ballots .	20
Total	191

The Employer timely filed post-election objections. On July 7, 1981, the Executive Secretary of the Agricultural Labor Relations Board (ALRB or Board) noticed for hearing the following issues:

(1) Whether agents or supporters of the UFW engaged in improper electioneering at the McKinnis Ranch polling place while

waiting in line to vote, and after voting; and if so, whether such improper electioneering affected the outcome of the election.

(2) Whether Board agents engaged in misconduct by conducting an on-site investigation of prospective voters within the polling area causing delay and confusion; and whether such investigation caused the Board agents to fail to properly supervise the McKinnis Ranch polling area thereby allowing a union agent or supporter to engage in improper electioneering within the polling area; and if so, whether such misconduct affected the outcome of the election.

A hearing on the above objections was held on August 11, and 12, 1981, before Investigative Hearing Examiner (IHE) Brian Tom. In his initial Decision, which issued December 3, 1981, the IHE recommended that the Board: (1) dismiss the objection alleging Board agent misconduct; (2) sustain the objection alleging improper electioneering at the polling place; and (3) set aside the election.

Thereafter, the Employer and the UFW each timely filed exceptions to the IHE's Decision, a brief in support thereof, and a reply brief.

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

The Board has considered the record and the attached Decision in light of the exceptions and briefs, and has decided to affirm the IHE's rulings, findings, and conclusions only to the extent consistent herewith.

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The Agency Issue

The UFW excepts to the IHE's conclusion that Alderberto Gomez (Gomez) was an agent of the UFW in conducting his electioneering activities at or near the designated polling area. The standard applied in assessing the impact of the conduct of a party or its agent on the free choice of voters differs from that applied to the conduct of a non-party. Thus, in Takara International Inc. (Mar. 15, 1977) 3 ALRB No. 24, we held:

> The question in every objections case is whether the misconduct, if it occurred, created an atmosphere in which employees could not freely and intelligently choose their bargaining representative. In general, misconduct by a party will be considered more destructive of a healthy atmosphere than misconduct by a non-party.

The IHE concluded that Gomez was an agent of the UFW under the doctrine of "apparent authority." In San Diego Nursery, Inc. (June 14, 1979) 5 ALRB No. 43, this Board discussed "apparent authority" and quoted Restatement (Second) of Agency (1975):

> Apparent authority is the power to affect the legal relations of another person by transactions with third persons, professedly as agent for the other, arising from and in accordance with the other's manifestations to such third persons.

In San Diego Nursery, supra, the facts closely parallel those in this case. In August 1978, some of the nursery employees began their own campaign for a representation election and went to the UFW officials for assistance. The Union officials responded that they had no time to organize at San Diego Nursery and that the employees would have to organize themselves. When asked for advice, the Union representatives told the employees how to solicit authorization cards and support for the Union. The employees

formed an organizing committee, solicited authorization cards, distributed leaflets and buttons, and talked to their fellow workers about the Union. Although certain members of the committee met periodically with Union representatives for advice, the employees conducted the election campaign on their own.

In San Diego Nursery, supra, 5 ALRB No. 43 the employer argued that, under the National Labor Relations Act (NLRA) precedent of NLRB v. Georgetown Dress Corp. (4th Cir. 1976) 537 F.2d 1239 [92 LRRM 3282], the Union should be held liable, under the principle of apparent authority, for the committee members' statements and conduct. In Georgetown, supra, professional union organizers, in conducting an election campaign, initiated contact with some employees and formed an in-plant organizing committee. The organizers directed the committee's activities in the plant, relying upon the committee's efforts because union representatives were not permitted on the employer's property. The committee was therefore the Union's only in-plant contact with the workers. The committee distributed leaflets requesting employees to attend union meetings. The NLRB, finding that the committee members solicited other employees because of their own interest in obtaining union representation, concluded that an agency relationship did not exist. (Georgetown Dress Corp. (1974) 214 NLRB 706 [88 LRRM 1593].) The U.S. Circuit Court reversed, finding that the committee members were the representatives of the union in the eyes of the other employees and that the union had authorized them to occupy that position. Accordingly, the court held the union liable, under the principle of apparent authority, for the acts and conduct of

the committee members. (NLRB v. Georgetown Dress Corp., supra, 537 F.2d 1239.)

In San Diego Nursery, supra, 5 ALRB No. 43, we rejected the argument as to the "apparent authority" of the in-plant committee and relied on several factors to distinguish that case from Georgetown. First, as NLRA precedents make no provision for union access to an employer's premises, the Union in Georgetown had to rely on the in-plant committee for all organizing activity. Moreover, the U.S. Circuit Court found that the union had expressly authorized the committee members to act as its agents. In the San Diego Nursery case, supra, we found:

> Here, no UFW official or organizer made any statements or engaged in any conduct which would indicate to the Employer's employees that members of the organizing committee were acting as agents of the union. Union officials did not engage in campaigning at San Diego Nursery. The employees conducted the organizational campaign by themselves. Therefore, unlike the Georgetown employees, the San Diego Nursery committee members were not acting as the union's contact with the rest of the workers. The nursery workers knew the committee members not as UFW organizers but as fellow employees, some of whom had worked for the Employer for a number of years. There was no manifestation by the UFW to the other employees that the UFW had authorized the committee to act as agents.

The IHE in the instant case based his conclusion that Gomez was an agent of the Union primarily on a statement made by UFW official Bobby de la Cruz at the pre-election conference, and on an answer given by Gomez during cross-examination by Employer's counsel. Contrary to the IHE, we do not construe the following testimony of Gomez as evidence that he considered himself to be an agent of the UFW:

Q: It is true, is it not, that you were present

there at a table along with Jose Manuel Rodriguez, Bobby de la Cruz, Art Mendoza and Jose Tinajera at the table representing the Union's side?

Interpreter: Would you repeat the names?

Mr. Roy: Jose Manuel Rodriguez, Bobby de la Cruz, Mr. Mendoza and Jose Tinajera.

(Translation)

The Witness (Mr. Gomez): Yes. I do not remember about Art Mendoza but I was there.
(RT. Vol. II pp. 214-215.)

The IHE interpreted Gomez' simple "Yes ... I was there" to mean that he "... thought that he was an agent" of the UFW. We read his answer as stating merely that he was at the pre-election conference table with at least three of the four named Union agents. We therefore reject the IHE's unwarranted finding, which he based on Gomez' clear and simple response, that Gomez "... was an agent of the UFW for the purpose of [his prior] distributing and collecting signed authorization cards, distributing campaign literature and [his future] electioneering." We note that Gomez was not asked whether he was an agent or representative of the Union, and that he did not testify that he was.

The IHE also found that UFW agent Bobby de la Cruz' statement at the pre-election conference conferred on Gomez the status of UFW agent by "apparent authority." It is clear that Gomez' activities as a member of the organizing committee up .to the time of the pre-election conference do not establish that he was an agent of the UFW under any NLRA or Agricultural Labor Relations Act (Act) precedent. Therefore, agency by apparent authority can be found only if de la Cruz' statement at the

pre-election conference table constituted a "manifestation" of agency status and was likely to be so construed by the employees in attendance. Unfortunately, the record does not reflect de la Cruz' exact words. In response to Employer counsel's question, the Company representative at the pre-election conference, John P. Frees, testified, " [de la Cruz] stated that on behalf of, well, that everybody that was sitting at the table was a representative of the Union." That is the sum total of Frees' recollection of de la Cruz' purported conferral of agency status on Gomez.

Employer's counsel Roy questioned Gomez as to whether "he was a spokesman for the Union." That question was objected to as calling for a conclusion. Then, when Roy asked Gomez to describe "his role at the table," Gomez answered, "Well, we're meeting there to see the election." Roy: "Okay - do you recall Mr. Bobby de la Cruz who was the director of the UFW stating that all of you that were sitting at the table were acting as representatives?" Gomez: "Yes." (R.T. Vol. II p. 214.)

In Roy's Affidavit in Support of Employer's Objections to the Election, he stated, "Mr. de la Cruz informed the ALRB and myself that all of the above legal people would be speaking on behalf of the Union and the employees." But, as a reading of Roy's affidavit and of the testimony of Gomez will confirm, the only person who did in fact speak on behalf of the Union at the pre-election conference was de la Cruz.

We will not base a finding of agency on the insubstantial evidence thereof in the record, because the consequences of

union agency by "apparent authority" often are contrary to the self-organization rights guaranteed under section 1152 of the Act.

The Board in the leading case of union agency by "apparent authority," San Diego Nursery, supra, 5 ALRB No. 43 said:

> ... to find an agency relationship on the facts before us would hinder the ability of unions to advise and encourage workers wishing to seek union representation because of the potential liability for the misconduct of individual employees, and would infringe upon employees' section 1152 right to self-organization.

On the basis of the above, and the record as a whole, we conclude that Gomez was not acting as an agent or representative of the UFW at any time during the pre-election campaign or on the day of the election, and we find no evidence that the UFW at any time directed, authorized, knew of, or ratified Gomez' acts and conduct during the course of the polling.[1/]

The Electioneering Issue

The UFW has excepted to the IHE's finding that "... the electioneering took place within the polling site rather than close to the polling site, rendering the conduct [of Gomez] all the more serious," and his conclusion that the electioneering interfered with the free choice of the voters. As the ALRB Election Manual, section 2-6680, pp, 6-14 (Co. Exhibit 9) prohibits electioneering at or near the polling place, and requires that all electioneering materials (except for non-disruptive insignia) visible from the polls should be removed, we must determine, based on all the facts

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[1/] Even assuming that de la Cruz' statement at the pre-election conference conferred agency status on Gomez, we would find that his agency was limited to those decisions and actions which took place at the pre-election conference.

and circumstances, whether the vocal electioneering and distribution of electioneering material by employee-adherents of the Union in this case so impaired the voters' exercise of free choice as to require setting aside the election.[2/] The record reflects that on the day of the election Gomez remained in the vicinity of the polling place from the beginning until the end of the election, i.e., from 10:00 a.m. to 12:00 noon. He himself voted at the midway point of the polling period. During that period, he may have remained in the polling area, ten feet or more from the voting booths, for several minutes, but it is clear that he spent most of the two-hour election period talking to the prospective voters who were waiting in line to receive their ballots,[3/] urging them to vote for the UFW, and distributing two leaflets: one leaflet instructed employees how to vote for the UFW; the other set forth the relatively high hourly and piece-rate wages paid by an agricultural employer who has a UFW contract; both leaflets asked the employees to vote for the UFW. Gomez, with help from co-workers, distributed the leaflets to virtually all of the approximately 170 employees who voted at that location. Almost every employee who approached the voting booths at that location still had one or both of the leaflets in his or her hands. There is no contention that either leaflet contained any threat, promise of benefit, or

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[2/] Glacier Packing Co. (1974) 210 NLRB 571, 573 n.5, [86 LRRM 1178, 1180 n.5]; Southeastern Mills (1976) 227 NLRB 57, 58, [94 LRRM 1003, 10<5TT

[3/] The polling site was an area about 75 feet square, in front of a barn of comparable size. Employees waited to vote in a line along a 75 to 100-yard dirt road leading to the polling site. (Union Exhibit 1).

misrepresentation, and no contention that Gomez, or any other employee, made any oral promise or threat, or in any way harassed or disturbed any person during the period they were thus communicating with the prospective voters.

We do not believe it is necessary to determine how much, if any, of the electioneering occurred within the 75-foot-square polling place. The ALRB Elections Manual prohibits electioneering... "at the polling place or in the protected area of voting." We find that once the polls have opened, and until such time as they close, any area where employees are waiting in line to vote must be considered a part of the "protected area of voting," or "quarantine area," where restrictions against electioneering apply and must be enforced, and where none but voters may be allowed to enter.[4/] In the instant case, electioneering and leafletting did occur within the protected area for a period of two hours, contrary to the prohibition in the Manual, and electioneering materials (presumably visible from the polls) were not "removed," again contrary to Manual procedures, during that period, except in one instance when Regional Director Wayne Smith directed Board agent Sylvia Lopez to confiscate leaflets held by an unidentified employee. We cannot condone, or even understand, the failure of the 10-12 Board agents who were present at the site to promptly stop such activity. It may be that Board agents assigned to

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[4/] We recommend that Board agents conducting future elections clearly define the "protected" or "quarantine" area and explain to the parties and observers that such area will include the location(s) where employees are waiting in line to vote, and that no electioneering will be permitted in either the polling area or the protected area.

conduct future election should be required to review, and demonstrate their knowledge of, the Elections Manual and the importance of carefully observing and strictly enforcing all procedures therein in order to minimize the possibility that the employees' right to a quickly-resolved election will not be delayed by objectionable conduct which Board agents are expected to control. The electioneering and leafletting herein could have, and should have, been stopped "promptly," as the Manual requires, and much time and expense could have been spared for all parties thereby.

While we shall continue to seek effective methods of assuring the appearance as well as the reality of a free and fair election in every case, we feel that the proper method of dealing with the Board agent conduct objected to in this election is through enforcement of our own internal rules relating to the conduct of our agents. Similar conclusions have been reached by commentators on the NLRB's attempts to regulate electioneering near the polls:

> To the extent the foregoing rules rest on the assumption that employee free choice is fragile, they are as unsupported by the data as other Board rules resting on the same assumption, hence ought not provide a basis for setting aside the results of an election in which employees have expressed their choice. To the extent these rules rest on the Board's desire to preserve the appearance of fairness in its processes, they may be justifiable, but there would appear a more satisfactory remedy for their violation than setting aside the results of an election that the Board does not even contend was influenced by the conduct involved. The Board can enforce rules relating to the conduct of its own agents by appropriate internal disciplinary procedures. Rules regulating the conduct of the parties, such as those prohibiting the alteration of Board documents or tampering with a Board ballot box, can be enforced by the passage of laws specifically prohibiting such conduct. (Footnote omitted.)
> (See Getman, et al. Union Representation Election; Law and Reality, p. 153(1976) Russell Sage Foundation.)

Having found that Gomez was not acting as an agent or representative of the UFW during the pre-election campaign or during the conduct of the election, that he did engage in vocal electioneering and leafletting throughout the balloting period, and that Board agents present during the election failed to adequately enforce the rules against such forms of electioneering, we must now determine whether the actions of Gomez, and/or the inaction of the Board agents, created a situation so coercive and disruptive, or so aggravated, that a free expression of employees' choice with respect to representation was impossible. That is the standard set forth in NLRB v. Aaron Brothers Corp. (9th Cir. 1977) 563 F.2d 409 [96 LRRM 3261], and which we shall henceforth apply in all cases where it is alleged that the acts or conduct of voting-unit employees, or other third parties, before or during the election, warrant setting aside the election. (See also NLRB v. Campbell Products Department, Division of Flintkote, Co. (3rd Cir. 1980) 623 F.2d 876 [104 LRRM 2967].)

In Aaron Brothers, supra, 563 F.2d 409-412, the Ninth Circuit held:

> We adhere to the Board's policy that "activities of a union's employee adherents which are not attributable to the union itself are entitled to less weight in the variable equation which leads to a conclusion that an election must be set aside." N.L.R.B. v. Monroe Auto Equipment Co., 470 F.2d 1329, 1332 (5th Cir.1972).Furthermore this Court has recognized that the Board's policy "credits employees with the ability to give true weight to the possibly impulsive allegations of fellow employees induced by the heat of a campaign." N.L.R.B. v. Sauk Valley Mfg. Co., 486 F.2d 1127, 1131, n.5 (9th Cir.1973). So to warrant overturning an election, employee conduct must be "coercive and disruptive conduct or other action [which] is so aggravated that a free expression

> of choice of representation is impossible." (Emphasis added.) Monroe Auto Equipment, 470 F.2d at 1332, quoting Bush Hog, Inc. v. N.L.R.B. 420 F.2d 1266, 1269 (5th Cir. 1979).
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> We agree with the Board's conclusions and hold that the Company failed in its burden to present to the Board a prima facie showing that the conduct complained of was attributable to the Union or so aggravated that a free expression of choice of representation by the other employees was impossible.

In Sewanee Coal Operators Association, Inc. (1964) 146 NLRB 1145 [56 LRRM 1021], the NLRB refused to set aside an election for improper conduct by a non-party electioneering at the polling site. The conduct consisted of circulating among the voters lined up to vote wearing placards reading "Vote for United Mine Workers And Be Able to Get a Pension," an exhortatory message delivered to 200-2000 voters lined up to vote. The NLRB held:

> ... the Regional Director does not point to any specific incidents of disorderliness or coercive conduct. We find the placard electioneering by unidentified persons on behalf of the UMW in the area outside the polls did not impair the exercise of free choice in the election.

In Star Expansion Industries (1968) 170 NLRB 364 [67 LRRM 1400], the NLRB reversed its Regional Director, who refused to set aside an election because electioneering had occurred at the polls, although the Director had previously specified that no electioneering would be permitted within 50 feet of the polls. Despite that notice and despite "the Board agent's instructions on three separate occasions that he leave the area and the admonition that he could not electioneer within 50 feet of the polls," the offender continued his activities.

The NLRB set aside that election primarily because of

the refusal of the offender to abide by the efforts of the Board agents to "prevent intrusions upon the actual conduct of the election." The NLRB distinguished Sewanee on the basis that, as in the instant case, there was no clear specification by the Board agent as to the limits of the "no electioneering area." Thus, the case law indicates that the NLRB requires coercive or disruptive conduct of the election as a basis for setting aside an election because of electioneering at or near the polling place.

The ALO relies heavily on Perez Packing, Inc. (Jan. 20, 1976) 2 ALRB No. 13, as precedent for the type of "objectionable conduct which leads to the conclusion that the free choice of voters was interfered with." (ALOD, p. 18). The conduct in Perez consisted of a failure of Board agents to control drinking and carousing of employees "across the narrow hallway from the door to the polling area." In that decision, we held that:

> Board agents could have attempted to quiet the crowd of employees and limit the beer drinking to an area further removed from the poll so that the disruptive effect of this conduct could have been minimized. (Emphasis added.)
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> In addition, the conduct of the UFW observer who persisted in talking directly to voters rather than through a Board agent, was found to be misconduct. He was warned on two or three occasions by the Board agents to stop conversing with the prospective voters. Despite these warnings, the UFW observer persisted ...."

The Board considered these improprieties in the election and concluded:

> Considered collectively, the objectionable conduct raised by the employer undermines the integrity of this election to such an extent that it would be inappropriate for the Board to fix its imprimatur to the outcome.

We believe it is unwarranted to equate the disruptive conduct and

repeated refusals to follow Board agents' instructions conduct present in the Perez case with the quiet and peaceable conduct of Gomez in the instant case.

In Tepusquet Vineyards (Dec. 19, 1978) 4 ALRB No. 102, an employee (Alvara) accompanied other workers to the polls, urged the crews to vote for the UFW, waited in the polling area while they voted, then left with the crew and repeated the process with other crews. Rejecting a contention that that electioneering constituted sufficient misconduct to set aside the election, the Board said:

> We do not condone activity which interferes with the proper conduct of an election. We reaffirm that Board agents have *a.* responsibility to preserve the integrity of the election process. However, because the record is devoid of evidence that Alvara 's activity at the polls had a prejudicial effect on the voters, we find that Alvara 's electioneering does not warrant setting aside the election. See Chula Vista Farms, Inc . , 1 ALRB No. 23 (1975) . Our decision in no way implies that this Board will decline to act forcefully when presented with a record of activity which establishes an atmosphere rendering improbable a free choice of a bargaining agent by employees.

Like NLRB decisions, this Board's decisions require that the conduct be threatening, coercive, or disruptive in order to warrant setting aside an election. For example, in D'Arrigo Bros. of Calif. (May 10, 1977) 3 ALRB No. 37, the Board rejected the NLRB "laboratory conditions" test and refused to set aside an election although large numbers of voters had assembled at the site, pro-UFW slogans were shouted at the polling site, UFW buttons were handed out at the polling site, and a crap game took place among employees waiting to vote. The Board commented:

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> Some deviation from the ideal does occur in representation elections, and did in this case. However, it does not rise to the level of conduct warranting setting aside the election.

In the same case, we considered the conduct of a union agent who distributed campaign buttons to unit employees "inside the voting area" and concluded:

> ... there is no evidence that voters were pressured to wear buttons or were in any way threatened with harm if they did not accept the offered campaign material; nor that their free choice of a collective bargaining representative was interfered with by the offer of a campaign button to them while they were in the polling area. We find that the giving of campaign buttons to these voters while they were inside the voting area is not a ground for setting aside this election.

Where a party, or the agent of a party, engages in electioneering at or near the polling place during an election, the NLRB considers such conduct a per se basis for setting aside the election, but when any employee(s) or other third party engages in such conduct at or near the polls, the election will not be set aside unless it appears that the electioneering substantially impaired the employees' exercise of free choice. (Glacier Packing Co. (1974) 210 NLRB 571 [86 LRRM 1178].) On the record of the instant case, we find that the unobtrusive conduct of Gomez, in distributing pro-UFW leaflets and orally urging other employees to vote for the UFW, was neither threatening, coercive, nor disruptive, and therefore did not tend to interfere with the voters.' free choice or to make a free choice impossible.

The "Milchem Rule"

The Employer excepted to the refusal of the ALO to apply the NLRB's "Milchem Rule" to the electioneering conduct of Gomez.

Milchem, Inc. (1968) 177 NLRB 362 [67 LRRM 1395] holds that where a party engages in sustained conversations with unit employees who are in the polling area or in line waiting to vote, "regardless of the content of the remarks exchanged," such conduct in itself constitutes grounds for setting aside the election.

As we have concluded that Gomez was not acting as an agent of the UFW during the course of the election, and as there is no evidence that he engaged in sustained conversation with any of the prospective voters, it is obvious that the Milchem rule is inapplicable to his electioneering conduct, for the rule applies only to parties and agents of parties, not to employee-adherents or other third parties. The ALRB Elections Manual directs the Board agent(s) charged with conducting the election to establish a protected area (or quarantine area) in the vicinity of the polling area and to instruct the parties that they (and their agents) are prohibited from being in either of those areas during the polling period. Moreover, we have found, supra, that any area where unit employees are waiting in line to vote during the polling period will be considered a part of the protected area. It follows that any party, or agent of a party, who is present in the polling place or in the protected area during an election will be engaging in objectionable conduct. Whether that presence will warrant setting aside the election will depend on our determination as to whether the party's (or agent's) acts, conduct, or statements in the presence of voters were so coercive or disruptive, or so aggravated that a free expression of the employees' choice in the election was impossible. (NLRB v. Aaron Brothers, supra, 563 F.2d 409-412.)

We are convinced that a mechanistic application of Milchem combined with a myopic disregard of the surrounding circumstances would not effectuate the purposes of the Act we administer.

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, and that, pursuant to Labor Code section 1156, the said labor organization is the exclusive representative of all agricultural employees of Pleasant Valley Vegetable Co-op, 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: November 4, 1982

JEROME R. WALDIE, Member

ACTING CHAIRMAN PERRY, Concurring:

I concur with Member Waldie's opinion and agree that the results of this election should be certified.

In the present instance, our IHE has concluded that, due to the imprimatur of authority devolving on Gomez from the hierarchy of the UFW, employees were deprived of an atmosphere of non-coercion by Gomez' peaceful and non-disruptive campaigning near one actual voting site. I note that had the 10 to 12 Board agents present at this particular voting site enforced the rules set forth in the election manual by more definitively setting out explicit and carefully delineated quarantined areas for voting, and aggressively sought to stem the source of the ubiquitous pamphlets, no questioning of this election would have been presented. I am sorely troubled by this failure of our own agents to effectively foreclose such conduct, especially after the years of experience we and our agents have acquired in the proper conduct of elections. I note additionally that a contributing factor may have been the

breach of an agreement by a supervisor of the Employer that caused a rapid influx of prospective voters rather than the ordered flow which had been previously devised. Whatever the reason, much of the activity of Gomez here complained of should not have been permitted to occur.

I join Member Waldie's conclusion that Gomez' activities here were not the actions of a UFW agent, but rather the overzealous campaigning of a long-time employee who had actively sought to certify a labor organization at his work site.

I believe, however, that the analysis of this election is not substantially furthered by the mechanistic application of highly technical legal principles combined with a disregard to the surrounding circumstances. Unfortunately, I find both my colleagues and the IHE guilty of this fault. Rather, I would conclude, based on San Diego Nursery Co., Inc. (June 14, 1979) 5 ALRB No. 43, and Tepusquet Vineyards (Dec. 19, 1978) 4 ALRB No. 102, that Gomez was not a union agent at the time of this election and that no coercive activity took place at the site where Gomez voted.

Surely Gomez' co-workers, having worked alongside this activist for a decade, could accurately assess Gomez' non-coercive campaigning and interpret the material given them in that light. The proper method of dealing with objectionable conduct that took place at this election is through the internal rules of this agency and the training of the Board agents there involved.

Dated: November 4, 1982

HERBERT A. PERRY, Acting Chairman

MEMBER MCCARTHY, Dissenting:

I would adopt the ALO's recommendation to set aside the election for the reasons stated in his Decision and on the additional grounds set forth below.

The ALO's finding that Gomez functioned with apparent authority of the UFW is well supported by the record and does not require extensive further discussion here. The ALO took into account the close collaboration between Gomez and the Union officials in the organizing campaign, for which the Union provided advice, instructions, recruiting materials, and the campaign literature which Gomez distributed to all voters at the election site during the balloting. Confirming the appearance that Gomez was acting on behalf of the Union was the statement by Union agent Bobby de la Cruz at the pre-election conference, indicating that Gomez was one of those present who spoke for the Union. Gomez's own testimony indicates that he also regarded himself as speaking for the Union (ALOD p. 11), although his own

view of his role is not critical to a finding of agency.

Approximately 40 employees attended the pre-election conference; many, if not all, of them were present when de la Cruz indicated that Gomez was one of those who spoke for the Union. Under such circumstances, it was clearly reasonable for the employees to believe that Gomez was acting for the Union. Accordingly, the subsequent electioneering conduct of Gomez at the polling place is attributable to the Union. Where poll-site electioneering is attributable to the Union, a stricter standard of conduct is applied than where the electioneering is carried on by an employee activist or other third party acting on his/her own behalf. (NLRB v. Georgetown Dress Corp. (1976) 537 F.2d 1239 [92 LRRM 3282].) The more indulgent standard of election conduct applied by the majority has essentially minimized the probable effect of Gomez's electioneering on the employees' expression of whether they wanted to be represented by a union.

Apart from the factual issue, I disagree with the standard employed by the majority for reviewing improper electioneering at the polling site. Instead, I favor the standard of review explained by the NLRB in Boston Insulated Wire and Cable Company (1982) 259 NLRB No. 149 [109 LRRM 1081] which is set out below. Member Waldie would establish *a* standard for reviewing objectionable election conduct based on the Aaron Brothers [1/] decision in which a U.S. Court of Appeals indicated that an election should be set aside only where there is "coercive

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[2/] NLRB v. Aaron Brothers Corp. (9th Cir. 1977) 563 F.2d 409 [96 LRRM 3261].

disruptive conduct or other action [which] is so aggravated that a free expression of choice of representative is impossible."

This would be an undesirable general rule for us to adopt, in my view, and one which is not properly applied in the present case. First, the Aaron Brothers holding is distinguishable on its facts. That case involved allegations of intermittent shouting in an assembly area which was outside the room designated as the voting area. Moreover, there was no finding that electioneering or disruptive conduct occurred within a prohibited area. Additionally, the court noted that the evidentiary record was devoid of any showing of union participation in the disruptive conduct. Finally, the union won the balloting by a convincing margin: 14 to 1.

It appears that the NLRB itself has not applied Aaron Brothers as an all-encompassing standard for reviewing all objectionable election conduct, particularly where poll-site electioneering has occurred. In a recent case involving electioneering, the national Board indicated that a variety of factors continue to inform its determination of whether an election sufficiently interfered with employee free choice as to warrant setting aside the election. It explained:

> When faced with evidence of impermissible electioneering, the Board determines whether the conduct, under the circumstances, 'is sufficient to warrant an inference that it interfered with the free choice of the voters.' This determination involves a number of factors. The Board considers not only whether the conduct occurred within or near the polling place, but also the extent and nature of the alleged electioneering, and whether it is conducted by a party to the election or by employees. The Board has also

> relied on whether the electioneering is conducted within a 'designated 'no electioneering area or contrary to the instructions of the Board agent. ' (Citations omitted.) (Boston Insulated Wire and Cable Company, supra, 250 NLRB No. 147.)

In the case before us, the electioneering occurred within the polling site and the "prohibited" area, for the entire two-hour duration of the election, reached the vast majority of voters, and was exhortatory in nature. As such, the objectionable campaigning gave the Union an unfair advantage because the employer was deprived of an opportunity to respond to the Union's implied claim (in a flyer Gomez distributed to all voters) that if Pleasant Valley employees were working under a UFW contract they also could receive over nineteen dollars per hour. Also, because I would find that Gomez was an agent of the Union at least from the time of the pre-election conference to the end of the election, that factor should also warrant setting aside the election.

Given the extensiveness, timing, and situs of Gomez "s actions, I would find that his electioneering clearly tended to affect and to interfere with the employees ' exercise of free choice in a fairly close election. The NLRB has strongly disapproved of overt electioneering within the polling area, where the electioneering is not isolated or otherwise insubstantial. In Star Expansion Industries (1968) 170 NLRB 364 [67 LRRM 1400], for example, the NLRB set aside an election where electioneering by a union agent near the polling place occurred

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for 15 minutes for a one-hour period.[2/]

I join my colleagues in deploring the failure of Board agents to follow clear-cut ALRB election rules to protect the integrity of the polling site. Our credibility as an effective administrator of the ALRA suffers as a result. More significantly, perhaps, is that a tainted election tends to exacerbate mutual tensions and suspicions of the parties as they set about to negotiate a contract.

The NLRB long ago explained a basic purpose of its rule against electioneering:

> The Board's rule against electioneering at or near the polling place is designed to ensure an atmosphere free from pressure or influence of any sort at the time and place where the employees cast their ballots. (Spartan Aircraft (1955) 111 NLRB 1373, 1375 [35 LRRM 1679].)

Our rule should strive to do no less, especially in view of our statutory mandate to conduct elections only seven days after a petition is filed, which leaves little time for campaigning. In the present case, the electioneering by Gomez deprived the voters of the opportunity for reflection and making their ballot choices free from interference, pressure or partisan influence. The failure of the Board agents to prevent or promptly terminate the electioneering in effect endorsed and compounded

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[2/] I disagree with Member Waldie's characterization of the Star Expansion Decision as holding that the primary reason for setting aside the election was the persistent disregard by the union agent of the NLRB agent's request to not electioneer near the polls. At least as important, and warranting the inference that employee free choice was interfered with, was the extensive electioneering near the polls. (See Williams, Janus and Huhn, NLRB Regulation of Election Conduct (1974) p. 269.)

the objectionable conduct. In my view, either of these circumstances warrants setting aside the election. Considered together, they require such action.

Dated: November 4, 1982

JOHN P. McCARTHY, Member

CASE SUMMARY

Pleasant Valley Vegetable Co-op. (UFW)

8 ALRB No. 82
Case No. 81-RC-4-OX

IHE DECISION

The IHE recommended that the Employer's objection alleging improper electioneering by a UPW agent at the election site be sustained and the election be set aside. The IHE found that a supporter of the UFW had been designated an agent of the Union and had campaigned for the Union by distributing pro-UFW pamphlets to prospective voters as they waited in line to vote.

The IHE recommended that the Employer's second election objection alleging Board agent misconduct involving conducting an on-site investigation of prospective voters and thereby creating confusion at the election site be dismissed.

BOARD DECISION

The Board adopted the IHE's recommendation regarding Board agent misconduct as an objection to the election and dismissed that objection. The Board rejected the findings of the IHE that Gomez was an agent of the Union. The Board rejected the application of the Mile hem Rule to the conduct of Gomez. The Board found that the electioneering by Gomez, though it occurred within the polling site, did not create a situation so coercive and disruptive, or so aggravated, that a free expression of employee's choice with respect to representation was impossible. The Board therefore rejected the IHE's recommendation regarding the election objection alleging improper electioneering by a UFW supporter or agent and certified the results of the election.

CONCURRENCE

Acting Chairman Perry concurred in the result, concluding that the only improper conduct was the failure of the Board agents to promptly halt the polling site electioneering, but that the facts of this case warranted certification of the election results.

DISSENT

Member McCarthy dissented. He would affirm the ALO's finding that Gomez was an agent of the Union. He would find that in view of its extensive-ness, last minute timing and exhortatory nature, Gomez' electioneering within the prohibited area clearly tended to affect and interfere with the employees' exercise of free choice in a fairly close election. He also regards the Board agents' failure to stop Gomez electioneering as compounding the objectionableness of election conduct. For these reasons, he would set aside the election.

* * *

* * *

STATE OF CALIFORNIA

BEFORE THE

AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of:	)	
PLEASANT VALLEY VEGETABLE CO-OP,	)	
Employer,	)	Case No. 81-RC-4-OX
and	)	
UNITED FARM WORKERS OF AMERICA, AFL-CIO,	)	
Petitioner	)	

Robert P. Roy, Esq., for the Employer

Chris A. Schneider, Esq., for the Petitioner

J. Kenneth Donnelly, Esq., for the General Counsel's Office

Brian Tom, Investigative Hearing Examiner: This case was heard before me on August 11 and 12, 1981, in Oxnard, California.

On April 2, 1981, the United Farm Workers of America, AFL-CIO, (hereinafter "UFW") filed a petition for certification for the agricultural employees of Pleasant Valley Vegetable Co-op.

Pursuant to the petition, an election was held with the following results:

UFW	89
No Union	37
Unresolved Challenged Ballots	68 194

On May 11, 1981, the regional director issued a report which

recommended that 45 challenged ballots be opened and counted and that 3 of the challenged ballots be sustained. As no exceptions were filed to this report, this report became final on July 24, 1981. On July 29, 1981, the amended tally of ballots was isssued which showed the following results:

UFW	100
No Union	71
Unresolved Challenged Ballots	20 191

The employer filed a timely objection petition pursuant to Labor Code Section 1156.3(c). The Executive Secretary dismissed some objections and set the following issues for hearing:

1. Whether agents or supporters of the United Farm Workers of America, AFL-CIO (UFW), engaged in improper electioneering at the McKinnis Ranch polling place while waiting in line to vote, and after voting, and if so, whether such improper electioneering affected the outcome of the election.

2. Whether Board agents engaged in misconduct by conducting an on-site investigation of prospective voters within the polling area causing delay and confusion and which caused the Board agents to fail to properly supervise the McKinnis Ranch polling area which allowed a union agent or supporter to engage in improper electioneering within the polling area, and, if so, whether such misconduct affected the outcome of the election.

Representatives of the employer and UFW were present throughout the entire proceeding and given full opportunity to participate in the hearing.

Kenneth Donnelly, an attorney for the General Counsel appeared

for the limited purpose of protecting the confidential nature of any Board records or procedures.

Both employer and the UFW filed post-hearing briefs. Upon the entire record, including the demeanor of the witnesses and consideration of the briefs, I make the following findings of fact and conclusion of law.

JURISDICTION

The parties did not challenge the Board's jurisdiction in this matter. Accordingly, I find the employer is an agricultural employer within the meaning of Labor Code Section 1140.4 (c), and the UFW is a labor organization within the meaning of Labor Code Section 1140.4(f).

PRELIMINARY FACTS

The location, physical surroundings and mechanics of the election established by the evidence are for the most part uncontroverted. The election took place at three separate locations. The alleged misconduct herein involved only one location, the McKinnis Ranch polling site. 130 to 150 of the 184 voters were scheduled to vote at this site. The time scheduled for the election at McKinnis Ranch location was 10 a.m. to 12 noon. The McKinnis Ranch polling site was described as being located at Rice and Sturgis Roads. A dirt road some 75 to 100 yards long off Sturgis Road led up to a barn located on the McKinnis Ranch. In front of the barn, three voting booths and two tables were set up. On either side of the dirt road there were fields where some of the workers who were to vote that day were working. On part of the dirt road, some workers had parked their cars. Prospective voters

lined up in front of the tables and along the dirt road to receive their ballots. They then proceeded to the voting booths to cast their ballots. The record shows that the Board agents designated the polling site as being the entire area bound by Sturgis and Rice Roads including the dirt road and that electioneering was not permitted within this area.

The Board sent eight to ten agents to supervise and oversee this polling site. Union and Company observers were generally stationed in the area in front of the voting booths throughout the election. During the election, 68 of the 194 prospective voters were challenged. The challenged voters were required to state to Board agents their name, address, whether they worked for the employer and when. This information was placed on a card. A diagram of the polling site is in exhibit as Union's Exhibit l.

On the election day, an employee named Alderberto Gomez (hereinafter "Gomez"), also known as "Pato," came to the polling site at 10 a.m. to cast his ballot. In addition to voting, he also brought along with him some leaflets, which stacked about 12 inches high. A copy of the leaflet was introduced into evidence as Company's Exhibits 10 and 11 and consists of two pages attached together. The first page is a blue card in the form of a sample ballot. On the front side of the card in large, letters appear the words "Vote So" in Spanish; immediately below appears an eagle with an "X" in an adjoining box. The words "United Farm Workers of America, AFL-CIO" appear further below in English and Spanish. On the reverse side of the card, there are

instructions in Spanish on how to cast a ballot. These instructions read, in part, "First mark an "X" where the eagle is underneath the United Farm Workers of America, UFW." The second page of the leaflet (Company's Exhibit 10) reads, in part, as follows: "Attention workers of Pleasant Valley. The salaries of the UFW Union." A photocopy of a check stub of an employee of Sun Harvest, Inc., is a reproduced. The following statement then appears: "This check stub is from the salary of a worker of Sun Harvest. He earned $569.04 in less than thirty hours of work or $19.13 per hour." Underneath that statement, four categories of workers with their salaries are set forth as follows:

	Right Now	15 July, 1981
Cauliflower cutter and celery transplanter	$5.65 per hour	$6.20 per hour
Tractor driver	$6.70 per hour	$7.10 per hour
Lettuce	79¢ per box plus 25¢ per hour (cost of living)	82¢ per box plus 50¢ per hour (cost of living)
Celery	$1.13 1/2 per box 25¢ per hour (cost of living)	$1.18 1/2 per 50¢ per hour (cost of living)

Then the following statement: "These other salaries which are earned by the workers of the Sun Harvest Company who have a contract signed with the Farm Workers Union. These salaries and increases are guaranteed by a signed contract. How much do you make without a Union?" Then in large letters, "Vote UFW."

On the day before the election, Gomez picked up this stack of leaflets from the UFW office in Oxnard, where they had been prepared for him. Gomez testified that between 10 a.m. and 12 p.m., he distributed copies of this leaflet to almost all the workers

waiting in line to vote at the voting site. While they were in line, Goraez engaged in conversations with some of the prospective voters urging them to vote for the UFW.

INCIDENT INVOLVING
ALDERBERTO GOMEZ (OBJECTION 1)

A. Agency Issue

Findings of Fact

The employer contends that Gomez was an agent of the UFW. The UFW, on the other hand, claims that while Gomez was a longtime union activist, he was not an agent. The conduct of a non-party is accorded less weight than that of a party in determining whether an election should be set aside. Takara International, Inc., 3 ALRB No. 24 (1977), Kawano Farms, Inc., 3 ALRB No. 25 (1977), C. Mondavi and Sons, 3 ALRB No. 65 (1977). Accordingly, it is necessary at the outset to make a determination regarding Gomez's status.

Both parties agree that Gomez was a UFW supporter of long standing. Gomez became a UFW member in 1973, and while he was not always a dues paying member, it is clear from the record that he remained a very active supporter of the UFW from 1973 to the present. In 1975, Gomez distributed UFW authorization cards to co-workers at Pleasant Valley Vegetable Co-op. In August of that same year, Gomez was selected by his co-workers to attend the annual UFW convention. Gomez mentions that he has always had an. interest in seeing that farm workers become organized. Gomez, however, has never been a paid staff member of the UFW.

A few months prior to the election at Pleasant Valley, Gomez approached Jose Manuel Rodriguez, (hereinafter "Rodriguez"), the

chief organizer for the UFW in their Oxnard office. Rodriguez advised Gomez that the UFW was too busy at that time to organize the Pleasant Valley workers, but if Gomez and his co-workers would organize themselves and secure the necessary signed authorization cards, the UFW would then assist them at the election. With these assurances, Gomez, with some assistance from other workers, set out to distribute and collect authorization cards from their fellow employees. Gomez acknowledged that he was the person primarily responsible for securing the signed authorization cards for the UFW. It is undisputed that Gomez was the most active person in the organizational campaign at Pleasant Valley. As the UFW stated in its post-hearing brief, "Gomez became the central figure in the election campaign at the company."

During the time Gomez was collecting the authorization cards, he had a number of meetings with Rodriguez. Gomez, at these meetings, would discuss with Rodriguez the forthcoming campaign at Pleasant Valley. At these meetings, Rodriguez also supplied Gomez with additional authorization cards. Gomez subsequently picked up a Petition for Certification from an ALRB office, and Rodriguez completed it and filed it for the UFW.

Prior to the election, Gomez attended a pre-election conference called by the ALRB. At this meeting, Gomez was seated at a table along with Rodriguez, Bobby De La Cruz, (hereinafter "De La Cruz"), identified as "the director of the UFW;" Art Mendoza, whose position is unidentified in the record; and Jose Tinajera, a co-worker of Gomez. Also in attendance were management representatives and approximately 40 employees from Pleasant Valley. De La Cruz, prior

to the opening of the meeting, stated to those present that everyone of the five persons seated at the table would represent the union.

Some time before the election, Gomez requested that the UFW office in Oxnard prepare for him the leaflet described earlier. The UFW did so, and then advised Gomez that the leaflets were available on the day before the election. Gomez picked up these leaflets at the UFW office and held them until he distributed them at the election the following morning.

Analysis and Conclusions of Law

Both the ALRB and the NLRB have considered the agency issue as it applies to union members, not employed by the union, but working on its behalf in an election campaign.

The NLRB has approached the agency issue on a case by case basis, scrutinizing the actual roles played by the various parties in determining whether or not an agency relationship has been established. Thus, the mere fact that an employer is found to be a member of an in-plant organizing committee is insufficient to establish an agency relationship. Tunica Manufacturing Co., Inc., 182 NLRB No. lll (1970).

In Tennessee Plastics, Inc., 215 NLRB No. 52 (1974), the Board held that though the in-plant organizing committee members actively supported the union campaign, they were not union agents because, the union was represented at that plant by union staff representatives.

Under other circumstances, the Board has found an agency relationship to have been established. In Local 340, International Brotherhood of Operative Potters, AFL-CIQ (Macomb Pottery Company)

175 NLRB 756, an employee of the company was found to be a union agent where he initiated contact with the union, received authorization cards along with instructions from the union, and was the prime contact between the union and the employees. In International Woodworkers of America, AFL-CIO (Central Veneer Inc.) 131 NLRB 189 (1961), the Board concluded that a person, not an employee, was an agent when the union provided authorization cards for a campaign and accepted the results of his efforts by filing a petition based upon the signed cards he secured.

The Board stated:

> "In these circumstances we conclude that when Respondent, acting through German, (a union representative), accepted his offer, instructed him in the procedures to be followed, procured the cards for him, and accepted the fruits of his efforts by filing a petition based on the signed cards he secured, it made him its agent for the purpose of organizing Central's employees. It is immaterial that German did not "instruct" Stringer that he was to organize Central's employees, as German must have known that such was Stringer's sole purpose in securing the authorization cards. We find, accordingly, that Respondent was responsible for Stringer's conduct in furtherance of that organization's purpose, whether or not that specific conduct was authorized or ratified."

In NLRB v. Georgetown Dress Corp., 537 F 2 1239, 92 LRRM 3282 (1976), the court reversed the decision of the Board that employees in an in-plant organizing committee were not agents of the union. The facts in Georgetown disclosed that union organizers assisted employees in forming an organizing committee and gave them advice on how to conduct the ensuing campaign. The committee members were the union's only in-plant contact with the workers. The court held that under the doctrine of apparent

authority, the union was held liable for the acts and conduct of the committee members.

The ALRB considered the agency question in Takara International, Inc., 3 ALRB No. 24 (1977) and following NLRB precedent concluded that an agency relationship cannot be found when it is based solely on membership in an in-plant organizing committee. See also Kawano Farm, Inc., 3 ALRB No. 25 (1977).

In Tepusquet Vineyards, 4 ALRB No. 102 (1978), the employer therein argued that an agency relationship was established between the union and an employee who was an active union supporter and who distributed and collected authorization cards on behalf of the union. The Board distinguished the situation in Tepuesquet from the facts in Woodworkers, supra, on the ground that the person found by the NLRB to be an agent in the latter case was not an employee of the company he sought to organize and that in the Tepusquet case the alleged union agent was an employee. The Board went on to hold that an agency had not been established.

In San Diego Nursery Co., Inc., 5 ALRB No. 43, employees, on their own initiative, formed an organizing committee, sought and received advice from the UFW, solicited authorization cards, all with minimal assistance from union officials. In holding that no agency was formed, the Board said that, "Here, no UFW official or organizer made any statements or engaged in any conduct which would indicate to the employer's employees that members of the organizing committee were acting as agents of the union."

The fact situation in San Diego is very similar to the one in the instant case. As in San Diego Nursery, the impetus for

organizing came from employees within the company sought to be organized. Similarly, the UFW states that they were too busy to be of much assistance to the employees, but if they would distribute and collect the authorization cards, the UFW would file a petition for an election. Unlike the San Diego Nursery Co. case, however, in the instant case we do find a statement indicating that the subject party was an agent of the union. De La Cruz, the director of the UFW, stated at the pre-election conference attended by management personnel and 40 employees that, among others, Gomez was a representative of the union. Under the doctrine of apparent authority such a statement is sufficient to establish an agency relationship. This statement by De La Cruz can only be taken as an acknowledgement of Gomez's status as a representative of the union. At the least, it would lead others to so believe. It is noteworthy that the union in its post-hearing brief offers no explanation for this statement by De La Cruz.

In a recent ALRB case where the Board did not find agency, the Board nonetheless went on to state that, "Therefore, when applying the principle of apparent authority, we will consider whether any act or omission of any principal, however subtle, has given the employees reasonable cause to believe an agency relationship exists." S.A. Gerrard Farming Corp., 6 ALRB No. 49.

Finally, it appears that Gomez himself thought that he was an agent. At the hearing, Gomez was asked the following question by the employer's attorney: "It is true, is it not, that you were present there (at the pre-election conference) at a table along

with Jose Manuel Rodriguez, Bobby De La Cruz, Art Mendoza and Jose Tinajera at the table representing the union side?" Gomez answered in the affirmative. Accordingly, I find that Gomez was an agent of the UFW for the purpose of distributing and collecting signed authorization cards, distributing campaign literature and electioneering.

B. Electioneering at Polling Site

Findings of Fact

Having found that Gomez was an agent for UFW for the purpose of the electioneering,I now move on to the question of the nature of his conduct at the polling site.

The leaflet distributed by Gomez was earlier described. Gomez testified that he had a foot high stack of these leaflets which he brought with him to the polling site. Between 10 and 12 p.m., he passed out almost all of them to his fellow workers at the polling site. Gomez further testified that he himself voted at about the midway point in the election and remained at the polling site talking to other prospective voters. Gomez acknowledged that during this period, he spoke to a number of his co-workers urging them to vote for the UFW. Gomez admits he was distributing leaflets somewhere where the prospective voters stood in line.

Lazaro Hernandez, (hereinafter "Hernandez"), a company observer at the election, testified that he saw Gomez handing out flyers after the election started to voters while they were waiting in line to vote. He also saw Gomez talking to a number of voters, but he did not hear what was being said. Hernandez

testified that he reported the fact that Gomez was distributing leaflets to Mauricio Nuno, (hereinafter "Nuno"), who told him that, "This did not have anything to do with it and its fine." Bartolo Zavala, another company observer, testified he also saw Gomez mingling among the prospective voters handing out leaflets. He saw Gomez as close as 10 feet from the voting booths distributing leaflets.

Nuno was called as a witness, and he testified that he was working as a board agent at the election on Sturgis Road. He recalls seeing Gomez at the election, prior to the time Gomez voted, but did not see him after he voted. Nuno did not see Gomez passing out leaflets, nor does he remember having a conversation with any company observer about Gomez passing out leaflets. He recalls that almost all the voters had the leaflets in their possession while they were waiting in line. He observed Gomez talking to voters but was unable to hear what was said.

Baltazar Martinez, (hereinafter "Martinez"), testified that he was present at the McKinnis Ranch election site on the day in question. He observed Gomez speaking to a few individuals while they waited in line. He did not see Gomez passing out any leaflets, He recalls that *a* company observer objected to him that Gomez was speaking to other workers. When Martinez went to talk to Gomez about this, Gomez responded that he wanted someone to explain the voting procedure to the crew that just arrived. Martinez asked Nuno to explain the voting procedure to the crew in question.

Wayne Smith, the regional director of the ALRB Oxnard office, testified that he was present for part of the election at McKinnis

Ranch. He testified that he instructed the Board agents to challenge the workers from a certain crew of workers. He did this becuase the list that the employer turned in on that crew was inadequate. While he was there, Sylvia Lopez, another Board agent, pointed out to him that an unidentified worker was passing out leaflets. He instructed her to take the leaflets away from that worker, which she did.

Syliva Lopez testified, and she recalls that she was at the election and observed a worker handing out leaflets near the voting tables. She took the leaflets away from that worker. She testified that she knows a person named "Pato" and that the person she took the leaflets from was not "Pato," but she was otherwise unable to identify that person.

In addition to testimony regarding Gomez, evidence was also introduced on the issue of who released the three crews to the polling site, which may have caused a "massing" of the workers. The parties agree that at the pre-conference meeting, it was decided that the crews would be released at different times to avoid any confusion at the polling site. Nuno testified regarding how the workers would be transported to the area. Some of the workers were in the adjacent field and, therefore, could walk; some drove their own cars, others may have been bused.

John P. Frees, the general manager of Pleasant Valley Vegetable Co-op, was called as a witness, and he testified that Bob Coultas, one of respondent's supervisors, was responsible for the release of the crews, though he had no personal knowledge as to whether Coultas in fact released them.

From the testimony of the above witnesses, I find that Gomez was present in the voting site, that area designated as quarantined, from the beginning until the end of the election, a period of two hours. During that time, he engaged in conversations with a number of employees waiting to vote, urging them to vote for the UFW or the "eagle." He voted at the midway point of the election. Also during that time, he distributed almost all the leaflets to workers who were waiting to vote. I find that these leaflets were campaign literature. I further find that Gomez circulated among different locations at the polling site, starting at the entrance to the dirt road and going as close as 10 feet to the voting booth while distributing the leaflets. I credit the testimony of Hernandez when he testified that he observed Gomez passing out leaflets and reported this fact to Nuno, inasmuch as this is corroborated in part by Gomez himself who admitted that he passed out the leaflets.

Analysis and Conclusions of Law

The employer argues that under the circumstances of this case, the rule in Milchem, Inc., (1969) 170 NLRB 362 should apply. Under Milchem, the NLRB will set aside an election where a party engages in sustained conversation with prospective voters, without inquiring into the nature of the conversation. The ALRB has not yet adopted the Milchem rule. Superior Farming Company, 3 ALRB No. 35; Sakata Ranches, 5 ALRB No. 56.

1. Gomez, Hernandez and Zavala all disagreed as to where Gomez was when he was distributing leaflets. They all agreed, however, that it was within the polling site, while workers were standing in line waiting to vote.

In Superior Farming Company, supra, the Board was urged by the employer to adopt the Milehem rule and overturn an election where the evidence showed that UFW organizers were within a polling site during an election and talked with some prospective voters. The Board contrasted the industrial setting under which the Milchem rule developed with the agricultural setting at Superior Farming Company.

The Board pointed out that the workers at Superior Farming Company did not walk a short distance to a polling place; rather, they were brought there by buses from different locations on a 20,000 acre ranch. The voters were required to wait in line outside in the heat and those that voted had to remain there for buses to take them from the polling site. The Board concluded that the Milchem "per se" rule was not applicable to the setting therein.

The Board went on to hold that: "Absent a showing that any conversations that union organizers might have had with prospective voters affected the outcome of this election, we are reluctant to set aside the election." Under the Milchem rule, no showing of the effect the conversations had would be required. Thus, in the Milchem case itself, the record disclosed that the union agents conversation with the prospective voters concerned, "the weather and like topics," yet the election was set aside.

In the instant case, the circumstances were very similar to the Superior Farming Company setting. The workers for Pleasant Valley Co-op worked for three separate labor contractors, all at different locations. Some walked to the polling site, others

were transported by car or bus. The voters herein were also required to stand in line for an extended period. Under the circumstances, I find the Milchem rule should not apply. Having rejected the Milchem "per se" rule as not applicable to this case, I must now examine Gomez's conduct and the campaign materials themselves to determine what effect, if any, they had on prospective voters.

As Gomez admitted, he remained at the polling site for the entire time the voting was taking place. Not only did he verbally urge voters to vote for the UFW, he also distributed -campaign literature with the same aim in mind. The leaflets were not merely reminders to the voters to exercise their right to vote, rather they were exhortatory messages urging the prospective voters specifically to vote for the UFW. As far as the salary information contained in the leaflet is concerned, the high hourly wage of $19.13 per hour claimed for the employees at Sun Harvest who worked under a union contract appears to be designed for maximum impact upon the voters' minds.

In the Star Expansion Industries Corp., 170 NLRB 364 (1968), an employee, found to be an agent of the union for the limited purpose of electioneering and distributing campaign literature, remained outside the polling site near its entrance for a large part of the time the polls were open. During that period, the, employee talked to a number of prospective voters. Several witnesses heard him say, "Make sure you vote right" and "Do the right thing." One witness observed the employee speak to the voters, pat some on the back and by gestures, describe the ballot

and point to the left-hand corner where the union he favored was located. The employee agent was asked to leave the area on three separate occasions, which he did, but each time he returned and engaged in similar conduct.

In holding that the electioneering was sufficiently objectionable to warrant a second election, the Board concluded as follows:

> "As was stated in Claussen Baking Company, 134 NLRB 111, 49 LRRM 1092, it is the province of the Board to safeguard its elections from conduct which inhibits the free choice of the voters, and the Board is especially zealous in preventing intrusions upon the actual conduct of its election. In furtherance of this responsibility, the Board prohibits electioneering at or near the polls.
>
> In the instant case, Singleton, acting on behalf of the IBES, was engaged in electioneering activities in close proximity to the polls during a substantial part of the voting period, notwithstanding the Board Agent's instructions, on three separate occasions, that he leave the area and the admonition that he could not electioneer within 50 feet of the polls. We view such conduct by one acting as an agent for a party as a serious breach of our rule against electioneering at or near the polls, and, in the circumstances, sufficient to warrant the inference that it interfered with the free choice of the voters. Accordingly, we shall set aside the election and direct that a new election be conducted."

In the instant case, the electioneering took place within the polling site rather than close to the polling site, rendering the conduct all the more serious. It is true that Gomez did not receive a warning from the Board agents present regarding his activities; however, that fact is not crucial, as it is the objectionable conduct itself which leads to the conclusion that the free choice of the voters was interfered with. Perez Packing,Inc., 2 ALRB No. 13.

In addition, given the fact that the election results were close, I find that Gomez's conduct affected the outcome of the election.

BOARD AGENT MISCONDUCT ON SITE INVESTIGATION (OBJECTION 2)

Findings of Fact
Analysis and Conclusion

The second objection we need to address concerns an alleged on-site investigation conducted by Board agents which resulted in confusion and thus permitted electioneering by an agent or agents of the UFW.

The record is quite clear that no investigation took place. What is clear is that in the course of the election, the Regional Director of the local ALRB office challenged the voters from a certain crew because of some uncertainty regarding their status. The challenge procedure utilized by the Regional Director is specifically authorized by 8 Cal. Admin. Code Section 20355. So far as the record shows, the only reason why challenges were necessary was because the employer has not provided the Board agents with a proper list for the crew in question. The employer cannot seek to upset an election citing as grounds, his own conduct. 8 Cal. Admin. Code Section 20365(d). The mere re-labeling of challenges as an on-site investigation is insufficient ground to support a finding of misconduct on the part of Board agents.

Quite clearly, the challenges slowed down the election. However, as the record reflects, the slowness of the election was also caused by the fact that all the crews were released within a short span of time, as the employer acknowledges in his post-

hearing brief. Once again, the evidence seems to suggest that the employer was at fault. As the General Manager for the employer testified, one of the employer's supervisors was responsible for releasing the crews, and while the General Manager did not in fact witness the actual release of the crews, he acknowledged the responsibility for the release was on the employer and not the union or Board agents. As the employees arrived within a short time of each other, it is a reasonable inference that the employer timed their release in such a manner as to cause them to arrive at the polling site at about the same time.

The employer argues that the second objection involves two separate "aspects" . . . "The second aspect of this objection involves improper conduct by Board agents in allowing a UFW agent to actively electioneer within the polling site for a two-hour period."

It is true that some of the testimony entered into at the hearing bears on this the issue as framed by the employer in his post-hearing brief. However, this is not the objection set for hearing by the Executive Secretary. The issue set for hearing clearly alleges the misconduct of the ALRB agents as one in which they conducted an on-site investigation.

In fact, the employer's first objection in his petition to set aside the election characterizes the misconduct of the Board agent as permitting a known union agent to campaign within the .. polling area. However, the Executive Secretary changed that objection into the one which was eventually set for hearing. Under the regulations, the hearing is strictly limited to the issues set forth in the Executive Secretary's Notice of Hearing.

8 Cal. Admin. Code Section 20365 (g). The employer, in apparent recognition that this issue was not framed in a way in which he would prefer, requests in his post-hearing brief that I consider a "clarification" he made as part of his opening statement at the hearing, "a formal motion for clarifiction" of the issue. This clarification was not offered as a motion to amend at the hearing nor did any of the parties, including myself, so regard it. It would be a denial of due process to grant his "motion for clarification" at this time, and said motion is accordingly denied.

If the employer disagreed with the issues set forth in the Executive Secretary's Notice of Hearing, his appropriate remedy was to petition for review by the Board pursuant to 8 Cal. Admin. Code Section 20393.

Having found that the Board agent did not engage in an on-site investigation of prospective voters, I find no Board agent misconduct.

RECOMMENDATION

Based on the findings of fact, analysis and conclusion herein, I recommend that employer's objection 1 be sustained, and the election be set aside and that employer's objection 2 be dismissed.

DATED: December 3, 1981

Respectfully submitted,

BRIAN TOM
Investigative Hearing Examiner