STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

MATSUI NURSERY, INC., Employer, and UNITED FARM WORKERS OF AMERICA, AFL-CIO Petitioner.	)	Case No. 82-RC-6-SAL 9 ALRB No. 42

ERRATUM

All references to the name Morales in the full paragraph which begins on page three and continues onto page four should be deleted, and the name Mendoza should be substituted.

Dated: August 24, 1983

ALFRED H. SONG, Chairman

JOHN P. McCARTHY, Member

PATRICK W. HENNING, Member

did not exhibit bias and as such, did not tend to affect the result of the election or to impair the balloting's validity as a measure of free choice. (See Coachella Growers, Inc. (1976) 2 ALRB No. 17; George Lucas and Sons (1982) 8 ALRB No. 61.) Romo's statement was made to representatives of the Employer and the Union in the context of negotiations between the parties for the ground rules of the election. Romo testified that his setting of the election for a date and time that neither party wanted was a negotiation tactic to bring the parties closer to agreement. We note that that is in fact what happened: the parties caucused and reached agreement once the preelection conference resumed.

We hereby also overrule the Employer's second post-election objection. The Employer's position from the time it filed its post-election objections through the time of the investigative hearing had been that Jose Mendoza was a company foreman or agent. Because of that, no testimony was adduced at the hearing concerning his status as a foreman or agent. The Employer is therefore estopped from now arguing that Mendoza was not an agent. (See Sam Andrews' Sons (1980) 6 ALRB No. 44.) Under California Administrative Code, title 8, section 20365(c)(5), a party may not allege the conduct of its agents as grounds for setting aside the election. In the instant case, since Mendoza's conduct was so inconsistent with the interests of the Employer, the employees could not reasonably have believed that Mendoza was acting on behalf of the Employer. (Vista Verde Farms v. ALRB (1981) 29 Cal.3d 307.) However, Andy Matsui had

ample opportunity to disavow Mendoza's conduct. An employer who is aware of the preelection misconduct of a foreman and who fails to correct it, cannot later rely on that conduct as grounds for setting aside the election. (NLRB v. Welfed Catfish, Inc. (5th Cir. 1982) 674 F.2d 1076 [110 LRRM 2278].) In addition, we note that subsequent to Mendoza's conduct at 8:30 a.m., Andy Matsui and labor consultant Joe Sanchez did in fact campaign among individual employees for the remainder of the day. Thus, Mendoza's conduct did not preclude the Employer from campaigning.

The Employer argues that by not reviewing the conduct of employee Jose Roman, the IHE failed to adequately examine the cumulative effect of the preelection conduct alleged to be objectionable in the Employer's post-election objections. Roman, who was present at the preelection conference, made statements similar to those of Jose Mendoza at about the same time Mendoza uttered his. As was the case with Mendoza's conduct, we conclude that Roman's conduct did not preclude the Employer from campaigning. The Board has consistently held that the actions of non-parties are accorded less weight than actions of Board agents or parties in determining their effect on the election. (See, e.g., San Diego Nursery Co., Inc. (1979) 5 ALRB No. 43; Kawano Farms (1977) 3 ALRB No. 25; Takara International (1977) 3 ALRB No. 24.) Further, the Board has held that actions of union supporters are not ipso facto attributable to the union, absent a showing of some union involvement in or union instigation of the actions of the supporters. (See, e.g., D'Arrigo Brothers of California (1977) 3 ALRB No. 37; Harden Farms (1976)

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

MATSUI NURSERY, INC.,	)	
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Employer,	)	Case No. 82-RC-6-SAL
	)	
and	)	
	)	
UNITED FARM WORKERS OF AMERICA, AFL-CIO	)	9 ALRB No. 42
	)	
	)	
Petitioner.	)	
	)	

DECISION AND CERTIFICATION OF REPRESENTATIVE

Following a Petition for Certification filed by the United Farm Workers of America, AFL-CIO (UFW or Petitioner), on September 11, 1982, a representation election was conducted among the agricultural employees of Matsui Nursery, Inc. (Employer). The official Tally of Ballots showed the following results:

UFW	46
No Union	23
Challenged Ballots	19
Total	88

The Employer timely filed post-election objections, the following two of which were set for hearing:

1. Whether the comment by Board agent Ben Romo to the effect that he would "...order that the election take place at 6:00 a.m. the following morning in order that the Employer would not campaign on the day of the election" exhibited bias, and if so whether such bias affected the outcome of the election.

2. Whether the foreman's conduct on the morning of September 11, 1982, telling the workers not to listen

and not to attend the meeting where Andy Matsui was to give a speech precluded the Employer from campaigning, and if so, whether such conduct by an alleged pro-union foreman had the effect of coercing the employees' free choice.

The hearing on objections was held on November 16, 1982, before Investigative Hearing Examiner (IHE) Robert L. Burkett, who issued the attached proposed Decision on March 15, 1983. The IHE concluded that the statements by Board agent Romo were isolated comments that did not tend to affect the employees' free choice or the results of the election. In addition, he concluded that the comments attributed to Jose Mendoza were insufficient to warrant setting aside the election.

The Employer timely filed exceptions to the IHE's Decision and a supporting brief, and the UFW timely filed a brief in response to the Employer's exceptions.

Pursuant to the provisions of Labor Code section 1146,[1/] the Agricultural Labor Relations Board (ALRB or Board) has delegated its authority in this matter to a three-member panel.

The Board has considered the record and the attached IHE Decision in light of the exceptions and briefs of the parties and has decided to affirm the IHE's rulings, findings,[2/] and conclusions, as modified herein, and to adopt his recommendations.

We conclude that the statement by Board agent Ben Romo

[1/] All section references herein are to the California Labor Code unless otherwise stated.

[2/] We place no reliance on the IHE's finding that no evidence was presented as to who the employees at the preelection conference were, whether they were eligible voters, or whether they understood what was being said.

did not exhibit bias and as such, did not tend to affect the result of the election or to impair the balloting's validity as a measure of free choice. (See Coachella Growers, Inc. (1976) 2 ALRB No. 17; George Lucas and Sons (1982) 8 ALRB No. 61.) Romo's statement was made to representatives of the Employer and the Union in the context of negotiations between the parties for the ground rules of the election. Romo testified that his setting of the election for a date and time that neither party wanted was a negotiation tactic to bring the parties closer to agreement. We note that that is in fact what happened: the parties caucused and reached agreement once the preelection conference resumed.

We hereby also overrule the Employer's second post-election objection. The Employer's position from the time it filed its post-election objections through the time of the investigative hearing had been that Jose Mendoza was a company foreman or agent. Because of that, no testimony was adduced at the hearing concerning his status as a foreman or agent. The Employer is therefore estopped from now arguing that Mendoza was not an agent. (See Sam Andrews' Sons (1980) 6 ALRB No. 44.) Under California Administrative Code, title 8, section 20365(c)(5), a party may not allege the conduct of its agents as grounds for setting aside the election. In the instant case, since Morales' conduct was so inconsistent with the interests of the Employer, the employees could not reasonably have believed that Morales was acting on behalf of the Employer. (Vista Verde Farms v. ALRB (1981) 29 Cal.3d 307.) However, Andy Matsui had

ample opportunity to disavow Morales' conduct. An employer who is aware of the preelection misconduct of a foreman and who fails to correct it, cannot later rely on that conduct as grounds for setting aside the election. (NLRB v. Welfed Catfish, Inc. (5th Cir. 1982) 674 F.2d 1076 [110 LRRM 2278].) In addition, we note that subsequent to Morales' conduct at 8:30 a.m., Andy Matsui and labor consultant Joe Sanchez did in fact campaign among individual employees for the remainder of the day. Thus, Morales' conduct did not preclude the Employer from campaigning.

The Employer argues that by not reviewing the conduct of employee Jose Roman, the IHE failed to adequately examine the cumulative effect of the preelection conduct alleged to be objectionable in the Employer's post-election objections. Roman, who was present at the preelection conference, made statements similar to those of Jose Morales at about the same time Morales uttered his. As was the case with Morales' conduct, we conclude that Roman's conduct did not preclude the Employer from campaigning. The Board has consistently held that the actions of non-parties are accorded less weight than actions of Board agents or parties in determining their effect on the election. (See, e.g., San Diego Nursery Co., Inc. (1979) 5 ALRB No. 43; Kawano Farms (1977) 3 ALRB No. 25; Takara International (1977) 3 ALRB No. 24.) Further, the Board has held that actions of union supporters are not ipso facto attributable to the union, absent a showing of some union involvement in or union instigation of the actions of the supporters. (See, e.g., D'Arrigo Brothers of California (1977) 3 ALRB No. 37; Harden Farms (1976)

2 ALRB No. 30; O. P. Murphy & Sons (1977) 3 ALRB No. 26.) The Employer has not met its burden of showing that Roman's conduct is attributable to the UFW or that it created a situation so coercive and disruptive, or so aggravated, that a free expression of employees' free choice was impossible. (Pleasant Valley Vegetable Co-op. (1982) 8 ALRB No. 82.) We therefore conclude that the Employer's objections, both individually and cumulatively, do not warrant setting aside the election.

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 the agricultural employees of Matsui Nursery, Inc., in the State of California for the purpose of collective bargaining, as defined in Labor Code section 1155.2(a), concerning agricultural employees' wages, working hours, and other terms and conditions of their employment.

Dated: August 3, 1983

ALFRED H. SONG, Chairman

JOHN P. McCARTHY, Member

PATRICK W. HENNING, Member

CASE SUMMARY

MATSUI NURSERY, INC.
(UFW)

Case No. 82-RC-6-SAL
9 ALRB No. 42

IHE DECISION

An election was held among the agricultural employees of Matsui with the United Farm Workers of America, AFL-CIO (UFW) receiving a majority of the votes cast. Two of the post-election objections filed by the Employer were set for hearing. The Investigative Hearing Examiner (IHE) did not conclude that Board agent Ben Romo's statement either did or did not exhibit bias. He concluded that based on the context in which Romo's statement was made, it did not tend to affect the outcome of the election. The IHE also concluded that the Employer could not rely on the misconduct of his agent to set aside the election. In addition, he applied National Labor Relations Board precedent which holds that an employer who is aware of the preelection misconduct of a foreman and fails to correct it cannot later rely on that misconduct to set aside the election. The IHE recommended that the two objections set for hearing be dismissed and that the UFW be certified.

BOARD DECISION

The Board dismissed the post-election objections and certified the UFW. The Board found that Board agent Romo's statement did not exhibit bias, and did not tend to affect the election results. The Board also concluded that the Employer could not use the misconduct of Morales as grounds to overturn the election because it was aware of such preelection misconduct and failed to correct it. In addition, the Board found that Morales' misconduct did not prevent the Employer from campaigning. Furthermore, the Board examined the cumulative effect of the Employer's objections and concluded that the misconduct of employee Jose Roman did not make a free expression of employees' free choice impossible.

* * *

* * *

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of:	)	
	)	
MATSUI NURSERY, INC.,	)	Case No. 82-RC-6-SAL
	)	
Employer,	)	DECISION OF THE INVESTIGATIVE HEARING EXAMINER
	)	
and	)	
	)	
UNITED FARM WORKERS OF AMERICA, AFL-CIO,	)	
	)	
Charging Party.	)	
	)	

APPEARANCES:

Frederick A. Morgan
Bronson, Bronson & McKinnon
for the Employer Matsui Nursery, Inc.

Marcos Camacho
for the United Farm Workers
of America, AFL-CIO (hereafter "UFW")

STATEMENT OF THE CASE

Robert L. Burkett, Investigative Hearing Examiner: This case was heard in Salinas, California on November 16, 1982. Previously a petition for certification was filed in this matter on September 7, 1982. A representation election was held on September 11, 1982 by the Agricultural Labor Relations Board (hereinafter "ALRB" or "Board"). The result was:

UFW	43
No Union	27

The employer timely objected to the election, alleging six purported grounds for setting aside the election. Pursuant to his authority under 8 California Administrative Code section 20365(c),

the Executive Secretary dismissed four objections and set two (employer's objections one and five) for hearing. The following objections were the subject of this hearing:

1. That portion of objection one regarding whether the comment by the Board agent in charge of the pre-election conference to the effect that he would ". . . order that the election take place at 6:00 a.m. the following morning in order that the employer would not campaign on the day of the election," exhibited bias, and if so, whether such bias affected the outcome of the election.

2. That portion of objection five regarding whether the foreman's conduct on the morning of September 11, 1982, telling the workers not to listen and not to attend the meeting where Andy Matsui was to give a speech, precluded the employer from campaigning, and if so, whether such conduct by an alleged pro-union foreman had the effect of coercing the employees' free choice.

Both the employer and the UFW were represented by counsel at the hearing and were given full opportunity to participate in the hearing, including examining witnesses and filing briefs. Upon the entire record, including my observation of the demeanor of the witnesses, after consideration of all the evidence and the party's post-hearing briefs, and taking into consideration the cumulative affects of objections one and five, I make the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. Objection that Board agent made an improper statement concerning the time and place of the election in order to improperly restrict the employer from campaigning on the day of the election.

An expedited four-day election was agreed to by the parties

before the pre-election conference. The Board agent prepared a stipulation of the parties agreeing to and consenting to the four-day election. This was signed early in the pre-election conference. A typed formal agenda was filed and practically everything was disposed of with very little effort except for some time spent on the question of eligibility of crew leaders to vote. After the agenda had been exhausted and the stipulation signed, the UFW objected to the alleged campaigning tactics of labor consultant Joe Sanchez and asked the company to agree that Sanchez not campaign on the day of the election. This the company refused to do.

Once the UFW realized that the company was not going to agree to no campaigning it stated that it would not go along with the ten o'clock election and wanted the election set for an earlier time. The parties then began to argue back and forth.

At this point, Board agent Ben Romo who was the supervising agent of Delores Martin, who presided over the meeting, intervened in the arguments by the parties. Mr. Romo testified that seeing the parties were again in disagreement as to when the election would occur, he instructed the parties that the Board had the discretion of setting the election with or without their input and that he would not hesitate in so doing. After the parties continued arguing, Mr. Romo informed the parties that he was thinking of setting the election on the seventh day after the filing of the petition, at 6:00 a.m.

The company had two witnesses testifying to the conduct of Mr. Romo, Joe Sanchez and counsel for the company Mr. Morgan. Mr. Sanchez testified that Mr. Romo said "that he would not have any

campaigning". It was the testimony of the witnesses for the company that Mr. Romo and not the UFW opened up the agenda. Mr. Morgan testified: "After we talked a little bit then Ben said I'll set an election at 6:00 tomorrow morning so there will be no - at 6:00 tomorrow morning so there will be no campaigning by the company." Mr. Morgan testified that he challenged Mr. Romo's authority to make such an order and said that he should put it in the order which Mr. Romo rufused to do. Mr. Morgan further testified that the company stated it was already 3:00 in the afternoon and it would not be possible to have a valid election at 6:00 the next morning with the voters having to be notified in Sacramento as well as Salinas. Finally, he stated that the company noted an election that early in the morning would be economically a big hardship. He said:

> We have voters coming from Sacramento. We simply did not have time to run a valid election. I told them I didn't think we could have a valid election and it was economically a big hardship on the company because of the trucks being there and that kind of thing.

Mr. Morgan and Mr. Sanchez testified that after the company made objections to a suggestion of a Saturday 6:00 a.m. election, Mr. Romo set the election at 6:00 a.m. on Tuesday to which the union objected because this would give Mr. Sanchez more time to campaign. Employees then agreed to an election the following Saturday at 1:00 p.m. in the afternoon. The election was held at 1:00 p.m. the following day, Saturday, November 11, 1982. When Mr. Romo was called by the union he testified that he did not recall saying that he would order the election at 6:00 a.m. the following morning so that the employer would not campaign. It is true that there was no actual denial that such a statement was made.

The major factual disputes around this objection center on whether or not Mr. Romo set the election for the next day starting at 6:00 a.m. in order to prevent campaigning, and whether or not he stated that he would not allow campaigning. Mr. Romo did testify that he involved himself in the negotiating process in order to push the parties to reach a compromise position. I find that the testimony of company counsel Mr. Morgan is the most credible offered when he stated that "after we talked a little bit then Ben said I'll set an election at 6:00 tomorrow morning so there will be no - at 6:00 tomorrow so there will be no campaigning by the company." This statement does not say that no campaigning by the company would be allowed - it was more an attempt to move the parties towards a compromise of the issues at hand. Mr. Morgan did not corroborate Mr. Sanchez' testimony that Mr. Romo said that "he would not have any campaigning."

2. Objection that the foreman's conduct had the affect of coercing the employees' free choice.

The events of September 11, 1982, were presented through the uncontroverted testimony of the company's witness, Mr. Sanchez. Mr. Sanchez testified as follows:

On the day of the election the company's basic strategy was to have group meetings to dispel the threats that workers would be fired if they voted for the company. Mr. Sanchez and Mr. Matsui started on the first of their planned meetings Saturday morning at approximately 8:30 a.m. in greenhouse number two. They asked crew leader Jose Mendoza to call the people in because Mr. Matsui wanted to talk to them. Mr. Mendoza said "Oh, no. We don't want to talk to you. We've already given you a lot chances. We've talked to you

many times. We don't want to talk to you any more." Then he turned around and started hollering at the other people that were in the area also not to get close to us (Mr. Sanchez and Mr. Matsui), not to talk to us, not to listen to us, just stay away from us.

In addition, workers were coming from another greenhouse and Jose Roman made statements somewhat similar to those of Mr. Mendoza. Mr. Mendoza and Mr. Roman talked and asked in a hostile manner, hollering and telling the workers to stay away, not to get close to Mr. Matsui and Mr. Sanchez. The workers did stop and did not come closer.

After Mr. Mendoza interrupted the group meeting, Mr. Sanchez and Mr. Matsui had a further conference and decided that there was nothing they could do about Mr. Mendoza. Mr. Sanchez was advised that he couldn't fire him on the day of the election. They had to play it cool. They obtained the advise of counsel and decided to talk to individuals rather than have group meetings. They were able to talk to less than one-third of the work force before the election.

Mr. Sanchez testified that he told Mr. Matsui that Mr. Mendoza was insubordinate and on cross-examination he testified that no orders were given to Mr. Mendoza to go work elsewhere or to leave the area.

CONCLUSIONS OF LAW

NLRB elections have been upheld where Board agents committed an act of fraternization or made statements which could be interpreted as favoring one side, but there was no affect on the election. See, e.g., N.L.R.B. v. Dobbs Houses, Inc. (5th Cir.

1970); Wald Sound, Inc (1973) 203 NLRB 366 [83 LRRM 1125]; Wald-Transformal Corporation (1973) 205 NLRB 148 [83 LRRM 1545]. The NLRB has also stated that it may set aside an election where commission of an act tends to destroy confidence in the Board's election process used or could reasonably be interpreted as impugning the election standards, even if the voting is not affected. Seee, Athbro Precision Engineering Corp. (1967) 166 NLRB 966 [65 LRRM 1699].

The ALRB has consistently held that it will not set aside an election based upon bias or appearance of bias unless it affected the conduct of the election and impaired the balloting validity as a measure of employee choice. Coachella Growers, Inc. (1976) 2 ALRB No. 17; Bruce Church, Inc. (1977) 3 ALRB No. 90; Mike Yurosek and Son, Inc. (1978) 4 ALRB No. 54; and Paul Bertuccio and Bertuccio Farms (1978) 4 ARLB No. 91. The Board's standard for setting aside an election because of Board agent misconduct was stated in Bruce Church, Inc., supra, and re-enunciated in Mike Yurosek and Sons, supra, as follows: "In Bruce Church, Inc. (1977) 3 ALRB No. 90, we enunciated a standard which required the setting aside of an election where the complained of Board agent conduct was 'sufficiently substantial in nature to create an atmosphere which rended improbable a free choice by the voters'." (4 ALRB No. 54, p. 3.)

The Board recently rejected a per se or "strict neutrality test" in its holding in George Lucas and Sons (1982) 8 ALRB No. 61. The Board stated that the neutrality rule was based on the NLRB's "laboratory conditions" doctrine which had been specifically

rejected by the Board in D'Arrigo Brothers of California (1977) 3 ALRB No. 37, page 7. The Board then went on to state that the proper standard for setting aside an election for Board agents' bias or the appearance of bias was that which it stated in its decision in Coachella Growers, Inc. (1976) 2 ALRB No. 17:

> To constitute the ground for setting an election aside for bias or an appearance of bias it must shown to have affected the conduct of the election itself and to have impaired the balloting validity as a measure of employee choice.

In the recent decision of Pleasant Valley Vegetable Coop. (1982) 8 ALRB No. 82, the Board held that an election would be set aside only in cases where such conduct created an atmosphere so coercive and disruptive that free expression of employees choice was impossible.

The Board stated that the agent conduct could not be condoned but that the "proper method of dealing with Board agent misconduct objected to in this election is through our (the Board's) own internal rules relating to conduct of our (Board) agents". Pleasant Valley Vegetable Coop., supra, at p. 11.

Even if I were to make a factual finding one hundred percent consistent with the company's position that (1) Mr. Romo did reopen the agenda after agreement on the time and place of the election; (2) Mr. Romo set the election for the next day starting at 6:00 a.m. in the morning in order to prevent campaigning; (3) Mr. Romo said he would not allow campaigning and (4) that Mr. Romo then said he would set the election at 6:00 a.m. on the seventh day, the company has still failed to show how the alleged Board agent misconduct created an atmosphere so coercive and disruptive or so

aggravated that a free expression of employees' choice was impossible. Mr. Sanchez testified three workers were present at the pre-election conference but presented no testimony as to who these workers were, whether or not they understood what was being said, and whether or not they were eligible voters.

Whatever statements were made were made in the context of negotiating the election ground rules amongst the parties. While Mr. Romo might have been somewhat overzealous in trying to force the parties to come to a compromise, his statements in no way could be interpreted to have been so substantial in nature as to create an improbability of free choice by the voters. Again, I reiterate that even if the finding of fact was toally consistent with the company's testimony, the context in which the statements were made and the individuals to whom they were made would have had little or more likely, no affect on the outcome of the election.

It should be noted that there was no evidence presented to indicate any other possible Board misconduct in this matter. The statements made by Mr. Romo should be viewed as isolated comments by Board agent and ones that did not have any affect on the employees' free choice.

No evidence was presented to refute the declaration contained in the company's own objection that Mr. Mendoza was in fact a foreman for the company. The declarations of Mr. Sanchez and Mr. Morgan, the objection itself and statements made at the hearing all admit to Mr. Mendoza's foreman status.

The UFW argues that the employer is barred from using the conduct of its own agent to set aside an election pursuant to the

Board's own Rules and Regulations section 20365(c)(5) which states, "No party may allege as grounds for setting aside an election its own conduct or the conduct of its agents." The UFW maintains that this Regulation must be strictly adhered to in order to prevent employers from "setting up" situations in which the employer would instruct a foreman to engage in objectionable conduct and later use that same conduct to set aside the election.

I am unwilling to go so far as to say that this rule must be strictly applied in all cases. However, in the case at hand I find the rule to be applicable. There is no question but that this individual was an agent of the employer as admitted by the employer and that while his actions were probably outside the scope of his agency, they were nonetheless ones that would have been considered in the drafting of a rule such as this. While there has been no allegation that the employer "set up" Mr. Mendoza's behavior, there is a strong presumption that an employer has control over his/her agents' activities and conduct. In this instance no control was attempted.

It is true that under the NLRB Rules and Regulations there are no similar or corresponding sections to the ALRB's Rules in section 20365(c)(5). The rule of law under NLRB precedent has been that an employer aware of the misconduct of a foreman who fails to correct it cannot later use said conduct to set aside an election. In N.L.R.B. v. Welfed Catfish, Inc. (5th Cir. 1982) 674 F.2d 1076, 110 LRRM 2278, the court held:

> The long-standing rule is that an employer may not stand idly by after learning that one of its supervisors has engaged in pro-union or anti-union conduct before a representation election. Rather, the employer must take

steps to dissipate the possible harmful effects of the supervisor's conduct on its employees. If the employer fails to take such steps, it cannot raise the supervisor's alleged misconduct as a grounds for setting aside the election; it's inaction stops it from doing so.

This holding is consistent with previous holdings such as N.L.R.B. v. Dobbs House, Inc., 613 F.2d 1254 and N.L.R.B. v. Air Control Products Inc. (5th Cir. 1964) 35 F.2d 245, 56 LRRM 2904.

Even if the Board were to find that section 20365(c)(5) does not apply to this matter, certainly the rule of Welfed Catfish, supra, would. The supervisor was there during the alleged misconduct of the foreman and did nothing to dissipate the alleged conduct, waiting instead to raise the issue as an objection to the election. As the National Labor Relations Board stated in Diversified Products Corp. (1972) 199 NLRB 161, 81 LRRM 1358, "under these circumstances, we will not allow the employer to take advantage of its own inability to control its supervisory staff." Finally, under the holding of Heritage Farms Mushrooms, Inc. (1982) 8 ALRB No. 65, I would find that there is no basis for this election to be set aside and that there was no specific evidence that the supervisor's conduct was coercive or the employees feared retaliation of such coercion. The activities of the supervisor was not sufficiently harmful to set aside the election.

Why it is true that the company's agent acted outside his apparent scope of authority, the employer's refusal to attempt to control its supervisor coupled with the lack of a showing that the supervisor's conduct was so coercive the employees feared retaliation to the degree that such fear or coercion reasonably played a part in the employees' voting decision, are insufficient

grounds to set aside this election even if the Board were to reject the 20365(c)(5) mandate.

The record in the case at bar shows that the majority of workers of Matsui voted for representation by the UFW. In judging the objections separately and together I find no basis in which to turn aside the election. There is a strong presumption that elections are properly conducted and that their results should be certified. California Lettuce Company (1979) 5 ALRB No. 24. This presumption was reiterated in other terms by the Board in D'Arrigo Brothers of California (1977) 3 ALRB No. 37 at page 4: ". . . (T)o set aside an election in the agricultural context means that employees will suffer serious delay in realizing their statutory right to collective bargaining representation if they choose to be represented".

CONCLUSIONS AND RECOMMENDATION

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

DATED: March 15, 1983.

Respectfully Submitted,

Robert L. Burkett

ROBERT L. BURKETT
Investigative Hearing Examiner