

STATE OF CALIFORNIA AGRICULTURAL  
LABOR RELATIONS BOARD

RON CHINN, a Sole Proprietor,	)	
	)	
dba RON CHINN FARMS,	)	
	)	
Employer,	)	85-RC-17-SAL
	)	
and	)	
	)	
UNITED FARM WORKERS OF	)	12 ALRB No. 10
AMERICA, AFL-CIO,	)	
	)	
Petitioner.	)	
	)	

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DECISION ON CHALLENGED BALLOTS  
AND AMENDED TALLY OF BALLOTS

Following a Petition for Certification filed by the United Farm Workers of America, AFL-CIO (UFW or Union) on September 23, 1985, a representation election was conducted among all agricultural employees of Ron Chinn Farms (Employer) on September 30, 1985. The initial Tally of Ballots showed the following results:

UFW. . . . .	7
No Union . . . . .	5
Unresolved Challenged Ballots. . . . .	<u>4</u>
Total. . . . .	16

Because the unresolved challenged ballots were outcome-determinative, the Regional Director for the Salinas Region investigated the challenges and issued a Challenged Ballot Report on December 5, 1985. She recommended that two of the four challenges be overruled and two sustained. The Employer excepted only to the recommendation to sustain the challenges

to the ballots of Felicia Escobedo and Teresa Jiminez Cortez. On January 24, 1986, the Executive Secretary issued an Order, pursuant to the recommendation of the Regional Director, to open and count the ballots of the two remaining challenged voters. A Revised Tally showed the following results:

UFW. . . . .	8
No Union . . . . .	6
Unresolved Challenged Ballots. . . . .	<u>2</u>
Total. . . . .	16

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

Teresa Cortez, an ex-field worker for the Employer and wife of a foreman, had quit several months, before the election to stay home and care for her children. During the last week of August and first week of September, she prepared lunch in her home for Ron Chinn, her husband, another foreman, and a field worker. Chinn paid her \$100.00 for each week with no deductions for taxes, workers' compensation, or any benefit funds. There is no evidence that Cortez cooked for Chinn at any time other than these two weeks, one of which fell within the eligibility period, and her name was not included on the Employer's payroll list. Cortez<sup>1</sup> declaration that she had on occasion prepared lunch without compensation for two other employees of Chinn who were brothers of her husband indicates that Chinn did not regularly provide Chinn's workers with lunch.

In recommending that the challenge to Cortez' ballot be sustained, the Regional Director found that Cortez' cooking was "neither incidental to nor in conjunction with the Employer's farming operation" and that she was therefore not an agricultural employee.

The term "agricultural employee" is defined in California Labor Code section 1140.4(b) as "one engaged in agriculture," and "agriculture", in turn, is defined by language taken from the Fair Labor Standards Act (FLSA), 29 USC section 203(f). (Labor Code section 1140.4(a): ". . . the cultivation and tillage of soil, dairying, the production, cultivation, growing, and harvesting of any agricultural . . . commodities . . . and any practices . . . performed by a farmer or on a farm as an incident to or in conjunction with such farming operation . . .") As this Board noted in Crown Point Arabians (1980) 6 ALRB No. 59,

This definition of agriculture consists of two distinct meanings. Within the primary meaning are certain specific and actual farming operations . . . the secondary meaning covers other practices, whether or not they would ordinarily be regarded as farming practices, provided the same are performed by a farmer or on a farm as incident to, or in conjunction with such (primary) farming operations.

U.S. Department of Labor (DOL) regulations construing section 3(f) of the FLSA and dealing with the "secondary" aspect of the agricultural laborer exemption state that, generally,

a practice performed in connection with farming operations is within the statutory language only if it constitutes an established part of agriculture, is subordinate to the farming operations involved, and does not amount to an independent business. (29 CFR section 780.144.)

Another DOL regulation provides that the section 3 ( f ) definition of secondary agricultural employees specifically includes "secretaries, clerks and bookkeepers" and operators of "a cook camp" operated "for the sole purpose of feeding persons engaged exclusively in agriculture on the farm . . . " ( 29 CFR section 780.158.)

Finally, in the leading U . S . Supreme Court case on the subject, the Court announced that non-farming activities which are performed off the farm do not come within the secondary definition of agriculture under the FLSA if they are organized as an "independent productive activity," regardless of whether they are necessary, or physically similar, to the agricultural operations. (See Farmers Reservoir and Irrigation Co. v. McComb (1949) 337 U.S. 755, 760-769 [ 69 S.Ct. 1274].)

The Employer cites the above-mentioned federal regulation respecting operators of cook camps as well as the Board's decision in Anderson Farms (1977) 3 ALRB No. 48 in support of its contention that Cortez' ballot should be counted. Cortez, however, did not cook in a "cook camp" or in a labor camp as did the individuals at issue in Anderson Farms. The few meals that she made for Chinn and his workers were isolated in time and cooked at her home where she presumably would be cooking for her husband regardless of the nature of his employment. Under the Farmer's Reservoir and Irrigation test, Cortez' work was more akin to that of an independent productive enterprise --namely, her own household -- and was no more "incidental" to the Employer's farming operation than a local restaurant or

canteen where an Employer might occasionally treat his crew to lunch.

Having found that Teresa Cortez is not an agricultural employee, we hereby adopt the Regional Director's recommendation that the challenge to her ballot be sustained, rendering moot the question of the eligibility of Felicia Escobedo.

Accordingly, we hereby certify the following amended Tally of Ballots:<sup>1/</sup>

UFW. . . . .	8
No Union. . . . .	6
Unresolved Challenged Ballots . . . . .	<u>1</u>
Total . . . . .	15

Dated: May 23, 1986

JORGE CARRILLO, Member

PATRICK W. HENNING, Member

GREGORY L. GONOT, Member

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<sup>1/</sup> The Employer timely filed objections to the election which will now be considered pursuant to Labor Code section 1156.3(c).

CASE SUMMARY

RON. CHINN, a Sole Proprietor,  
dba RON CHINN FARMS

12 ALRB No. 10  
Case No. 85-RC-17-SAL

Regional Director's Report

As the four ballots challenged by the United Farm Workers of America, AFL-CIO (UFW) were sufficient in number to affect the outcome of this election, the Regional Director investigated the challenges and issued a report recommending that two of the four challenges be overruled and two sustained.

Board Decision

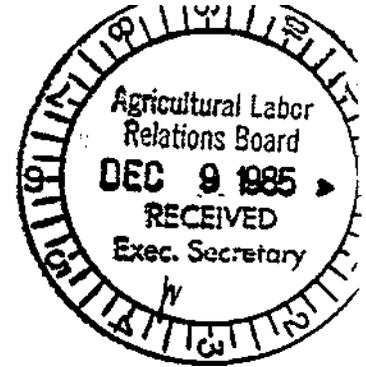
The Employer excepted to the recommendation to sustain the challenges to Felicia Escobedo and Teresa Cortez. Cortez was the wife of a foreman. The Employer paid her to cook several lunches for him, her husband and two other crew members in her own home during the eligibility period. The Board upheld the Regional Director's conclusion that Cortez was not eligible to vote, finding that she did not qualify as an "agricultural employee" because her work was not "incidental to or in conjunction with" the Employer's farming operation. Escobedo's ballot being no longer outcome-determinative, the Board declined to decide whether or not she was eligible to vote.

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This Case Summary is furnished for information only and is not an official statement of the case, or of the ALRB.

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STATE OF CALIFORNIA  
 AGRICULTURAL LABOR RELATIONS BOARD



In the Matter of:	)	
	)	
RON CHINN, a Sole	)	
Proprietor, dba _1/	)	
RON CHINN FARMS,	)	Case No. 85-RC-17-SAL
	)	
Employer,	)	REGIONAL DIRECTOR'S
	)	
and	)	<u>CHALLENGED BALLOT REPORT</u>
	)	
UNITED FARM WORKERS OF	)	
AMERICA, AFL-CIO,	)	
	)	
Petitioner.	)	

Pursuant to a Petition for Certification filed on September 23, 1985, by the United Farm Workers of America, AFL-CIO (hereinafter UFW), and a Notice and Direction of Election dated September 27, 1985, an election by secret ballot was conducted on September 30, 1985 among all agricultural employees in the State of California of the Employer. The tally of ballot issued on September 30, 1985 showing the following results:

Number of Names of List. . . . .	15
Void Ballots. . . . .	.0
No Union . . . . .	.5
UFW. . . . .	7
Challenged Ballots . . . . .	5 2/
Total. . . . .	16

1. The RC petition designated the employer as Ron Chinn Farms. The employer in its response to the petition designated the correct legal name as Ron Chinn Farms and further described this entity as a sole proprietorship.

Footnote 2 on next page.

The eligibility period is for those employees who were employed from September 1 to September 15, 1985. Because the number of challenged ballots was sufficient to determine the outcome of the election, the undersigned Regional Director pursuant to section 20363 of the Board's Regulations, conducted an investigation after reasonable notice to all parties to present relevant evidence, has completed an investigation of the Challenged Ballots, has carefully considered all evidence submitted by the parties, and hereby issues her report thereon.

The Challenged Ballots;

The ballots of Rogelio Cortez, Felicia Escobedo, and Felix Rodriguez Lomeli were challenged by the UFW under .Regulation Section 20355( a ) ( 2 ) , "the prospective voter was not employed in the appropriate unit during the applicable payroll period." The ballot of Teresa Jimenez Cortez was challenged by the UFW under Regulation section 2 0 3 5 5 ( a ) ( 7 ) , "The prospective voter is not an agricultural employee of the

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2. The ballot of Felix Rodriguez Lomeli was challenged by the UFW on the basis that the voter did not work during the eligibility period. The ballot of Felix Rodriguez Lomeli was inadvertently allowed to be inserted into the ballot box without first being enclosed in a challenged ballot envelope. The undersigned hereby corrects the tally of ballots to read as follows:

No Union. . . . .	5
UFW . . . . .	7
Challenged Ballots . . . . .	4
Total . . . . .	16

The disposition regarding the challenge to her ballot will be discussed herein.

employer as defined in Labor Code section 1140.4 ( b ) " . The ballot of Shirley Guerrero Gamez was challenged by the Board on the basis that her name was not on the eligibility list.

1. Rogelio cortez

The Employer's position is that Rogelio Cortez is an eligible voter, was employed on September 5, 1985, and except for a two hour period on September 5, 1985 he did not work during the eligibility period. The Union's position is that Rogelio Cortez did not work during the eligibility period and that the employer did not present any evidence to establish that Rogelio Cortez had a valid leave-of absence. In a declaration, Cortez stated that he worked during the eligibility period as a general laborer and that he was granted about a three week leave-of-absence because of an illness in early September 1985. Cortez further stated that he had worked for the Employer intermittently since 1980. Starting in 1984, Cortez began working on a regular basis for the Employer. In 1985 Cortez started work in May and from June through August harvested various crops for the Employer.

Towards the end of August or early September 1985, Cortez became ill and requested time off. On or about September 5, Cortez decided he wanted to work and was assigned to do some general chores, ( e . g . burning cardboard, wood, plastic bags, and cleaning up the ranch yard) . Because Cortez was still sick, he was only able to work a couple of hours. Cortez received \$8.00 in cash for his services of September 5,

1985.

Cortez recalled returning to work on or about September 27, 1985.

In a declaration, owner Ron Chinn stated that Cortez was employed on or about September 5, 1985 to harvest but because of his ill health, he was assigned to assist the foreman, Octavio Escobedo to do some burning chores. The Employer paid Cortez \$8.00 in cash for September 5, 1985. No state or federal deductions were made. The employer submitted payroll records which show that from July 14, 1985 through August 30, 1985, Mr. Cortez worked on a regularly weekly basis. Cortez does not appear on the payroll records for the period September 1, 1985 through September 15, 1985.

Although requested, UFW did not provide any evidence in support of its contention or any evidence to contradict the information obtained during the investigation.

The evidence shows that Cortez requested time off from work because he was feeling ill and this time off was granted. The evidence further indicates that Cortez was a regular employee and but for this illness, he would have worked more hours during the eligibility period. The Board in Rod McLellan Co. (1977) 3 ALRB No. 6 held that employees who were on unpaid sick leave or unpaid holiday may, under appropriate circumstances, vote. These circumstances, in part, included whether the employee had a history of employment, whether the employee would have performed work

during the eligibility period but for an absence due to sickness or vacation, and whether there was a current job actually held by the employee during the eligibility period despite the illness or vacation. Here, Cortez performed several hours of work during the eligibility period and during the remainder of the period was on sick leave.

Based upon the foregoing, it is recommended that the challenge to the ballot of Rogelio Cortez be overruled and his ballot be opened and his vote counted.

2. Felicia Escobedo

The Employer's position is that Felicia Escobedo is employed on a daily basis to assist her husband, foreman Octavio Escobedo, in the preparation of the payroll and she was an agricultural employee employed during the eligibility period. The UFWs position is that Felicia Escobedo was not employed during the eligibility period, is employed by another agricultural employer, is not an agricultural employee, and is the wife of a foreman.

Felicia Escobedo stated in her initial declaration that she worked during the eligibility period as a payroll clerk. In addition, Felicia Escobedo stated that during the eligibility period she worked cutting and bunching parsley and spinach in her husband's crew. She was paid for the cutting and bunching of parsley "out of her husband's check" and was paid gratiuties and cash for the work she performed as a "payroll clerk".

Felicia Escobedo stated in her initial declaration she had worked for Ron Chinn Farms since on or about 1983. In her subsequent declaration, Felicia Escobedo stated she had been an agricultural employee of Ron Chinn Farms since mid-1984. Escobedo's duties since about 1984 have entailed assisting her husband in the preparation of the payroll on a daily basis. According to Felicia Escobedo, this involves about half an hour every night five to six days a week, or half an hour seven days a week during the busy season.

According to Felicia Escobedo, she does not receive a set salary nor is paid on a regular basis by Ron Chinn Farms. Rather, sometime during the eligibility period, she was compensated for her work as a payroll clerk by receiving a set of tires and rims for her Blazer truck which she drives to work about once a week. Prior to this set of tires and rims, Escobedo received in mid-July 1985 a \$100.00 cash payment from Ron Chinn Farms. Escobedo stated that also in 1985 she received a set of brakes for her car as payment for her duties as a payroll clerk.

Finally, Felicia Escobedo stated she works as a payroll clerk for Gene Jackson Farms (another agricultural employer) five days a week from 8:00 a.m. to 5:00 p.m.

Ron Chinn Employer stated in his declaration that Felicia Escobedo is employed on a daily basis to assist her husband Octavio Escobedo in the preparation of the payroll. This assistance involves foreman Octavio collecting the

payroll information from each employee. The payroll information consists of the hours worked by each employee or the number of pieces picked by each employee. Escobedo's assistance is in helping Octavio add up the information since Octavio has problems with the arithmetic involved in tabulating the payroll information. The payroll information is then given to the Employer who prepares the payroll checks. Foreman Octavio Escobedo was originally assigned the payroll responsibility in January 1983 and then Felicia Escobedo began helping her husband in June or July 1983.

Chinn confirmed that Felicia Escobedo was given a set of tires and rims worth about \$800.00 on or about September 14, 1985. On or about July 1985, the Employer gave Felicia Escobedo \$100 for her work as a payroll clerk and on or about October 10, 1985, the Employer compensated her with a set of brakes. Chinn also confirmed that no state or federal deductions are made from the payments to Felicia Escobedo and that the Employer does not make contributions for her to workmen's compensation or unemployment insurance. There is no record of Felicia Escobedo on the Employer's payroll.

The UFW did not provide any information or evidence regarding the status and eligibility of Felicia Escobedo.

A summary of the evidence shows that Felicia Escobedo assists her husband about three hours a week in his duties regarding the tabulation of the hours worked and pieces picked of about twelve employees. Felicia Escobedo does not

prepare the checks but rather the Employer prepares, signs and issues the payroll checks. Felicia Escobedo is not paid by the Employer on an hourly rate, piece rate, or a salary basis. Felicia Escobedo receives gifts and cash for her assistance in helping her husband with the information necessary for the payroll. Other than the statement in the declaration taken during the election, there is no evidence showing that Felicia Escobedo worked harvesting any Ron Chinn Farms' crops during the eligibility period.

The Board in Rod McLellan, supra, held that if an employee does work in the period, she may vote whether or not her name appears on the payroll... It concluded, "in short, payroll does not describe a particular piece of paper". The Board held that "in deciding their eligibility, (it) will consider such factors as the employees' history of employment, continued payments into insurance funds, contributions to pension or other benefit programs, and any other relevant evidence which bears upon the question of whether or not there was a current job or position actually held by them during the relevant payroll period."

Considering the above factors, the evidence shows that Felicia Escobedo spends a half hour an evening tabulating figures which are part of the foreman's duties, but does no other clerical work incidental to the employer's agricultural operations. Felicia Escobedo unlike other agricultural employees of the Employer does not receive compensation on an

hourly or piece rate basis, or contributions to workmen's compensation fund or unemployment insurance fund.

The undersigned recommends that the challenge to Felicia Escobedo's ballot be sustained and her vote not be counted.

3. Felix Rodriguez Lomeli

Though challenged by the UFW, Felix Rodriguez Lomeli's ballot was inadvertently allowed to be inserted into the ballot box without being segregated. In Agro Crop (1977) 3 ALRB No. 64, six challenged voters were allowed to place their unsegregated ballots in the same box with the other ballots. The Board set aside the election because the failure to segregate six ballots could have affected the outcome of the election, because there was no way to identify which ballots were in fact challenged, and because there was nothing on the record to indicate whether the challenges would have been overruled. Here, unlike Agro Crop, supra, it is known that it is Lomeli's ballot which was inadvertently not segregated as a challenged ballot. Thus, the undersigned has conducted an investigation with respect to Lomeli's eligibility.

The Employer's position is that Felix Rodriguez Lomeli is an agricultural employee who worked under her husband's (Julian Aguillon) name during the eligibility period. The UFW's challenge of Felix Rodriguez Lomeli was that she did not work during the eligibility period.

Payroll records initially provided by the employer when the petition was filed do not show Felix Rodriguez Lomeli as having been issued a check in her own name. In a declaration, Felix Rodriguez Lomeli stated that she worked during the period September 1, 1985 to September 15, 1985 cutting spinach and parsley. Lomeli assists her husband when he is assigned to cut the spinach and/or parsley. Lomeli's husband is a general laborer who does irrigation work when it is available. However, when no irrigation work is available he is assigned to harvest spinach, parsley, and other crops and his wife Felix Rodriguez Lomeli frequently works with him harvesting those crops. Specifically, Lomeli and her husband worked together harvesting crops on September 3, 4, and 14, 1985. Felix Lomeli was paid for this work under her husband's name.

During the challenge investigation, the Employer provided some production records for the eligibility period of September 1, 1985 to September 15, 1985 in support of its position that Felix Lomeli did general field work during that period and was paid under her husband's name.

Although requested the UFW did not present any evidence regarding, the status of Felix Lomeli or its contention that she did not work during the eligibility period.

In M. V. Pista & Co. (1976) 2 ALRB 8, the Board found seven family members who worked under their head of

household's name eligible to vote because:

1. . . .they were employed in the appropriate unit during the applicable payroll period, and

2. . . .their names were omitted because they were being paid on a family unit basis.

The evidence shows that Felix Lomeli did work during the payroll eligibility period cutting spinach and parsley and was paid for this work under her husband's name. The fact her name did not appear on the payroll list is not dispositive of her eligibility status because she worked under her husband's name and was paid on a family unit basis.

It is recommended that pursuant to M. V. Pista & Co. supra the challenge to Felix Rodriguez Lomeli's ballot be overruled and that she be found eligible.

The facts involving Felix Lomeli show that she was the person challenged and the recommendation of the undersigned based on the evidence is that the challenge be overruled. See Agro Crop. (1977) 3 ALRB No. 64. Therefore, it is further recommended that Lomeli's cast ballot remain reflected as in the corrected tally of ballots.

4. Teresa Jimenez Cortez

The Employer's position is that Teresa Jimenez Cortez is an agricultural employee who worked as a cook during the eligibility period. The UFWs position is that Teresa Jimenez Cortez is not an agricultural employee, i . e . a field worker, and does not cook the meals for the workers.

Teresa Jimenez Cortez stated in her election challenge declaration that she worked during the eligibility period-as a cook and was paid for one week's work. In a subsequent declaration, Teresa Cortez stated that she has worked for the Employer since 1980. Since 1980, Cortez worked intermittently in the fields when she did not have to take time off from work to care for her children. Cortez stated that she had not previously worked in 1985 because she was pregnant and had her child in July 1985.

Teresa Cortez stated that she prepared lunch during the last week of August and the first week of September 1985. Teresa Cortez prepared lunch at her home, located on the ranch, for Ron Chinn, two foremen (including her husband), and a field employee. Teresa Cortez was paid by personal check \$100.00 each week.<sup>3/</sup>

Ron Chinn in his declaration stated that Teresa Cortez cooked lunch on three or four occasions during the period September 4 through September 13, 1985. The Employer's representative confirmed that the lunches were for the carrot crew which consisted of himself, two foremen, and an employee. Teresa Cortez was paid a \$100.00 in cash for her services but no state or federal deductions were made and there were no benefits such as workmen's compensation or unemployment

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3. Prior to late August or early September 1985, Teresa Cortez on occasion may have prepared lunch for her husband and his two brothers who are field workers. Teresa Cortez was not compensated for this food preparation.

insurance.

The Board in Hemet Wholesale (1976) 2 NLRB No. 24 concluded that whether employees of an employer engaged in agriculture, who do not themselves perform actual farming tasks, are agricultural employees depend upon whether the tasks performed are incidental to or in conjunction with the employer's farming operation. In Anderson Farms Co. (ANDCO) (1977) 3 ALRB No. 48 the Board overruled the challenges to two cooks. However, the Board did not cite the factors relied on in adopting the Regional Director's recommendation that the cooks were a part of the bargaining unit.

The undersigned has reviewed the duties of Teresa Cortez to determine if the task she performed was incidental to or in conjunction with the employer's farming operation.

Teresa Cortez's duties show that on only three or four occasions during the eligibility period did she cook lunch for the employer, two foremen and an agricultural employee. There is no evidence that any other employees were provided meals by Cortez. Teresa Cortez was not paid on an hourly, piece rate, or salary basis. In contrast to the other agricultural workers, Teresa Cortez, was paid on a gratuity basis in the form of \$100.

From the foregoing, inasmuch as it appears that Teresa Cortez was not an agricultural employee and her duties during the eligibility period were neither incidental to or in conjunction with the employer's farming operation the undersigned recommends that the challenge to her ballot be

sustained and her vote not be counted.

5. Shirley Guerrero Gamez

The Employer did not present a position in writing concerning the eligibility of Shirley Guerrero Gamez. The Employer's representative was sent a confirming letter that the Employer agreed Gamez had worked during the eligibility period under her husband's name. The UFW did not submit a position, evidence, or declarations regarding the eligibility of Gamez.

In her challenge declaration, Shirley Gamez stated she worked during the eligibility period harvesting parsley and spinach and was paid under her husband's name. Another employee declared that since January 1985 Shirley Gamez had assisted him in the afternoons harvesting parsley and spinach, and specifically during the first two weeks of September 1985.

As cited above, M. V. Pista & Co., supra, permits family members who work under one name to be eligible to vote. The evidence shows that Shirley Guerrero Gamez worked during the eligibility period harvesting parsley and spinach and was paid under the name of a family member. The undersigned recommends that the challenge to Shirley Guerrero Gamez be overruled and her ballot be counted.

RECOMMENDATIONS

- A. Names of voters whose ballots are to be opened and counted.
  - 1. Rogelio Cortez

2. Shirley Guerrero Gamez
- B. Names of voters whose ballots are not to be opened and counted.
1. Felicia Escobedo
  2. Teresa Jimenez Cortez
- C. Name of voter whose ballot was cast and should be found eligible.
1. Felix Rodriguez Lomeli

CONCLUSION

The conclusions and recommendations of the undersigned Regional Director, set forth in the report herein, shall be final unless exceptions to the conclusions and recommendations are filed with the Executive Secretary by personal service within five days of receipt of this report or by deposit in registered mail post-marked within five days following service upon the parties of the Regional Director's report. An original and six copies of the exceptions shall be filed and shall be accompanied by seven copies of declarations and other documentary evidence in support of the exceptions. Copies of any exceptions and supporting documents shall be served pursuant to section 20430 on all other parties to the proceeding and on the Regional Director and proof of service shall be filed with the Executive Secretary along with the exceptions .

12/5/85  
DATE

  
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