Lamont, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

LEO GAGOSIAN FARMS, INC., Employer, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Petitioner.	)	Case No. 81-RC-6-D 8 ALRB No. 99

DECISION AND CERTIFICATION OF REPRESENTATIVE

Following a Petition for Certification filed by the United Farm Workers of America, AFL-CIO (UFW) on August 3, 1981,[1/] the Regional Director conducted a representation election among the agricultural employees of Leo Gagosian Farms, Inc. (Employer or Gagosian) on August 10, 1981. The official Tally of Ballots showed the following results:

UFW	84
No Union	57
Unresolved Challenged Ballots	23
Total	164

The Employer timely filed post-election objections, one of which was set for hearing. A hearing was conducted before Investigative Hearing Examiner (IHE) Ismael A. Castro who thereafter issued the attached Decision in which he recommended the

[1/] All dates herein refer to 1981 unless otherwise stated.

Agricultural Labor Relations Board (Board or ALRB) dismiss the Employer's objection and certify the UFW as the collective bargaining representative of the Employer's agricultural employees. The Employer timely filed exceptions to the IHE's Decision and a supporting brief, and the UFW filed a brief in response to Employer's exceptions.

Pursuant to the provisions of Labor Code section 1146,[2/] the ALRB has delegated its authority in this matter to a three-member panel.

The Board has considered the objection, the record and the IHE's Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the IHE as modified herein.

Gagosian grows table grapes on approximately 500 acres in the Lamont-Arvin area. His 1981 harvest began on July 3 and the UFW began its organizing efforts on July 13. Gagosian began laying off his harvesting crews on July 29. At the time the UFW filed the Petition for Certification on August 3, between 40 and 50 agricultural employees were working.[3/] The Employer seeks to have this Board set aside the representation election held on August 10 on the ground that the results of the election are nonrepresentative due to inadequate notice to eligible voters

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[2/] All section references herein refer to the California Labor Code unless otherwise indicated.

[3/] The Employer does not contest the Regional Director's determination as to peak or showing of interest.

which resulted in a low voter turnout.[4/]

Low voter turnout, standing alone, is not a basis upon which this Board will set aside an election. An election is deemed to be representative where there is sufficient notice, the voters are given an adequate opportunity to vote, and there is no evidence of interference with the electoral process. (Lu-Ette Farms (Sep. 29, 1976) 2 ALRB No. 49; Verde Produce Company, Inc. (May 16, 1980) 6 ALRB No. 24.)

> [I]t is a well-established principle that in the conduct of a democratic election, where adequate opportunity to participate in the balloting is provided all those eligible to vote, the decision of the majority actually voting is binding on all. The indifference or neglect of those failing to exercise the right given them by law should not be permitted to invalidate an otherwise properly conducted election.
> (S.W. Evans and Sons (1948) 75 NLRB 811, 813 [21 LRRM 1081].)

Section 1156.3(a)(4) states that, upon the filing of a petition, if a question concerning representation exists, the Board shall direct an election by secret ballot within seven days "upon due notice to all the interested parties." One of our Regulations requires the Regional Director to disseminate the official notices, and such other notices as are required within

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[4/] The Tally of Ballots states that the total number of eligible voters is 414. The Employer's response to the Petition for Certification also states the number of eligible voters for the preceding (eligibility) payroll period to be 414. Using that number of eligible voters, the voter turnout would be 39 percent. On the other hand, the employee list which the Employer submitted to the Board and which was later given to the UFW contains over 600 names. The Employer contends that 627 employees were eligible to vote, and that only 26 percent of that number voted, but does not explain the discrepancy between his inconsistent assertions of 414 and 627 eligible employees.

his or her discretion to apprise potential voters of the election, and requires the parties to cooperate fully in the dissemination of such notices.[5/]

We have implemented the duties imposed by the statute and our regulation by requiring the Regional Director to give as much notice as is reasonably possible under the circumstances of each case. Recognizing the exigencies of our election procedure and numerous responsibilities placed on Board agents upon the filing of a petition, we do not require that election notices be given individually to each potential voter, even in situations where the eligible voters are no longer working at the petitioned employer:

> Thus, even where some eligible employees fail to hear of an election because of the notice difficulties, we shall nonetheless certify the results if the Regional Director provided as much notice as reasonably possible under the circumstances.
> (Verde Produce Company, Inc. (May 16, 1980) 6 ALRB No. 24.)

(See also Sun World Packing Corporation (Apr. 25, 1978) 4 ALRB No. 23; Lu-Ette Farms, supra, 2 ALRB No. 49.)

It is uncontradicted, in this case, that the Regional Director, his agents, and the parties met the duties and obligations imposed upon them by law.

Board agents conducted a workers' education program on

[5/] Regulation 20350(c): All parties shall be required, upon request by the Regional Director or his or her agent, to cooperate fully in the dissemination to potential voters of official Board notices of the filing of a petition and official Board notices of direction of an election and any other notices which, in the discretion of the Regional Director or his agent, are required to fully apprise potential voters of the time and location of the election.

August 4 for the 40 or 50 employees still working at Gagosian. Those workers were advised of their rights under the Agricultural Labor Relations Act (Act or ALRA), were told of the filing of the election petition, and two official Board Notices[6/] were distributed to them. Board agents asked them to inform other eligible employees about the prospective representation election.

Despite our repeated pronouncements that we do not require that individual Notices be given to eligible employees who are no longer working,[7/] the Regional Director and Board agents made every reasonable effort to do so. In addition to notifying those still employed at Gagosian, four Board agents visited every home for which there was an address on the eligibility list and left copies of the official Board Notice at each of those addresses, including private homes in Delano, Ripley, Lamont, Bakersfield, Earlimart, Arvin, McFarland, and Tipton, as well as motels and labor camps. In addition, Board agents posted official Notices in laundromats in the area and placed thirty-five (35) radio spots which were aired by two stations covering the geographic area.

The parties cooperated with the Board agents and launched their own aggressive campaigns to reach the eligible employees

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[6/] One Notice informed the employees of their rights under the Act and the other informed that that a Petition for Certification had been filed by the UFW.

[7/] The NLRB also holds that individual notices are not required even where eligible voters are not working. (Rohr Aircraft Corp. (1962) 136 NLRB 958 [49 LRRM 1886]; Central Dispensary & Emergency Hospital (1942) 46 NLRB 437 [11 LRRM 265]; National Silver Company (1946) 71 NLRB 594 [19 LRRM 1028].)

who had left Gagosian Farms. The UFW used 20 organizers and workers to distribute campaign leaflets that included the time, date, and place of the election, and personally contacted as many eligible employees as possible. The UFW placed 40 spots on the same radio stations used by the Board agents. The Employer hired five labor consultants whose responsibility it was to locate workers who had left its employ. It attached a campaign flyer to each of 300 pay checks distributed on or after August 5, and placed 32 radio spots. Respresentatives of the UFW and Gagosian traced eligible voters to other ranches and were able to campaign at other places of business. The record herein and the Tally of Ballots show that over 100 eligible employees who were not working for Gagosian on the date of the election had been contacted and voted. The Board agents more than satisfied their duty to give as much notice as is reasonably possible under the circumstances and the parties fully cooperated in that effort.[8/]

Election results should be certified if adequate notice to employees has been provided, unless it is affirmatively shown that eligible employees were prevented from voting by the conduct of the parties or by unfairness in the scheduling or conduct of the election. (Versail Manufacturing, Inc. (1974) 212 NLRB 592

[8/] Our concurring colleague suggests that the Regional Director should have done something more than he did to provide a better opportunity for a larger turnout. The record discloses that the Board agent in charge suggested that the election be held within five days or less of the filing of the petition, rather than the usual seven days, and that the Employer opposed that proposal on the basis that it wanted more time to campaign among its employees.

[86 LRRM 1063].) Factors beyond the control of the parties which prevent eligible employees from voting should not constitute a basis for setting aside an election. (Rohr Aircraft, Corp., supra, 136 NLRB 958 (notice not required to employees not working because of illness, vacation, military training); Wanger Dairy (1977) 232 NLRB 631 [96 LRRM 1279] (election results certified although storm prevented return of driver who could break tie vote); National Silver Company, supra, 71 NLRB 594 (election not set aside although 21 employees did not receive Notice by mail because incorrect addresses were given to Regional Director).) The fact that some former Gagosian employees had moved out of the area to find work is clearly a personal factor outside the control of the Board or the parties.

> But once the election has been held there is no more reason to negate the results at the behest of the dissatisfied party, because of personal matters affecting the opportunity of individual employees to vote, than there would be in the case of a political election. There must be some degree of finality to the results of an election, and there are strong policy considerations favoring prompt completion of representation proceedings. Neither of these interests would be served by permitting litigation regarding the personal reasons a dissatisfied party may seek to assign for individual employees' failure to vote. [Footnote omitted.] 9/
> (Versail, (1974) 212 NLRB 592, 593 [86 LRRM 1063].)

9/ Where voters have not received sample ballots, or for any of myriad personal reasons, voter turnout may be quite low in national and local elections. For example, the city records of LaPuente, County of Los Angeles, California, reveal that city council members were elected in 1978, 1980 and 1982, in elections in which only 10.76 percent, 12.00 percent, and 10.22 percent, respectively of the eligible voters participated. Yet no one seriously suggests that the percentage of delivered Sample Ballots or low voter turnout should nullify the results of an election.

Even where the number of potential voters who do not receive an official notice is sufficient to affect the outcome, the election results should be certified where the Board agents have made reasonable efforts to notify the electorate. In Rohr, supra, 136 NLRB 958 the vote was 44 Intervenor, 45 United Welders. Four (4) eligible employees, temporarily on layoff, did not receive individual notices of the time, date, and place of the election. The NLRB certified the results of the election, stating that it did not require that each employee receive an individual notice, as the Regional Directors had the discretion to determine how much notice could be reasonably provided in each case. In Wanger Dairy, supra, 232 NLRB 631 the NLRB certified the results of an election in which the vote was tied, even though one eligible employee was unable to vote due to weather conditions, a factor beyond the control of the Board or the parties.

In this case, all reasonable steps were taken by the Board and the parties to notify the eligible voters, and a sufficient and representative number voted.[10/] No eligible employee was denied the opportunity to vote by the conduct of a

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[10/] A vote is representative or unrepresentative depending on the facts of each case. In Verde Produce Company, Inc., supra, 6 ALRB No. 24, we found the vote unrepresentative because only 66 of 222 eligible employees voted and not one of those was a striker, although a strike was current. In this case, a substantial number of working and nonworking employees voted and nothing indicates those who had left the area or were in the area but failed to vote would not assent to the majority choice, a presumption we are bound to adopt absent contrary evidence. (Virginia Railway Co. (1937) 300 U.S. 515 [1 LRRM 743]; SW Evans & Son, supra, 75 NLRB 811; Sun World, supra, 4 ALRB No. 23; TMY Farms (Nov. 29, 1976) 2 ALRB No. 58.)

party nor was the scheduling or the conduct of the election unfair. The Regional Director and Board agents exceeded the statutory requirements to provide as much notice as was reasonably possible.

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 Leo Gagosian Farms, Inc. 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: December 27, 1982

ALFRED H. SONG, Member

JEROME R. WALDIE, Member

ACTING CHAIRMAN PERRY, Concurring:

I concur with the majority's opinion and agree that the results of this election should be certified. The election was properly conducted on the seventh day after the filing of the Petition.

However, the reality of this situation is that more than 70 percent of the eligible voters did not vote and less than 10 percent of the eligible voters were working for the employer on the day of the election.

It is the responsibility of the Regional Director to see that there is opportunity for a representative turnout so that the great majority of the voters are not disenfranchised.

Dated: December 27, 1982

HERBERT A. PERRY, Acting Chairman

CASE SUMMARY

Leo Gagosian Farms, Inc. (UFW)

8 ALRB No. 99
Case No. 81-RC-6-D

IHE DECISION

The IHE dismissed the Employer's objection that the timing of its layoffs and/or the procedures employed by the Board resulted in the lack of notice to eligible voters, such that the election results must be considered nonrepresentative. The Employer argued that the low voter turnout must be considered nonrepresentative because a number of eligible voters did not vote because they failed to receive notice of the election.

The Regional Director's decision to conduct the election was proper and was not an abuse of discretion. The United Farm Workers of America, AFL-CIO (Petitioner or UFW) properly filed the Petition for Certification, a proper showing of interest was made and the Employer's workforce was at more than 50 percent of peak the payroll period preceding the filing of the Petition. The election was conducted within the seven day statutory period.

Employer failed to prove that the vast majority of its workforce eligible to vote had left the area. Most of the workers who testified lived or worked in the Delano area or Bakersfield area after they were laid off and were in the area prior to and on the day the election was conducted. Accordingly, the Employer's assertion that the efforts to notify eligible voters were unsuccessful or hampered by the migratory nature of the workforce lacks merit.

Board agents, Petitioner's agents and Employer's agents separately engaged in home visits, purchased radio spots and utilized other methods of communication. Notice of the election at Gagosian Farms was as widely disseminated as reasonably possible. The methods used and the efforts of the Board, as well as the parties, were more than adequate to furnish notice of the election to the largest number of employees possible under the circumstances. Accordingly, having found that the time of the layoffs and/or the procedures employed by the Board did not result in lack of notice to eligible voters such that the election results would be considered nonrepresentative, the IHE concluded that the procedures employed and the Board's notice efforts were not unreasonable and does not warrant setting the election aside. The IHE recommends that the Employer's objection be dismissed and the UFW be certified as the exclusive bargaining representative of all the agricultural employees of the Employer in the State of California.

BOARD DECISION

The Board adopted the IHE's recommendation that the Employer's objection, contending that the Board's procedures resulted in a lack of notice to eligible voters and a nonrepresentative vote,

be dismissed. The Board affirmed its prior rulings that individual notice is not required to be given to eligible voters who are no longer working for the Employer, and that it will certify the results of an election if the Regional Director provided as much notice as reasonably possible under the circumstances. The Board therefore adopted the IHE's recommendation and certified the UFW as the exclusive bargaining representative of all the agricultural employees of the Gagosian Farms, Inc. in the State of California.

CONCURRENCE

Acting Chairman Perry concurred in majority's opinion but pointed out the low percentage of eligible employees who voted, and noted that the Regional Director has a responsibility to provide opportunity for a representative turnout so that a majority of those eligible to vote are not disenfranchised.

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This Case Summary is furnished for information only and is not an official statement of the case, or of the Agricultural Labor Relations Board.

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Agricultural Labor Relations Board
APR 9 1982
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Exec. Secretary

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of:

LEO GAGOSIAN FARMS, INC., Case No. 81-RC-6-D

Employer,

and

UNITED FARM WORKERS OF AMERICA, AFL-CIO,

Petitioner.

Kenwood C. Youmans, Esq. and Thomas E. Shirley, Esq. of Seyfarth, Shaw, Fairweather & Geraldson for the Employer.

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

DECISION

STATEMENT OF THE CASE

ISMAEL A. CASTRO, Investigative Hearing Examiner:

This case was heard before me on October 28, 29, 30 and November 2, 3, 4, 5, 10, 11, and 12, 1981, in Bakersfield, California. On August 3, 1981, the United Farm Workers of America, AFL-CIO (hereinafter referred to as "UFW") filed a Petition for Certification[1/] in Case No. 81-RC-6-D, in order to obtain a representation election for the bargaining unit of all of the agricultural employees of Leo Gagosian Farms, Inc. (hereinafter referred to as "Employer"). An election was conducted on August 10, 1981.[2/]

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

2/ IHE Exhibit 2.

The Tally of Ballots from the election revealed the following results:

United Farm Workers	84
No Union	57
Number of Unresolved Challenged Ballots	23
Total Number of Ballots	164 3/

On August 15, 1981, the Employer filed its objections to the election and the Executive Secretary, by order dated September 28, 1981, dismissed objections two (2) and three (3) and scheduled for hearing the Employer's objection number one (1).[4/] On September 30, 1981, the Employer filed a request for review with the Agricultural Labor Relations Board (hereinafter referred to as "ALRB" or "Board") of the Executive Secretary's order dismissing objections two (2) and three (3). By order dated October 13, 1981, the Board denied the Employer's request for review. Thereafter, the Executive Secretary issued a Notice of Investigative Hearing Confirmation and Hearing Location dated October 14, 1981. Evidence at the hearing was limited to the following issues:

> "Whether the timing of the layoffs and/or procedures employed by the Board resulted in lack of notice to eligible voters, such that the election results must be considered to be non-representative."

All parties were represented at the hearing and were given full opportunity to participate in the proceedings. Both parties submitted post-hearing briefs on January 25, 1982.

3/ IHE Exhibit 3.

4/ IHE Exhibit 4.

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

FINDINGS OF FACT

I. Jurisdiction

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

II. The Objection to the Election

A. Introduction

In it's post-hearing brief the Employer argues that the election conducted at Gagosian Farms on August 10, 1981, should be set aside because a significant number of eligible employees never received notice of the election. The Employer additionally asserts that efforts to notify the employees eligible to vote over the weekend of August 8 and 9 were unsuccessful due to the fact that "the great majority of employees had either returned to their homes in such scattered areas as Texas, Mexico, the Indio-Coachella area, Lamont, and Delano, or had gone to work for other farms throughout the San Joaquin and Sacramento Valleys."

The Employer also argues as a basis for setting aside this election, that the Board did not provide as much notice as reasonably possible under the circumstances. The Employer asserts that no serious steps were taken by the Board to contact laid-off employees until the afternoon of the day before the election.

Lastly, the Employer argues that the results of the Gagosian election are nonrepresentative because of the inadequacy of these notice efforts which resulted in a low voter turnout.

B. Testimony of the Board Agents

1. Roger Smith testified that he was assigned to conduct the election at Gagosian Farms on Monday, August 3, 1981. Although he is the Board's statewide compliance officer stationed in Sacramento, he had been temporarily assigned to Dalano to investigate unfair labor practice charges not related to this case. While in Dalano on this temporary assignment, the instant petition for certification was filed and he was then assigned as Board agent in charge of the election. (V Tr. 22, 23)[5/] Also assigned to assist in the election were Board agents Carlos Fierros and Joe Sahagun who were placed under his supervision.

Immediately after this assignment on August 3, Smith telephoned Gagosian Farms and advised the Employer that a petition for certification had been filed by the UFW, that the Employer's response was due within 48 hours,[6/] requested access onto the Employer's property in order to conduct worker education, and requested the Employer's employee list which would indicate street addresses and job classifications of workers employed during the Employer's last payroll period. (V Tr. 28) At that time the Employer's secretary informed Smith that a portion of the workforce had been laid off. Later that evening at 5:30 p.m., Smith met

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5/ References to the transcript of the hearings by volume and page will be as follows: (__ Tr. __).

6/ See 8 Cal. Admin. Code section 20310.

personally with Reggie Morse, the Employer's general manager, and reviewed with him the Board's regulations covering the Employer's response and gave Mr. Morse a copy of the regulations. Smith also gave Mr. Morse the Board's handbook and several copies of Board notices[7/] to be distributed to the workers the following day (V Tr. 29), and to other workers who might come in for their checks. (V Tr. 32)

Sometime during this period, Smith advised Luis Lopez, the Board's Delano Regional Director, that a majority of the workforce was no longer working at Gagosian Farms and also advised him of the potential problem of giving these laid off employees notice of the election. Both Smith and Lopez agreed that the best the Board could do was to broadcast notice of the election on the radio and to do some home visits in order to get out the vote. (V Tr. 26)

On August 4, 1981 at approximately 10:00 a.m., the day following the filing of the petition, Smith and Board agents Fierros and Sahagun took access onto the Employer's property to conduct worker education. This was the first contact the agents had with workers eligible to vote at the upcoming election. The contact was made with approximately 45 to 50 employees[8/] at the Employer's Lamont Ranch. The agents advised the assembled employees of the filing of the election petition, informed them of their

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7/ See Employer's Exhibits 2 and 3.

8/ It is undisputed that the only crew working after the filing of the elections petition was that of Domingo Ruperte, Jr. (aka "smiley").

rights under the Act, distributed two Board notices,[9/] and requested that they advise other eligible employees of the possibility of an election. (V Tr. 31).

On August 5, 1981, smith received the Employer's response along with the employee eligibility list and also a letter from the Employer's counsel at that time, Mr. Timothy J. Lewy.[10/] Mr. Lewy's letter objected to holding the election on the basis that only a small number of employees remained employed at Gagosian Farms. Mr. Lewy also advised that "(t)he vast majority of Gagosian Farms' 1981 employees have dispersed to areas unknown to the Company." Thereafter, Mr. Lewy indicated that it would be "virtually impossible" for all parties and the Board to locate and inform a significant number of employees in order to permit them to vote. Smith responded to the Employer's objection by indicating that the Board wanted to get as many people to vote as possible if an election were to be conducted. Smith also advised the Employer that the Board regulations controlled his actions with respect to holding the election and if there was a showing of at least 50 percent of peak agricultural employment[11/] and there was a sufficient showing of interest[12/] an election would be conducted. (V Tr. 44)

9/ See Employer's Exhibits 2 and 3.

10/ See Employer's Exhibit 9.

11/ See Labor Code section 1156.3(a)(1).

12/ See Labor Code section 1156.3(a); 8 Cal. Admin. Code section 20300(j)(2).

After receiving this information, Smith returned to Delano and reviewed the Employer's response and the eligibility list. He then called Mr. Lewy's office at approximately 4:30 p.m. and informed Mr. Lewy that it appeared that the election was going to go forward and requested from him an idea of when he would like to have the election and when he would like to have the pre-election conference. Thereafter, Smith contacted the Employer's office and informed them of his finding. He also contacted the UFW and advised them of his finding and subsequently gave them the Employer's employee list.[13/]

Also on Wednesday August 5, Smith advised Luiz Lopez that he needed additional Board agents to assist him in establishing polling sites, monitoring the election procedures, and to assist in getting out the vote. Because Smith would be working with new Board personnel, he requested agents who had experience in other elections. (V Tr. 55) In response to this request, Board agent Ladislao Pineda from the Board's Salinas Regional Office was assigned to the election, as well as Frank Lemus, Baltizar Martinez and Connie Hendrix. Pineda was to assist in notifying the electorate of the election, while the other Board agents were assigned to set up the polling sites.

Smith also testified that during this time, although no determination had yet been made as to the exact time and place of

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13/ See 8 Cal. Admin. Code section 20313.

the election, he had suggested to Reggie Morse and Mr. David Aquino[14/] that the election be conducted within five (5) days or sooner rather than wait the full seven (7) days. The Employer opposed this suggestion because they wanted more time to campaign. (V Tr. 57) Smith also determined that over 600 workers were on the eligibility list after his review of the list provided by the Employer.

On August 6, Smith was also attending to make a final determination of the time and place of the pre-election conference by arranging a mutual agreement between the parties. Moreover, on August 6, he attempted to obtain the services of a Filipino translator or interpreter but was unsuccessful.

On August 7, Smith attempted to contact some radio stations in the area in order to ascertain their rates and also whether they would be able to broadcast an announcement of the election in Spanish during the upcoming weekend. (V Tr. 48) Smith was finally able to purchase six (6) spots on Sunday, August 9 and seven (7) spots on Monday, the day of the election, on radio station "KXEM" in McFarland.[15/] He also contacted radio station "KWAC" in Bakersfield and purchased nine (9) spots on Saturday, four (4) spots on Sunday, and nine (9) spots on Monday.[16/] The radio announcements were all in Spanish and

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14/ Mr. Aquino is a labor management consultant hired by the Employer on August 3, 1981, to organize and assist in campaigning on behalf of the Employer as well as to assist in locating and notifying the workers of the election. His testimony will be discussed later.

15/ See Employer's Exhibit 4.

16/ See Employer's Exhibit 5.

announced the election and the various voting sites available for eligible workers to vote.

Smith also contacted various locations in Delano and Lamont in his attempt to find voting sites. Moreover, all during this time prior to the pre-election conference, Board agents Sahagun and Fierros assisted Smith in the determination of the showing of interest, and in making telephone calls in order to get available facilities and use them as voting sites. (V Tr. 53) Moreover, Pineda arrived on Friday and also assisted in contacting various radio stations.

At the pre-election conference on August 7, the final voting sites and times were agreed upon by the parties. After, this determination the Notice and Direction of Election[17/] was prepared and distributed to the parties. (V Tr. 70) Although at the conference the Employer complained that they were unable to locate a foreman and his crew, Smith explained that all parties had problems locating workers and that there was little the Board could do but to suggest that workers be asked the whereabout of other workers. (V Tr. 66) Also at the pre-election conference Smith asked the parties whether some employees were working with other employers in the area or if the parties knew where some workers could be located. Neither party gave any information at that time. (V Tr. 68)

On Saturday, August 8, Smith attempted to personally notify workers of the election by doing some home visitations. No other agents assisted Smith that morning. Smith spent

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17/ See IHE Exhibit 2.

three (3) or four (4) hours doing these home visits in the Bakersfield or the Lamont area. Smith recalled encountering. David Villareno from the UFW while visiting workers at their residences. Smith testified that he visited a total of 12 to 15 homes but was only successful in contacting two (2) eligible employees. As to all employees and other persons that he encountered, Smith advised them of the times and places of the election and requested that they pass the word to other employees of the election. Although Smith was only able to locate two (2) eligible workers, he testified that 40 percent of the homes that he visited he met either wives, parents or relatives of the workers. (V Tr. 72, 73) Moreover, in three (3) or four (4) or five (5) of these homes, Smith talked with someone other than the eligible worker and advised them of the election and left them a copy of the Notice and Direction of Election.

Also on that Saturday, Smith detected on the eligibility list that the labor contractor crew list of A. Mijarez was incorrect. He then contacted the Employer for a correct copy which was provided and delivered to him at his motel room. Smith then contacted the UFW and advised them of the correction. Lastly on Saturday, Smith called the radio stations KXEM and KWAC and confirmed that the Board's announcements were to be aired that weekend as scheduled.

Also, prior to Sunday and at the pre-election conference, the union objected to some of the addresses contained on the Employer's eligibility list. The union objected to the number of P.O. Boxes listed and addresses which only named the street

but no address number.[18/]

Smith became aware of this problem on Wednesday, August 5, and had called the Employer's office and asked if they had more complete addresses. The secretary advised Smith that she had done her best and that she had really worked hard to get the addresses that had already been provided. (V Tr. 59)

In Smith's attempt to ascertain street addresses he visited labor contractor A. Mijarez at his room[19/] at the Stardust Motel in Delano. Smith made contact with Mijarez at the motel and also observed that a few of his crew members were sleeping in the room. (V Tr. 60) Although Mijarez advised Smith that he did not know where some of his crew members were located, Smith gave him some Board notices to hand out to his other crew members.[20/]

On Sunday, August 9, Smith, Pineda, Sahagun and Fierros met at approximately 12:00 noon at the Board's Delano office, and divided up the eligibility list to do house visits. Smith had arrived earlier at the office because the UFW and the Employer were scheduled to designate their observers for the

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18/ Review of the Employer's eligibility list reveals that there were 95 workers who listed P. O. Box addresses, 37 workers who listed street names with no numbers, and five (5) employees who did not list an address but simply designated their address as unknown. See Joint Exhibit I.

19/ See Joint Exhibit I which lists contractor Mijarez and 11 of his 17 crew members as residing at the Stardust Motel, Room 32, Delano.

20/ Subsequently, Smith testified that he personally notified six (6) of the crew members who were either in the room with Mijarez or standing outside. Smith also indicated that only two (2) of these crew members voted at the election. (V Tr. 80)

election.[21/] (V Tr. 80) Smith and Pineda were to take all addresses within the Bakersfield-Lamont area, while Sahagun and Fierros took the Delano-McFarland-Earlimart area addresses. (V Tr. 75) The entire eligibility list was reviewed and divided between the agents.

Smith testified that he visited employees who lived in Pixley, Bakersfield, the Mijarez crew in Delano, and Arvin.[22/] After this meeting, Smith and Pineda met at 1:00 p.m. at Lamont where they first went to the park and determined where would be the best place to situate the polling site. Thereafter, Smith took the addresses on the West side of Lamont while Pineda took the addresses on the East side. (V Tr. 81) Smith further testified that he visited all of the houses on the west side that were on the list. One house, however, was vacant. (V Tr. 82) The total number of houses that Smith visited were six (6) or eight (8). Smith was not able to determine how many eligible voters he came into contact with because each house contained families. What Smith would do was ask if a certain family member resided there and if that person was an eligible voter, he then gave him or her the Board's notice of the election. (V Tr. 83)

21/ See 8 Cal. Admin. Code section 20350(b) which provides for designation of election observers at least 24 hours before the election.

22/ Review of the eligibility list reveals that workers which listed their address in Pixley numbered 22 (excluding P. O. Box addresses). Those listing their homes in Bakersfield numbered 68. In Lamont the total was 118. In Arvin the total was two (2). See Joint Exhibit I.

Smith further testified that he visited the same number of houses where no one was at home. Smith further testified that at two homes visited the persons listed for that address did not live there. (V Tr. 85) The total time spent in Lamont by Smith was two and one half (2 1/2) or three (3) hours. (V Tr. 84)

After doing house visits in Lamont, Smith went to Bakersfield. Smith estimated that he visited 12 to 15 houses in that area. Smith, however, was only able to contact two (2) eligible voters. In seven (7) or eight (8) homes that were visited no one was at home. At the remaining five (5) or six (6) homes, people that were related to the workers in some way were at home. (V Tr. 84) If the eligible worker was not at home, Smith would leave a notice nonetheless and tell the person at home what the notice was. (V Tr. 85)

As to employees who listed motel addresses in Bakersfield, Smith was not successful in contacting them.[23/] (V Tr. 85) Smith spent a total of two (2) hours in Bakersfield.

After leaving Bakersfield, Smith went to Pixley where he attempted to visit several addresses located at one trailer park. However, no one at the park knew the people on the list. (V Tr. 85)

Smith testified that he considered to himself the possibility of mail balloting but rejected the idea because alot

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23/ Review of the Employer's Eligibility List reveals that a total of 19 employees listed a motel address in Bakersfield. See Joint Exhibit I.

of the employee addresses were no good. (V Tr. 81) No attempts were made on Monday to contact employees at their residences. (V Tr. 89)

Lastly, Smith testified that the home visits conducted by the Board were unique although radio spots are generally used when there is a big election in order to make sure the vote gets out. (V Tr. 88) Moreover, although it was the understanding of Smith that the Union and the Employer were going to be conducting contacts with employees, he recognized that it was the Board's responsibility to notify the employees of the election. (V Tr. 114) As to employee addresses which only contain P. O. Boxes, the Board agents looked some up in the telephone book but were unsuccessful. (V Tr. 117) Where addresses had no numbers the Board agents contacted labor camps. (V Tr. 117)

2. Board agent Ladislao Pineda testified that he was temporarily assigned to the Gagosian Farms election. He arrived in Delano on Friday morning, August 7, the day of the pre-electin conference. (I Tr. 43) [24/] Pineda assisted in monitoring several polling sites the day of the election and also assisted on Sunday in doing house visits notifying workers of the election. (I Tr. 63)

On Sunday, August 9, Pineda met with Smith at the Delano

24/ Pineda testified that he has been employed with the ALRB since 1975 as a field examiner and has previously been involved in 30 to 40 elections prior to assisting in the Gagosian Farms election. (I Tr. 41, 46)

Board office and was given Lamont addresses from the eligibility list to visit. (I Tr. 64) Pineda further testified that he went down his Lamont address list and visited every house. (I Tr. 65) When someone was home Pineda would explain the Board's notice by letting them know that there was going to be an election the following day and that there was going to be a polling site in Lamont for those who lived there. (I Tr. 65) For those houses where people were not home Pineda would leave the notice on their front door. (I Tr. 65)

Pineda further testified that he contacted approximately 50 workers and spent about six (6) hours in Lamont visiting workers' houses.[25/] (I Tr. 70) After canvassing Lamont, Smith and Pineda went to a labor camp called "little camp" in Tipton and found four (4) workers living there. These workers were notified of the election. (I Tr. 74) No attempt was made by Pineda, however, to contact people with P. O. Box addresses. (I Tr. 74)

Lastly, Pineda testified that he did not miss any houses on his address list (I Tr. 98) and that on some occasions several people listed the same address. Some of the people who listed the same address also had the same last names or listed the same address but had different last names. Pineda testified that he either talked with someone at home about the election or left a notice of the election on the front door. For those addresses

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25/ While Smith left for Bakersfield, Pineda apparently stayed in Lamont and continued to canvass the community in his attempt to locate workers. (see V Tr. 85)

which listed more than one (1) person residing at the residence Pineda left three (3) or four (4) Board notices of the election.[26/] (I Tr. 99)

3. Board agent Carlos Fierros testified that he is employed with the ALRB as a field examiner I. Fierros began working with the Board on August 3, 1981. He further testified that he was assigned to assist Roger Smith in the conduct of the Gagosian election on August 5, 1981. (II Tr. 95) Fierros accompanied Smith when he met with Reggie Morse at Gagosian Farms and assisted in conducting worker education to employees still employed by the Employer. (II Tr. 97)

Fierros also assisted Board agent Smith in contacting employees at their homes on Sunday, August 9.[27/] (II Tr. 109) Fierros worked with Board agent Sahagun and divided the names on the eligibility list. (II Tr. 110) He was given the responsibility of contacting approximately 30 homes in the Delano and McFarland area. He began his contact efforts at 3:30 p.m. and ended his efforts that night at 8:30 or 9:00 p.m. (II Tr. 112) Fierros also testified that he visited all of the homes assigned to him but that approximately five (5) or six (6) addresses given did not exist. (II Tr. 113) Of the homes he did visit, approximately one-half of the people were there with some of these people being eligible voters. (II Tr. 113) At two (2) or three (3) homes visited the people there indicated that the employees sought no

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26/ Pineda further testified that he was raised in the Delano area and spent 25 years in that locale. He also worked for a short period of time in McFarland before working with the Board. Pineda testified that he has a fair understanding of the layout of the area. (I Tr. 100)

27/ Fierros did not work on Saturday, August 8, because his son was ill and he hadn't been home all that week. His home was located out of the Delano area. (II Tr. 119)

longer lived there.

Fierros testified that as to the addresses he was assigned he did not have problems in locating the houses[28/] if the addresses were good. (II Tr. 119) Moreover, the greatest number of people living at one address were nine(9), and that usually more than one (1) person lived at the same address. (II Tr. 119).

4. Board agent Joseph Sahagun testified that he had been employed with the ALRB as a field examiner I since June of 1981. (II Tr. 122) On August 5, he was assigned to assist Roger Smith in the conduct of the Gagosian Farms election. Sahagun had previously assisted in one other election before this assignment. Sahagun assisted Smith in conducting worker education along with agent Fierros. (II Tr. 124) In assisting in this program, Sahagun notified approximately 20 workers that there would be an election on Sunday or Monday. (II Tr. 128) Sahagun also assisted in conducting home visits on Sunday, August 9. (II Tr. 131) He testified that he began notifying workers of the education at 4:30 p.m. and ended at 8:30 that evening. (II Tr. 132) Before ending his efforts, however, he had gone through the entire address list of employees assigned to him by Smith. (II Tr. 132) Both Fierros and Sahagun split up the list of workers and compiled a "coherent list" apparently matching those employees which had the same address. This separate list was created in order to expedite the notification process. (II Tr. 132) Because Sahagun was new to the area he was given the addresses of workers in Delano, while Fierros was given addresses in the

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28/ Fierros also testified that he has resided in the Delano areas for the past 20 years.

outlying areas such as McFarland and Earlimart. (II Tr. 133) The list of employees retained by Sahagun contained approximately 110 names of workers.[29/] However, employees residing at the Stardust Motel in Delano were not included. Sahagun further testified that his list contained approximately 25 street addresses and 40 addresses with route or P. O. Box numbers. The addresses which listed route numbers and P. O. Box numbers were not located. However, Sahagun did look through the telephone directory in an effort to obtain street addresses for these workers. This effort failed. (II Tr. 144)

That Sunday evening, Sahagun visited 20 houses. People were at home in about 50 percent of the homes visited. In about eight (8) or nine (9) homes, some workers were present who were eligible voters. In some of these houses there were from one (1) to eight (8) workers living at the same address. (II Tr. 134) Those employees contacted were given the Notice and Direction of Election, a copy of the Board notices setting forth rights of workers, and given an explanation about the election procedure. Where there were more workers living at the same address, Sahagun would give them a corresponding number of Board notices of the election. (II Tr. 135) Although Sahagun did not return to those houses where persons were not present, he did leave a corresponding number of Board notices. Sahagun did not attempt

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29/ Review of the eligibility list reveals that the number of workers with discernable Delano street addresses totals 184. (P. O. Box addresses are excluded and Route addresses are included in this figure) See Joint Exhibit I.

to conduct home visits on Monday, the day of the election. (II Tr. 136)

5. Luis Lopez testified that he was appointed by the Board as the Regional Director for the Delano regional office on August 3, 1981. Prior to actually assuming office, the Delano Regional Field Examiner Frank Pulido appointed Roger Smith as agent in charge of the Gagosian election. However, Lopez, prior to the assignment, was consulted about this appointment and approved it. (IV Tr. 105) After the petition was filed by the UFW, Lopez was advised that many workers were not in the area. At that time Lopez emphasized to Smith that it was critical to go and give notice of the election to workers on the radio. (IV Tr. 111) After hearing of the Employer's objection to holding the election, Lopez asked Smith if there was going to be a showing of voter participation of at least half of the electorate. (IV Tr. 121) Lopez then told Smith that what was needed was to contact employees at their homes and a need for announcement of the election on the radio. Lopez monitored Smith's progress but also gave him wide discretion with respect to conducting the election because of his experience in conducting other elections in the past. Lopez also told Smith to request assistance by the UFW and the Employer to notify employees of the election. (IV Tr. 125) Lopez felt that the voter turnout would be at least 50 percent, but he also was confident that they had done everything reasonably possible to allow the voters to particpate in the election. (IV Tr. 144)

C. Testimony of Employer Agents

1. Mr. Reggie Morse testified that he is the general manager for Gagosian Farms. (VII Tr. 75) He has worked for the Employer in that position since April 20, 1981, and his responsibilities entail general management of the ranches and the business. His responsibilities also entail working with accountants and bankers, preparing budgets and working with ranch foremen. During the instant election period at Gagosian Farms, Morse worked with the ranch foremen and the labor consultants. (VII Tr. 76)

Morse also testified that the nature of the Company's business was farming grapes on approximately 500 acres located in the Lamont area. (VII Tr. 77) Although the Employer has separate ranches, they are all within an eight (8) mile radius of each other.

The 1981 grape harvest period began on July 3, 1981, and at the time of their hire, harvest employees were required to provide their addresses. (VII Tr. 80) The reason for this request was for record keeping, for mailing of W-2 forms, and for insurance purposes. During the 1981 harvest, the Employer hired eight (8) crews, although not all were involved in the actual harvesting of grapes. (VII Tr. 81) Five (5) crews were assigned to picking and packing the grapes. The crew bosses for these crews were Augusto Madera,[30/] Domingo Ruperte, Jr.,[31/]

30/ Review of the Employer's eligibility list (Joint Exhibit I) reveals that Augusto Madera had a total of 92 workers in his crew.

31/ Domingo Ruperte, Jr. had a total of 75 crew members.

Clay Ancheta,[32] Elias Davila[33] and Manuel de Macabalin.[34] The remaining three (3) crews were assigned to trucking, swamping, use as scale boys, and assigned other miscellaneous tasks.[35]

The crew bosses in the five (5) harvest crews were responsible for supervising and hiring their own workers. Morse also testified that company representatives had no other contact with the employees who were employed in these crews except through their crew bosses. (VII Tr. 82) Moreover, the Augusto Madera and Domingo Ruperte crews were considered "local", while the Clay Ancheta, Elias Davila and Manuel Macabalin crews were considered "out of town" crews. (VII Tr. 88)

On July 17 the UFW filed with the Board a notice of intent to organize and notice of intent to take access onto the property of the Employer. At that time the Employer was required and did submit their employee address list to the Board.[36] (VII Tr. 82) After submission of this employee address list, Morse was again contacted by a Board representative who requested additional addresses than those previously submitted.[37] On July 24, 25 and 27 the Employer researched the records to see if

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32/ Clay Ancheta had a total of 110 crew members.

33/ Elias Davila had a total of 146 crew members.

34/ Manuel de Macabalin had a total of 153 crew members.

35/ The remaining crews were the Pete Gagosian crew with 13 members, the Bill McClean crew with 21 members and the labor contractor crew of A. Mijarez with 17 crew members.

36/ See 8 Cal. Admin. Code section 20910(c).

37/ See Joint Exhibit III.

addresses were different, met with crew bosses and requested current street addresses where employees were living and not mailing addresses nor Post Office Box numbers. (VII Tr. 83) Morse testified, however, that this second effort was not very successful[38/] because a lot of employees could not give any different addresses.

Morse further testified that after the filing of the petition for certification by the UFW, he submitted the employee eligibility list to Roger Smith on August 5. (VII Tr. 84) The eligibility list submitted at that time was the most complete list the Employer had. Also submitted with the list was a letter from the Employer's attorney Mr. Timothy J. Lewy.

On August 3, the day the election petition was filed, Morse spoke with Smith at the Company office and told Smith that 40 or 50 employees were currently working with the Company. Morse also told Smith that they could not see how an election could be conducted when 650 workers were employed the week of July 26 to August 1 and the vast majority of these employees had been laid off when the work was finished. (VII Tr. 86) Because these employees had moved to other parts of the state, Morse testified, the Company didn't know how they would be able to contact them. The Employer also felt that it was impracticable to be able to contact most people and inform them of the election. At thattime the Company did not know the time and place of the election, nor were they sure whether an election would be

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38/ See Joint Exhibit IV.

conducted. (VII Tr. 87)

On August 3 Smith left with Morse two Board notices and one Board letter. Morse testified that Smith did not advise him to circulate the Board notices nor did Smith advise Morse of the election.[39/] (VII Tr. 89) Morse first learned of the election at the pre-election conference which was held August 7 in Delano. At that time the Company protested holding the election because the Company was unable to contact the vast majority of workers to notify them of the election. (VII Tr. 93)

At the pre-election conference on August 7 polling sites were discussed. The Smith ranch polling site was selected because that site was the Employer's ranch headquarters and the employees would know the location. Also, it was understood that some workers were in the vicinity. (VII Tr. 94) A polling site in Lamont was selected because some people from two (2) of the permanent crews lived in that area which would give them the opportunity to vote. Moreover, it was understood that other workers were then working in the Lamont-Arvin area. A polling site in Poplar was also selected because a great many workers were either living or working around that area. Moreover, a polling site in Delano was selected because it was understood

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39/ This testimony contradicts the testimony of Smith who testified that he advised Morse on August 3 to circulate the Board notices to the workers. (V Tr. 29) I credit the testimony of Smith rather than that of Morse because of Morse's conceded inexperience and unfamiliarity with the conduct of Board elections. (VII Tr. 76, 115) Moreover, review of the Board notices given Morse on August 3 (see Employer's Exhibits 2 and 3) reveal that one is a Board notice <u>to farmworkers</u> advising them of their rights under the ALRA and the other is a Board notice to <u>employees</u> advising them of the filing of the petition for certification. Essentially, these notices are intended for employees and not employers.

that workers lived in that area and also because the Company wanted that site. (VII Tr. 95)

The Employer also proposed a polling site in the Indio-Coachella area because it was their understanding that a "great-many" workers had gone back to Indio. Moreover, Elias Davila's crew was from that area. (VII Tr. 96) Although the union opposed the proposed Indio polling site, Board agent Smith left the final decision on sites open until Sunday, August 9 in order to allow the Employer time to come up with the names of employees who were located in the Indio area. (VII Tr. 108) If employees were located in Indio, then Smith would consider a voting site there. The Employer, however, was not able to produce the names of any employees located in Indio-Coachella. Morse testified that he had understood that employees were located in Indio because a gentleman had told him that some people had gone back to Coachella, although he could not recall the number of workers which were said to have returned. (VII Tr. 113) On Sunday, August 9, Smith consequently advised Morse that a polling site in Indio would not be provided by the Board. (VII Tr. 97)

Morse also testified that he was not able to contact crew foreman Elias Davila. The last contact the Company had with Davila was August 1 when he was given his crews payroll checks for distribution to his crew members. (VII Tr. 97, 98, 99)

Morse further testified that on August 4 the Employer hired labor consultants David Aquino and Mike Peredes. The

consultants were to assist in campaigning and notifying workers of the filing of the election petition. (VII Tr. 101, 102) Before the pre-election conference the consultants were to contact as many workers as possible, and to notify them that there would be an election. (VII Tr. 102) After the pre-election conference, the consultants were assigned to notify workers who were eligible to vote of the time and place of the election. David Aquino coordinated the activities of the consultants hired by the Employer. Also, on August 5 additional consultants were hired.

Morse also testified that this was his first time going through an election campaign (VII Tr. 109) and that he relied solely on the labor consultants to contact people with respect to campaigning and the election. (VII Tr. 111) Also, the labor consultant had mentioned to him the usual time frame between the filing of the petition for certification and the holding of the election. Aquino also acted as the Company representative at the pre-election conference. (VII Tr. 116)

Morse testified that the Company rented a "big van" for the Delano area in case anybody needed a ride. Other drivers and transportation were lined up in case the Company got any calls or anyone indicated they needed a ride to the polls. (VII Tr. 117) Moreover, Morse testified that he knew that Gagosian workers were working at Tenneco and that the Employer requested access but was denied. (VII Tr. 119)

Morse also testified that crew foreman Bill McClean was in charge of giving notice of election to workers who lived

in the Bakersfield area. (VII Tr. 105) McClean was able to contact quite a few people, approximately 30 to 80 because most workers had permanent addresses. (VII Tr. 120)

2. Mr. David Aquino testified that he is self-employed as a labor consultant with West Coast Management Services. Aquino has been primarily involved with agricultural labor relations since 1975. (VI Tr. 1) Aquino was contacted Tuesday morning, August 4, by Gagosian Farms to coordinate their efforts for the August 10 election. Aquino was also to assist the Employer with the filing of the Employer's response to the elections petition and to assist in the completion of other forms that might be required by the Board. Aquino's experience with respect to Board conducted elections has been his previous involvement with approximately 20 elections. Aquino further testified that he is familiar with the ALRA and the administrative processes of the Board. (VI Tr. 17)

At the time of his employment, Aquino testified that he knew when the petition for certification had been filed and that he had calculated that the election would be conducted on Monday, August 10. (VI Tr. 56) He had also calculated at that time that seven (7) days would be at least enough time to contact employees. (VI Tr. 57)

Also, on Tuesday, August 4, the Employer hired Mr. Mike Peredes as a labor consultant to assist Aquino in the election. His assignment was to contact workers in the Arvin-Lamont area. (VI Tr. 10) On Friday afternoon, Roy Mendez and Joe Mendez were also hired as labor consultants to assist in

the campaign. (VI Tr. 8) Henry Mendez was also hired and was assigned to contact foreman Elias Davila, but was unsuccessful. He was able, however, to locate Erasmo Flores, Davila's assistant on Friday after the pre-election conference. (VI Tr. 9) Moreover, Roy and Henry Mendez were assigned to locate workers in the Richgrove area. (VI Tr. 46) Aquino testified that he supervised the activities of all of these labor consultants. (VI Tr. 59) Also according to Aquino, the hiring of four labor consultants to assist in an election is unusual, where the usual number of consultants hired is one or two. (VI Tr. 58)

On Wednesday, August 5, Aquino made contact with crew foremen Domingo Ruperte, Jr. (aka "Smiley"), Manuel de Macabalin and Augusto Madera. (VI Tr. 5) Payroll checks were ready to be distributed to these crews for work performed the payroll period immediately preceding the filing of the elections petition. (VI Tr. 5) Aquino also prepared a campaign flyer to be distributed with the paychecks urging the employees to vote "no union" at the election. Aquino testified that not knowing where these workers were, but knowing that alot of them would be going to the crew bosses to pick up their checks, he thought that the Employer could hand out a propaganda piece[40/] telling the workers about the feeling of the company to vote no union. The flyer was also used to inform them of the possibility of an upcoming election. (VI Tr. 5) Although, Board agent Smith had given Reggie Morse two Board notices on Tuesday to be

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40/ See Petitioner's Exhibit A.

distributed to workers, Aquino testified that he did not distribute any of these notices with the payroll checks to these crews. (VI Tr. 66)

Approximately 40 or 50 members of the Domingo Ruperte crew were still working for the Employer during this period. The crew was "on call" and were to be called when work became available. (VI Tr. 4, 6) Aquino testified that he made contact with Ruperte at his home and gave him the crew payroll checks. Ruperte was asked to distribute the Employer's campaign flyer with the checks and was also told about the possibility of an election on Monday, August 10. Ruperte was told that if the election was conducted, the Employer would be counting on him to assist in contacting his crew members. (VI Tr. 6) Aquino knew the home address of Ruperte as well as the home addresses of Macabalin and Madera. Aquino testified that he arranged to contact all of the foremen when the time and place of the election was determined after the pre-election conference. (VI Tr. 64) Moreover, each crew foreman went through the worker eligibility address list and Aquino testified that there was thus an attempt on everyone's part to try and contact as many people as possible. (VI Tr. 65)

Aquino also made contact with crew foreman Macabalin on Wednesday in order to distribute the crews payroll checks. As with Ruperte, Macabalin was given the Employer campaign flyer to distribute with the checks. Macabalin was also advised of the possibility of an election on Monday, August 10.

(VI Tr. 6, 64) At this time Macabalin informed Aquino that he was working at Tenneco West and that some members of his crew who worked at Gagosian Farms were also working with him there. (VI. Tr. 43) As to other members of his crew Macabalin was not sure how many were still in the area. (VI Tr. 61)

In response to Macabalin's information as to the location of some of his crew, Aquino requested access onto the property of Tenneco West. Aquino requested access in order to inform the workers about the Gagosian election. Tenneco West, however, refused to allow access. (VI Tr. 72)

On Friday, August 7, after the pre-election conference, Aquino advised Macabalin of the specific time and date of the election. (VI Tr. 44) Aquino also gave Macabalin a stack of the Board's Notice and Direction of Election. (VI Tr. 44)

On Wednesday, Aquino advised crew foreman Madera of the possibility of an election on Monday, August 10. (VI Tr. 64) Aquino also gave him the Employer's campaign flyer to distribute to his crew along with their paychecks. (VI Tr. 6, 62) Madera also advised Aquino that he and other members of his crew were working at a ranch called Sumner Peck located in the Arvin-Lamont area. (VI Tr. 74) Like Ruperte and Macabalin, Aquino had the home address of Madera and was supposed to contact him when he knew of the time and place of the election. (VI Tr. 64)

Although Aquino was not able to contact foreman Davila, he was able to locate his crew assistant Erasmo Flores on Friday after the pre-election conference. (VI Tr. 9) That evening accompanied by Flores the consultants were able to

contact some families who worked in Davila's crew. (VI Tr. 13) However, they did have some difficulty because some addresses were incorrect. (VI Tr. 13) Also that evening, Flores was given a stack of the Board's Notice and Direction of Election for distribution. (VI Tr. 32, 67) Aquino testified that Flores would help in contacting employees and that he knew where some people lived, but that some people had left the area. (VI Tr. 34) Moreover, Flores assisted in contacting at least 40 members of the Davila crew who were located in the Delano, Richgrove, Poplar, Bakersfield, Pixley, and McFarland areas. (VI Tr. 45, 68, 69) Labor consultant Roy Mendez knew where to contact Flores during this time.

Aquino testified that he was aware that employees were also working with other employers in the Richgrove and Delano areas. He also knew that some workers were employed with Frank Herrera, and with other employers whos names Aquino was not able to recall. (VI Tr. 74) Moreover, Aquino testified that the Employer obtained permission to take access at one location, but the name of that employer Aquino was not able to recall. (VI Tr. 75)

Aquino testified that he attempted to make home contacts on Thursday morning, August 6, in the Delano area. (VI Tr. 9) Aquino asked the four or five workers still employed at Gagosian Farms to make contacts in Bakersfield. (VI Tr. 51) Moreover, crew foreman Pete Gagosian also made contact with workers living in the Bakersfield area. (VI Tr. 50)

Aquino also testified that Henry and Roy Mendez had difficulty in contacting people at their homes on Saturday and

Sunday because of the heat. (VI Tr. 51) Moreover, after the pre-election conference and on Saturday morning Aquino was unsuccessful in contacting people in the Delano area because no one was home. (VI Tr. 12) Aquino testified that although he had copies of the Board's Notice and Direction of Election, he did not leave them at the houses where people were not there. (VI Tr. 42) However, each consultant was given a stack of the Board's notice and instructed to give a copy to each individual they met. (VI Tr. 41) No visits were made on Sunday, August 9. (VI Tr. 42) On Monday, the day of the election, Aquino made some telephone calls to workers and contacted two people. (VI Tr. 76) He also made a home visit.(VI Tr. 14)

As another method of contacting people, Aquino purchased some radio spots prior to the pre-election conference. (VI Tr. 10) On Friday afternoon, after the pre-election conference, Aquino was able to purchase spots in the McFarland station, KXEM. (VI Tr. 11) Aquino testified that he used the McFarland station because it was a station well listened to. (VI Tr. 36) Moreover, Aquino purchased spots in the Bakersfield station, KWAC, because it had been used in other elections. (VI Tr. 36) Although Aquino did not purchase spots in any English speaking station, he did purchase some time in a Filipino program on Sunday morning on KXEM. (VI Tr. 37) The Employer purchased these radio spots to broadcast campaign statements urging a no union vote at the upcoming election. They did not broadcast, however, the time and place of the election because the Board agents were broadcasting that

message. (VI Tr. 70) The radio spots were aired on Saturday, Sunday and Monday with 32 spots aired on KWAC and 28 spots aired on KXEM.[41/]

3. Elias Davila testified that he worked as a crew foreman at Gagosian Farms during their July 1981 harvest. He has also worked for the Employer for the past four or five years. (VII Tr. 19) As a crew foreman, Davila had the responsibility of gathering the crew members and also had the authority to hire them for the Gagosian harvest. (VII Tr. 19) Davila also testified that Erasmo Flores worked as his assistant during this harvest period which began July 20 and ended on July 29. (VII Tr. 20)

During this period Davila lived at the Birch Motel in Bakersfield. (VII Tr. 19) However, he did not advise the Employer of his current address except for his permanent address in Indio. (VII Tr.23) Moreover, because his crew had just arrived in the Delano area from Indio, he did not know where each crew member lived during this period. (VII Tr. 33) Davila testified however, that he nonetheless always remained in touch with his crew. (VII Tr. 32) With respect to contact with the Employer, Davila testified that he was always the one who initiated contact rather then having the Employer attempt to locate him. (VII Tr. 41) Moreover, Davila testified that he always initiated the contact because he did not always live in the same place. (VII Tr. 42) Although, during this harvest period Davila lived at the Birch

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41/ See Petitioner's Exhibits C, D, and E.

Motel, the Employer never contacted him there. (VII Tr. 42)

Davila also testified that at the end of the harvest, he was responsible for distributing paychecks. (VII Tr. 21) He got the payroll checks the Saturday following the layoffs and distributed them to his crew on Saturday, Sunday and Monday.

Some employees went to his motel room to pick up their checks while others went to the house of his assistant Erasmo Flores. (VII Tr. 21) Some checks were distributed in a park in Delano while others got their checks through family members. Not all checks, however, were personally delivered. At least five were mailed to Indio.

After the distribution of the paychecks, Davila left Bakersfield and returned to Indio. He did not stop at the company, however, before leaving the area. (VII Tr. 44) While in Indio, Davila testified that he saw at least five members of his crew. (VII Tr. 24) Moreover, Davila testified that at the time he left Bakersfield, he did not know about the election. (VII Tr. 28)

D. Testimony of the Employer's UFW Witness and Employee Witnesses

1. Ben Maddock testified that he is the UFW Delano Field Office Director. He has held that position since 1972. (I Tr. 108) In his role as director he supervises UFW activities in regard to elections. (I Tr. 109) He has previously been involved in approximately 30 table grape elections.

Maddock testified that at the time the UFW filed the instant petition for certification, he knew that some crews eligible to vote at the election had been laid off. (I Tr. 114,

116, 117) Although Maddock knew that at least three crews had been laid off, he had no knowledge as to the number of crews which remained to finish the harvest. (I Tr. 116) Maddock recalls telling the Board after their petition qualified for an election order that at least three crews had been laid off, but had no knowledge as to the number of crews which remained to finish the harvest. (I Tr. 116)

At the pre-election conference, Maddock acted as the UFW's spokesman, and after receiving the Board's Notice and Direction of Election, he made copies for distribution. (I Tr. 121) Maddock, however, testified that he did not personally go around and talk to people.

With respect to the general location of the electorate after the layoff, Maddock testified that he had a good idea where most of the employees were living and working at the time of the election. (I Tr. 122) Maddock knew that a few workers were working and living in the Porterville area and he was aware that one person had left the area to work in Madera. Overall, however, the UFW knew where approximately 400 people were residing and living at the time of the election. (I Tr. 128)

Maddock also testified that approximately 40 workers listed on the voter eligibility list had changed their address since the Gagosian layoff because at that time they had moved from Lamont to Delano. (I Tr. 128) Maddock testified that he was not sure if he informed the Board of these address changes. (I Tr. 129)

Maddock further testified that he assigned 20 people

to do home visits. (I Tr. 139) Of these 20, two or three were Gagosian employees. (I Tr. 153) Although, the UFW had some difficulty in finding people at home, the organizer assigned would return to the residence in order to make contact. (I Tr. 138) Some people, however, on the eligibility list were never contacted. Maddock also testified that on Sunday, August 9, they had located a family where some of their members had already left the area. (I Tr. 138)

The UFW had also purchased radio spots on the Spanish-speaking radio stations KXEM and KWAC.[42/] The UFW's announcement would advise the public of the election at Gagosian Farms and also indicate the times and places of the voting sites. (I Tr. 130) These radio spots were purchased after the pre-election conference and all of the announcements were in Spanish. (I Tr. 133)

2. The Employer introduced the testimony of forty-five (45) employee witnesses at the hearing in this matter. Thirty-four (34) of these witnesses were members of the Elias Davila crew.[43/] Three (3) workers were members of the Pete Gagosian

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42/ See Petitioner's Exhibits H and I.

43/ Members of the Elias Davila crew who testified were Nicolas Barrera, Lucia Barrera, Jose Gilberto Cavazos, Leonida Cavazos, Jose H. Barrera, Jose Gilberto Barrera, Jr., Pedro B. Elizondo, Otillia V. Elizondo, Flor Elizondo, Pedro V. Elizondo, Guadalupe Zamudia (aka Nicolas), Estella Zandejas, Olga Lopez, Guadalupe Zamudio (aka Rosalbe), Ana Maria Lopez, Lilia Zandejas, Manuel Baez, Jose Elizar Baez, Maura Baez, Angelina Elizondo, Guadalupe Baez, Gerardo Baez, David Machiche, Maria Machiche, Ramon Dejara, Maria Diaz, Tony Rodriguez, Ana Rose Lopez, Socorro Alvardo, Joel Moralez, Reynaldo Pena, Herberto Barrera, Leonard Torres, and Francisco de Lara.

crew.[44/] One (1) worker witness was a member of the Bill McClean crew[45/] while another one (1) worker was a member of the Augusto Madera crew.[46/] Six (6) other workers were members of the Manuel de Macabalin crews.[47/] All of these workers witnesses testified that they did not receive notice of the election which was conducted at Gagosian Farms on August 10, 1981.[48/]

III. ANALYSIS

It is undisputed that at the time the UFW filed its petition for certification on August 3 the Employer only employed 40 or 50 members of the Domingo Ruperte crew with the balance of the 627 workers eligible to vote in the election not employed at the time because of the ending of the Employer's harvest period. These substantial layoffs and the efforts utilized by the Board in notifying these laid off employees of the election, form the basis for the Employer's objection to certification of the election results. In essence, the Employer places in issue the Boards procedures in conducting elections in such circumstances and the Board's procedures in notifying the electorate of the

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44/ Members of the Pete Gagosian crew who testified were Aniba Santiago, Ruben Chairez, and William Hernandez.

45/ The member of the Bill McClean crew who testified was Bill Cramer.

46/ The member of the Augusto Madero crew who testified was Brad Champagne.

47/ Members of the Manuel de Macabalin crew who testified were Manuela Benitez, Guadalupe Ramirez, Ruberto Benitez, Louis Martinez, Eliseo Martinez and Rebel Lebouef.

48/ The remaining testimony was proffered by the UFW in its case in chief. However, because I find that the Employer has failed to establish a prima facie case to warrant setting aside the election, a full discussion of the substance of that testimony is not necessary.

election.

A. The Decision to Conduct the Election

The State Legislature in drafting the provisions of the Agricultural Labor Relations Act with respect to the Board's responsibility to conduct elections provided major differences from the National Labor Relations Act from which the ALRA was principally modeled after.

> "These deviations were necessitated by the differences between agriculture and the industries regulated by the NLRA. An electoral system for agricultural workers must provide a speedy, secret ballot election for all eligible voters. The election must be conducted when the employment payroll reflects a meaningful complement of workers, and the employees must be afforded the opportunity to decide freely whether they desire representation or not." Levy, The Agricultural Labor Relations Act of 1975 -- La Esperanza De California Para El Futuro, 15 Santa Clara Law Review 783 (1975).

In conformity with the purpose of the Act to provide "speedy" elections, Labor Code section 1156.3(a) was drafted to provide, in relevant part, as follows:

> "1156.3(a) A petition which is either signed by, or accompanied by authorization cards signed by a majority of the currently employed employees in the bargaining unit may be filed in accordance with such rules and regulations as may be prescribed by the board, by an agricultural employee or group of agricultrual employees, or any individual or labor organization acting in their behalf alleging all the following:
>
> (1) That the number of agricultural employees currently employed by the employer named in the petition, as determined from his payroll immediately preceding the filing of the petition, is not less than 50 percent of his peak agricultural employment for the current calendar year.
>
> . . . . . .

> Upon receipt of such a signed petition, the board shall immediately investigate such petition, and, if it has reasonable cause to believe that a bona fide question of representation exists, it shall direct a representation election by secret ballot to be held, upon due notice to all interested parties and within a maximum of seven days of the filing of the petition."

The Board has continually held that "[t]he time limitations of the Act are in themselves statutory mechanisms which function to protect voter franchise in an industry characterized by short periods of seasonal employment and high employee turnover." Sun World Packing Corp., (April 25, 1978) 4 ALRB No. 23. In Lu-Ette Farms (September 26, 1976) 2 ALRB No. 49, the Board held:

> "We are committed to the principle that every effort should be made to notify eligible employees of an election and give them an opportunity to vote. However, we note that the requirement of the ALRA that an election be held within 7 days of the filing of a petition combines with rapid turnover in the workforce characteristic of much of California agriculture to create pecuilar difficulties in providing such notice. The burden of confronting these difficulties falls in the first instance on the Regional Director and Board agents in charge of the case, but particularly in view of the time contraints involved, the parties themselves are expected to participate in efforts to notify employees."

The Board has also noted that these time constraints are provided for the purpose of assuring the largest possible turnout of eligible voters. Ron Nunn Farms, (May 25, 1978) 4 ALRB No. 31. As such, these time limitations are not jurisdictional and the Regional Director may, in his or her discretion, schedule an election exceeding these periods, if

necessary, in order to insure a representative election. See Verde Produce Company, Inc., (May 16, 1980) 6 ALRB No. 24; see also Klein Ranch (December 11, 1975) 1 ALRB No. 18.

In the instant case the Employer stipulated at the hearing and admitted in its response[49/] that during its payroll period immediately preceeding the filing of the petition it was at least 50 percent of peak agricultural employment. (I Tr. 2, 3) Moreover, the Board upon review of the authorization cards submitted by the UFW determined that a bona fide question of representation existed in order to conduct the election.[50/] Thus, after the filing of the petition in the instant case, and upon the determination that the Employer was at least 50 percent peak agricultural employment, and that the authorization cards submitted were signed by at least 50 percent of the bargaining unit employees, the Board properly ordered an election to be conducted within seven days from the filing date of the elections petition as mandated by the ALRA. Although the circumstances were such that a substantial number of eligible employees were no longer working for the Employer at the time of the filing of the petition and the conduct of the election, this fact alone was not a basis for refusing

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49/ See Employer's Exhibit 9.

50/ It should also be noted that unlike the NLRA which requires that a petitioning union submit authorization cards signed by only 30 percent of the unit employees (20 C.F.R. 101.18(a), the ALRA requires the submission of cards signed by a majority of employees. (California Labor Code section 1156.3(a)) The purpose of this 50 percent requirement "reflects the fact that there will be less time for organizational activity following the filing of the petition." Levy, The Agricultural Labor Relations Act of 1975 - La Esperanza De California Para El Futuro, 15 Santa Clara Law Review 783, 795, Fnt. 92, (1975).

to hold the election.

Moreover, the testimony of Board agent Smith established that he initially had suggested to Reggie Morse and labor consultant David Aquino that the election be conducted sooner than the full seven (7) days. The Employer, however, rejected this suggestion because more time was needed in which to campaign. The testimony of Aquino also established that the full seven (7) day period was needed in order to locate and make contact with employees eligible to vote at the election. Thus, Aquino's testimony corroborates the testimony of Smith that the Employer opposed the suggestion that an election be conducted sooner than the Act mandated. In this respect, although the seven (7) day election requirement was not jurisdictional, the holding of the election sooner or later than this period would not have served the interests of the electorate, the parties, or the Board. The time period alloted thus allowed sufficient time to campaign and inform the electorate of the election.

B. The Location of the Workforce After the Layoffs

In its post-hearing brief, the Employer argues that:

> "Efforts to notify the employees over the weekend of August 8 and 9 were unsuccessful for a number of reasons. Chief among these was the migratory nature of the Employer's workforce. Well before efforts at notification could begin, the great majority of employees had either returned to their homes in such scattered areas as Texas, Mexico, the Indio-Coachella area, Lamont, and Delano, or had gone to work for other farms throughout the San Joaquin and Sacramento Valleys."

Reggie Morse, the Employer's general manager, testified that of the eight crews working for the Employer during the pre-petition period, the Manuel Macabalin, Clay Ancheta, and Elias Davila crews were considered "out-of-town" crews. Of these, the evidence presented indicated that the Davila crew were recent arrivals to the Delano area having come from the Indio-Coachella area to work at Gagosian Farms. Davila testified, however, that after the grape harvest ended at Gagosian Farms, his position as crew leader ended. Davila had worked for Gagosian Farms the last four seasons and the crew members were aware of his leaving at the end of that harvest period . Davila also testified that at the end of this work season, everyone looked for other work in the Delano area.[51/] Moreover, the testimony of 28 of the 34 Davila crew members who testified

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51/ At the hearing Davila testified as follows:

Q. (Hearing Officer) When you first started with Gagosian Farms, did you know that the harvest was going to last only approximately nine days?

A. Well, not exactly, not knowing that it was going to be exactly nine days, but aware that it was going to be a short season.

Q. Did you advise your crew members that it was going to be a short season?

A. They have knowledge of that.

Q. And I take it, since you left Bakersfield and returned to Indio, that you also told your employees that you were no longer going to be their foreman after Gagosian layoff?

A. They know that my job as foreman ends there.

Q. And what do they usually do then after you leave?

A. Well, from then on, everyone, each one of us, even I look for work further on ahead.

Q. In the Delano area?

A. Yes, in the Delano area, well we call it the Delano area, but that includes all of the towns of Ducor, Pixley, Earlimart, McFarland. (VII Tr. 57)

corroborated the testimony of Davila that the members of his crew remained in the Delano area at the end of the harvest period at Gagosian Farms. Seventeen (17) of these crew members testified that after being laid off they began to work for a company called Tenneco West which is located in the Delano area.[52/] Moreover, these employees did not testify that they moved from their residence or to any other area other than the residence they were occupying at the time they were working with Gagosian Farms. Indeed, at the time they testified they were still residing at the location where they were living while they were working for Gagosian Farms in July of 1981. Ten (10) other members of Davila's crew also testified that after the layoff they began to work for another Delano area employer, Vincent Zaninovich.[53/] These employees also did not testify that they moved from their residence after the layoff at Gagosian Farms. Lastly, one (1) employee testified that he is a permanent resident living in Bakersfield and remained in the area after the layoff at Gagosian Farms.[54/]

52/ These workers were Nicolas Barrera, Lucia Barrera, Jose H. Barrera, Jose Gilberto Barrera, Jr., Pedro B. Elizondo, Otillia V. Elizondo, Flor Elizondo, Pedro V. Elizondo, Manuel Baez, Jose Elizar Baez, Maura Baez, Angelina Elizondo, Guadalupe Baez, Gerardo Baez, Ramon De Yara, Reynaldo Pena, and Herberto Barrera.

53/ These workers were Jose Gilberto Cavazos, Leonida Cavazos, Guadalupe Zamudio, Estella Zandejas, Olga Lopez, Guadalupe Zamudio, Ana Maria Lopez, Lilia Zandejas, Ana Rosa Lopez and Socorro Alvarado.

54/ That employee is Leonard Torres.

However, two (2) employees testified that after the layoff they moved to the town of Biola located near Fresno,[55/] and two other workers also testified that they moved to Madera.[56/] Moreover, one employee witness testified that he and nine (9) other members of his family returned to Indio after the layoff and prior to the conduct of the election.[57/]

No evidence was introduced, however, establishing that any other members of the Davila crew or members of any of the other crews left for Texas or Mexico after the Gagosian layoff. The only testimony presented was that of crew foreman Davila who testified that after the layoff and after the distribution of his crews payroll checks he left for Indio-Coachella, Texas, and finally to Mexico where he resides. However, the notice efforts with respect to Davila are inconsequential here, because Davila was ineligible to vote at the election.[58/] (See California Labor Code section 1140.4(j); 8 Cal. Admin. Code section 20352(b)(1)). Thus, the Employer's contention in this

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55/ These employees are Maria Diaz and Tony Rodriguez.

56/ These employees are David Machiche and Maria Machiche.

57/ That employee is Francisco de Lara.

58/ Although not at issue at the hearing, the evidence presented firmly establishes that Davila was a supervisor within the meaning of Labor Code section 1140.4(j) because he had the authority to hire and fire the members of his crew. Reggie Morse testified that the crew foremen possessed this authority because the Employer maintained very little contact with the workers other than through the crew leaders.

regard is without merit.

Thus, the evidence presented does not establish that a substantial majority of the Davila crew left the Delano area after the layoff at Gagosian Farms in July of 1981. Moreover, the relocation of thirteen (13) members of a crew of 146 workers cannot be regarded as substantial.

As to the general location of the other crews, Reggie Morse testified that the 92 workers in the Augusto Madera crew and that 75 workers in the Domingo Ruperte, Jr., crew were considered "local" crews. There being no evidence presented that members of these two crews dispersed to areas other then the Delano area, it was thus not established that these eligible voters were not located within the immediate area at the time of the election.

Other factors which militate against the Employer's argument that a vast majority of the Gagosian workers left the area, is the testimony of both union witnesses and the Employer's witnesses who established that Manuel Macabalin was working as a foreman at Tenneco West which is located in the Delano area. Moreover, the evidence established that at least 40 members of his crew which also worked at Gagosian Farms during the pre-petition period, were working with him at Tenneco West. Two (2) other members of Macabalin's crew also testified that they began working after the layoff for an employer named Jim Holmes who is also located in the Delano area.[59/] There being no other

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59/ These workers are Louis Martinez and Eliseo Martinez.

evidence establishing that the remaining members of Macabalin's 153 crew members relocated to areas other than the Delano area, it was thus not established that a majority of these employees were not in the area during the conduct of the instant election.

Since no argument or evidence was introduced with respect to the general location of the Clay Ancheta crew of 110 workers, the Employer also failed to establish that these crew members had left the Delano area after the layoffs.

As to the A. Mijares labor contractor crew of 17 workers, Board agent Smith testified that on Saturday, August 8, he made personal contact with Mijares and at least six (6) of his crew members and notified them of the election. Smith also testified that at least two (2) of these members voted at the election. Thus, as to these crew members, the evidence does not establish that they left the area after the layoff at Gagosian Farms.

Lastly, based on the testimony and evidence presented, the crew members of Pete Gagosian and Bill McClean crews were mainly local permanent residents.[60/]

Therefore, I find that the evidence presented does not support the Employer's contention that a vast majority of the employee workforce at Gagosian Farms had left the immediate area after the end of season layoff in July of 1981. Accordingly, the Employer's additional assertion that the efforts to notify

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60/ Aniba Santiago, Ruben Chairez, and William Hernandez testified that they are permanent residents living in Lamont. They worked in the crew of Pete Gagosian. Bill Cramer, Brad Champagne, and Leonard Lebouef also testified that they are permanent residents living in Bakersfield.

the electorate of the election were unsuccessful or hampered by the migratory nature of the workforce likewise lacks merit.

C. The Efforts to Notify the Electorate

As in all election objection cases, the party objecting to the election has the burden of showing that the election conducted by the Board was invalid. Labor Code section 1156.3(c) provides that "unless the Board determines that there are sufficient grounds to do so, it shall certify the election." The Board has construed this language to mean that the Legislature has in effect established a presumption in favor of certification "and indicated that the burden of proof rests upon the party objecting thereto" (California Lettuce Co., (1978) 5 ALRB No. 24; See also Carl Joseph Maggio, Inc., (1976) 2 ALRB No. 9).

Where it is alleged that inadequate notice procedures caused low voter turnout and a nonrepresentative vote, the Board will scrutinize these procedures and the efforts of the Board agents in giving notice of the election in order to make a determination whether the methods used were adequate and if the Regional Director provided as much notice as reasonably possible under the circumstances. Lu-Ette Farms, (1976) 2 ALRB No. 49; Sun World Packing Corp., (1978) 4 ALRB No. 23; Verde

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Produce Co., Inc., (1980) 6 ALRB No. 24.[61/]

In its post-hearing brief the Employer argues that no serious steps were taken by the Board agents to contact laid-off employees and notify them of the election until the afternoon of the day before the election. The evidence presented, however, shows that the Board agents began contacting and informing eligible workers of the election the day after the petition for certification was filed. Board agent Smith testified

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61/ Both the Employer and the union in their post-hearing briefs apply the Board's "outcome-determinative" test. However, my review of Board precedent reveals that the Board has applied three standards of review whose application depends to a large extent on the voter turnout. Where an election conducted by the Board results in a high percentage of eligible employees excercising their vote, the Board will look to this high voter turnout as evidence that notice of the election was adequate. Yamada Bros. Farms, Inc., (1975) 1 ALRB No. 9 (95 percent voter turnout); Yamada Bros., (1975) 1 ALRB No. 13 (93 percent voter turnout); Admiral Packing Co., (1975) 1 ALRB No. 20 (91 percent voter turnout); West Foods, Inc. (1975) 1 ALRB No. 12; Kawano Farms, Inc., (1977) 3 ALRB No. 25.

Where it is alleged that a number of eligible employees did not receive notice of the election and that number of voters would not have been outcome-determinative, the Board will dismiss the objection on that basis and certify the results. Carl Joseph Maggio, Inc., (1976) 2 ALRB No. 9 (61 percent voter turnout); R. T. Englund Co., (1976) 2 ALRB No. 23 (62 percent voter turnout); Harden Farms of California, Inc., (1976) 2 ALRB No. 30 (85 percent voter turnout); Ron Nunn Farms (1978) 4 ALRB No. 31 (80 percent voter turnout).

However, where there is relatively low voter turnout the Board will scrutinize the procedures utilized to notify the electorate of the election and also review the representative character of the vote. Lu-Ette Farms (1976) 2 ALRB No. 49; Sun World Packing Corp. (1978) 4 ALRB No. 23; Verde Produce Co., Inc., (1980) 6 ALRB No. 24.

Thus, because the voter turnout here was approximately 26 percent, and because the precise number of who did or who did not receive notice of the election cannot be determined, the Board's third standard for review is applicable here.

that on August 3, he met personally with Reggie Morse, the Employer's general manager, and requested access onto the Employer's property in order to inform those workers still employed of their rights under the ALRA and also inform them of the fact that an election petition had been filed by the UFW. On the following day, August 4, Board agents Smith, Sahagun and Fierros took access and distributed the Board notices and orally informed these workers of the possibility of an election.

Moreover, at that time Board agent Smith informed Regional Director Luis Lopez about the employee layoffs and it was agreed that the Board needed to use radio broadcasts and personal home visits in order to maximize the participation of the electorate. The agents then contacted and purchased radio spots on two Spanish-speaking radio stations in McFarland and Bakersfield. These announcements were directed to eligible voters and informed them of the election and the nearest voting sites. Smith also testified that he spent three or four hours making home visits on Saturday in the Lamont area, as well as contacting the A. Mijarez labor contractor crew and informed them of the election.

On Sunday, the day before the election, agents Smith, Fierros, Sahagun and Pineda divided the eligibility list and visited homes in Bakersfield, Pixley, Lamont, Delano and other areas.

Thus, in view of the evidence presented and upon review of the efforts of the Board agents in their attempts to notify the electorate of the election, their efforts to notify the

electorate were spread over the seven day period and not just on the day before the conduct of the election.

Moreover, after the filing of a petition for certification, the time available to Board agents is not solely directed to notifying the electorate of the election. As the Board noted in Henry Moreno, (May 11, 1977) 3 ALRB No. 40,

> "Under statutory command to conduct elections within seven days from the time a petition is filed, this Board has required that an election eligibility list be submitted within 48 hours, allowing a maximum of five days for investigation and correction of defects in the list and for use of the list to contact and inform employees of election issues. These requirements place severe time constraints on the ability of Board agents to investigate showing of interest, scope and composition of unit questions, and to arrange for orderly conduct of the election itself. This pressure is further compounded by the fact that petitions in any given office are filed within short periods of time corresponding to seasonal peaks in local crops, rather than spread out over the year.

Thus, as in this case and in most other elections conducted by the Board, the time available and used by the Board agents while not directly engaging in notice efforts are generally spent in investigating the showing of interest and arranging for the orderly conduct of the election.

The Employer also asserts that "[w]here as here, personal contact is both feasible and necessary, a failure to provide it to the fullest possible extent mandates that non-representative election results be set aside." However, neither the ALRB nor the NLRB requires that Board agents personally notify individual workers of the election. In Lu-Ette Farms

(September 26, 1976) 2 ALRB No. 49, the Board held that "we decline to made individual notification by the Board agent mandatory, however, since even if a complete list is timely furnished the burden of supplying individual notice within the 7-day period may simply be too great." In Sun World Packing Corp., (April 25, 1978) 4 ALRB No. 23, the Board affirmed its policy of not requiring personal notice of the election. "We have previously declined to impose upon Board Agents the task of directly notifying individual workers who are no longer employed by the employer at the time of the election, noting that such a burden would simply be too great in light of the many responsibilities which a Board Agent must fulfill in the brief period provided by the Act between the filing of a representation petition and an election."

The NLRB also does not require individual notification of the election to workers. Such personal contact, however, is discretionary with the Board agent. The national Board in Rohr Aircraft Corp., (1962) 136 NLRB 958, 49 LRRM 1886, held as follows:

> We find no merit in the Intervenor's contention that the election should be set aside because, as it now appears, certain temporary laid-off employees who may have been eligible to vote were not individually notified of the time, date, and place of the election. As observed in other cases, it is not the customary practice of Board agents to send individual notification to employees in layoff status, or persons who for other reasons may not be working or employed at the time of the election. Such notification, under Board procedures, is discretionary with the Board's Regional Office and agents, and depends on the circumstances of the case. The reason for this rule is obvious: In some situations it is feasible to send individual notification to employees in disputed or nonworking categories, particularly where their status is made known to

> the Board agent at an appropriate time; in other situations, however, such as that here presented, the Board agent may not know of the existence or whereabouts of such employees, or may be convinced that the likelihood of their voting or being eligible is so slight that it does not justify the additional effort and expenses involved. These categories may include not only laid-off employees, but employees who are ill, on vacation, in military training, on out-of-town assignment, on detail to another employer, etc. The parties may, of course, if they desire, notify these potential voters themselves, and, if such persons appear at the polls, they may vote subject to being challenged. To make individual notification by the Board agent mandatory, however, would place an almost impossible burden on the agent to investigate and uncover on his own initiative all conceivably eligible voters, and, under penalty of having the election set aside, send individual notification to each.

Moreover, the Board has also held that the Board agents choice of methods in notifying workers of the election is to a large extent dependent upon the parties properly advising the agents where workers are located. In Lu-Ette Farms, supra, the Board held as follows:

> "We are committed to the principle that every effort should be made to notify eligible employees of an election and give them an opportunity to vote. However, we note that the requirement of the ALRA that an election be held within 7 days of the filing of a petition combines with rapid turnover in the workforce characteristic of much of California agriculture to create pecuilar difficulties in providing such notice. The burden of confronting these difficulties falls in the first instance on the Regional Director and Board agents in charge of the case, but particularly in view of the time constraints involved, the parties themselves are expected to participate in efforts to notify employees."

In that case the Board also found that because 40

eligible employees no longer worked for the Employer prior to the filing of the petition for certification and the fact that the Employer only submitted a partial list of employee addresses (45 out of approximately 114 employees),[62/] notice to these workers became a matter of "guesswork" and resulted in the Board agents not knowing the number of workers no longer working for the Employer and what number of employees "might not be reached by the notice procedures they selected."

In the instant case, the Board used two major methods of communication with laid-off employees. One method was by radio broadcast, and the other by home visits.

Board agent Smith testified that he purchased six radio spots for August 9 and seven radio spots for Monday, August 10 on radio station "KXEM" in McFarland. He also purchased four radio spots for Sunday and nine spots for Monday on radio station "KWAC" in Bakersfield. The reasonableness of using these radio spots as a method of advising eligible workers of the election is confirmed by the extensive use of this same method of communication by both the Employer and the union. Labor consultant David Aquino testified that he purchased 32 radio spots on KWAC and 28 spots on KXEM. The Employer's campaign statements were aired on

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62/ The Board noted that the Employer was estopped from raising the unrepresentative vote as the basis for objecting to the election because partial compliance with the obligation of submitted employee addresses would be an attempt to rely on its own misconduct as grounds for setting aside the election.

Saturday, Sunday, and the day of the election. Aquino also testified that the use of radio spots was a usual method of informing employees of an election in the Delano area. Moreover, Aquino testified that the Employer only aired campaign statements because the Board was already airing the time and place of the election. Thus, it cannot be argued that the use of radio spots to advise employees of an election was an unusual or unreasonable method of communication for the Board in excercising it's responsibility to provide notice.

The other major method of communication used by the Board in it's effort to notify workers of the election was home visitations. Moreover, as Board agent Smith testified, the day following the filing of the elections petition he took access onto the Employer's Lamont ranch and informed at least 40 to 50 members of the Ruperte crew of the election. As to the extent of the home visits, Smith testified that on Saturday, August 8, he spent three to four hours in the Bakersfield or Lamont areas visiting the homes of employees. In this effort, he visited 12 to 15 homes and encountered either Gagosian employees or relatives of Gagosian workers at these residences. Smith testified that he would give these people the Board's Notice and Direction of Election. Smith also testified that he made contact with crew foreman Mijarez at his motel in Delano. Also, on Sunday, Smith testified that he visited homes in the Lamont and Bakersfield areas.

Board agent Pineda testified that he visited all of the houses listed on his assignment sheet containing Lamont addresses. Board agent Fierros also testified that he visited all of his assigned addresses in McFarland and Delano. Board agent Sahagun testified that he visited all of his assigned addresses in McFarland and Earlimart.

Thus, the efforts of the Board agents in making home visits were extensive considering the size and general location of the electorate. As to those addresses where no one was home, the agents testified that they nonetheless left copies of the Notice and Direction of Election.

Labor consultant David Aquino also testified that he and other consultants engaged in extensive visits to workers houses during this time. Moreover, the hiring of five labor consultants by the Employer was unusual and an example of the Employer's extra effort in attempting to get out the vote.

Moreover, one cannot ignore the successful use of the Employer's campaign flyer and its distribution to the Madera crew of 92 workers, the Macabalin crew of 153 workers and the Ruperte crew of 75 workers as a method of communicating the fact of the possibility of an election. (See VI Tr. 61-63) The Employer also had available the assistance of all ot the crew foreman except for Davila, Erasmo Flores, however, gave added assistance in locating members of the Davila crew.

Although the Board was not informed of the distribution of payroll checks to three of the five itinerant crews, the efforts of the Employer in their campaign meant that notice of the election was widely disseminated among the electorate. It should also be noted that the Employer's failure to advise the Board agents of where members of the electorate were working during this time, may have hampered the Board in adequately reaching these employees. However, in view of the efforts of the union,[63/] the Employer and the Board in separately engaging in home visits, purchasing radio spots, and utilizing other methods of coummunicating with eligible voters, it is apparent that notice of the election at Gagosian Farms was as widely disseminated as reasonably possible.

Thus, the methods used and the efforts of the Board as well as the parties, were more than adequate to furnish notice of the election to the largest number of employees as possible under the circumstances.

Lastly, an inference cannot properly be drawn from the testimony presented that a substantial majority of the electorate did not receive notice of the election. The testimony of Brad Champagne established that, although he did not receive notice of the election, his brother Brian voted. Crew foreman Bill McClean personally contacted

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63/ UFW field director, Ben Maddock, as part of the Employer's case in chief, testified that he knew where at least 400 employees lived and worked during the time prior to the conduct of the election. Maddock also testified that he had assigned 20 people to notify the electorate of the election.

Brian at his home and transported him to the voting site.[64/] (III Tr. 79, 87) Eliseo Martinez also testified that, although he did not receive notice of the election, he received a copy of the Employer's campaign flyer which was stapled to his paycheck, but removed it without reading it and later placed in in the trash. (VI Tr. 143) Thus, although the Employer presented the testimony of a number of workers who did not receive notice of the election, this evidence does not pursuasively establish the inference that the majority of those workers not testifying did not receive notice of the election. Accordingly, the Employer's assertion that 450 employees did not receive such notice is rejected.

In conclusion, the Employer has failed to establish a prima facie case that the notice procedures used by the Board were inadequate. The Employer has also failed to establish that the efforts of the Board agents and that of the Regional Director were less than adequate. Accordingly, I find that the Regional Director, as well as the parties, provided as much notice as reasonably possible under the circumstances.

CONCLUSION

Having found that the timing of the layoffs and/or the procedures employed by the Board did not result in lack of notice to eligible voters such that the election results would

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64/ It should also be noted that Board agent Smith testified that he visited the Champagne house in Bakersfield and left two Board notices of the election. (V Tr. 100)

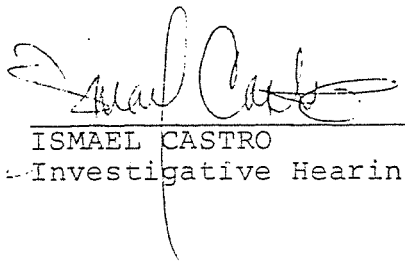
be considered nonrepresentative, I therefore conclude that the procedures employed and the Board's notice efforts were not unreasonable and as such do not warrant setting the election aside.

RECOMMENDATION

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

Dated: April 9, 1982

Respectfully submitted,



ISMAEL CASTRO
Investigative Hearing Examiner