

THE STATE OF CALIFORNIA
AGRICULTURAL LABOR RELATIONS BOARD

THE CAREAU GROUP dba EGG CITY,)
)
Employer,) Case No. 86-RD-6-SAL
)
and)
)
RAMON R. ORNELAS and) 14 ALRB No. 2
JOSE ZARAGOZA,)
)
Petitioners,)
)
and)
)
UNITED FARM WORKERS)
OF AMERICA, AFL-CIO,)
)
Certified Bargaining)
Representative.)
)

DECISION AND ORDER ON CHALLENGED BALLOTS

On October 27, 1986, Ramon R. Ornelas and Jose Zaragoza filed petitions to decertify the United Farm Workers of America, AFL-CIO (UFW or Union) as exclusive collective bargaining representative of the agricultural employees of Egg City (Company or Employer). An election was held on November 3, 1986 and, in order to preserve voter eligibility questions for the Agricultural Labor Relations Board (ALRB or Board), all 497 votes were cast as challenged ballots.

The Regional Director conducted an investigation, and on April 1, 1987 issued his Report on Challenged Ballots (Report), in which he recommended that 187 of the challenges be overruled and that 308 be sustained. Both the Union and the Employer timely filed exceptions to portions of the Report. Upon consideration of

the entire record, the Board has decided to affirm the rulings, findings and conclusions of the Regional Director (RD) to the extent they are consistent with this decision.

Employer's Exceptions

The Employer excepts to the RD's recommendation that the Board count the ballots cast by seven employees^{1/} whom the National Labor Relations Board (NLRB), through an administrative determination by the Regional Director of Region 31, had determined to be commercial employees under the jurisdiction of the NLRB. This objection has merit.

Labor Code section 1140.4(b)^{2/} specifically excludes from the statutory definition of "agricultural employee" any employee covered by the National Labor Relations Act (NLRA). Given the facts of this case, we find that the Board's exercise of jurisdiction over the seven employees in question has been preempted by the NLRB. Not only has the national board determined that these workers are commercial, but the Union, as part of an NLRB settlement agreement, has disclaimed any interest in representing them or any other Egg City worker determined by the NLRB to be commercial. Were this Board to reach a contrary decision regarding the status of these workers, we would precipitate the very conflict between state and federal law which

^{1/} The seven voters are: Raul J. Gutierrez, Jose Javier Espinosa, Ismael Marquez, Encarnacion J. Gonzalez, Jesus Martinez, Adolfo Martinez, and Rafael Linares Zamora.

^{2/} All section referenced herein are to the California Labor Code unless otherwise specified.

the preemption doctrine serves to avoid. (See Rigi Agricultural Services (1985) 11 ALRB No. 27.)

Accordingly, we sustain the challenges to the seven ballots in question.

Union's Exceptions

Processing Plant Employees

The UFW excepts to the RD's determination that the processing plant employees are commercial by virtue of the volume of eggs -- approximately 28 percent -- purchased from outside sources. (See McFarland Rose Production Co. (1976) 2 ALRB No. 44.) In support of this exception, the UFW asserted its belief that, rather than processing eggs raised by other producers, Egg City merely purchases them whenever it is unable to fill large orders with its own supply.

Nevertheless, as the Union itself acknowledged, the Board is bound by the NLRB's prior determination that the processing plant is a commercial operation. Therefore, the challenges to ballots cast by processing plant employees must be sustained.

Disabled Workers

The Union excepts to the RD's recommendation that the Board sustain the challenges to ballots cast by 23 of 24 workers who were disabled and absent from work during the eligibility period. This exception lacks merit.

Of the 23 voters in question, 16 were commercial workers. The challenges to their ballots are sustainable on that basis

alone.^{3/} With respect to the seven remaining workers,^{4/} the facts are undisputed. All had taken authorized leaves of absence for work-related injuries, but had failed either to return to work when their leaves expired, or to seek authorization to extend their leaves. In each case, the leave of absence had expired prior to the eligibility period for the election. The Union submitted a number of declarations by these workers stating that they remained disabled, but intended to return to work soon as they were physically able.

In Comite 83, Sindicato de Trabajadores Campesinos Libres (1987) 13 ALRB No. 16 (Hiji Brothers), the Board reiterated its long-standing rule that when an employee is absent from work during the eligibility period because of illness or vacation, the Board will look to the "employee's work history, the pattern of benefit payments made on behalf of the employee and any other relevant evidence which could bear upon the question of whether or not the employee held a current job or position during the relevant payroll period." (Id., at p. 12.) Here, it may be assumed that a disabled worker on authorized leave holds a "current job or position." Once the leave expires, however, there is no basis, given the facts of this case, to support such a

^{3/} These workers are: Lilia V. Godinez, Imelda Blanco Naranjo, Adela Rico de Garcia, Salvador A. Ceja, Rudolfo Lugo Parra, Pedro S. Moncada, Flora Salgado, Consuelo Morales Garcia, Angelina de Rodriguez, Ignacio R. Rodriguez, Rafael S. Sandoval, Lilia Valle Castro, Celia Anaya, Enriqueta Zaragoza, Guadalupe Alcaraz, Anita Garcia Torres.

^{4/} These workers are: Jesus R. Garza, Otoniel Tamayo Rodriguez, Rodrigo Martinez, Pedro Rangel Rangel, Samuel Salgado Melgoza, Arturo A, Cortez and Manuel Alvarez Madrigal.

finding.^{5/} Accordingly, the challenges to the ballots cast by the seven workers in question are sustained.^{6/}

Samuel C. Valdovinos

The Union excepts to RD's recommendation that the Board sustain the challenge to the ballot cast by Soledad [sic] C. Valdovinos on the basis that Company records show that Valdovinos quit on March 11, 1985. The Union provided a declaration signed by Valdovinos stating that sometime after the spring of 1986 he was transferred to egg picking until he was laid off. Later, he was recalled to work a few days before the strike. The declaration, however, does not state whether Valdovinos was recalled to perform agricultural work or commercial work. Therefore, it cannot be determined, on the basis of the record before us, whether Valdovinos is eligible to vote. Accordingly,

^{5/}Judson Steel v. Workers' Comp. Appeals Bd. (1978) 22 Cal.3d 657 (Judson), which the Union cites in sole support of its objection, is inapposite. In Judson, the plaintiff, having over-extended an approved leave for a work-related disability, returned to work, only to be stripped of his seniority and laid off simply because his leave had exceeded the one-year term provided for by the collective bargaining agreement. The California Supreme Court held that Labor Code section 132(a), which prohibits discrimination against an employee injured in the course of employment, bars such action. The State's nondiscrimination policy requires reinstatement, the court held, regardless of the terms of collective bargaining agreement, provided a vacant position exists at the time the employee seeks reinstatement and he or she is physically able to do the work. In this case, the Union established that the disabled workers are not able to return to work. At most, therefore, Judson shows that the Company's disabled workers did not automatically lose their seniority by taking unauthorized leaves. It does not, however, affect the Board's conclusion regarding this exception.

^{6/}The seven workers are: Jesus R. Garza, Otoniel Tamayo Rodriguez, Rodrigo Martinez, Pedro Rangel Rangel, Samuel Salgado Melgoza, Arturo A. Cortez and Manuel Alvarez Madrigal.

we order that his ballot be placed in abeyance. If it proves to be outcome determinative, further investigation shall be conducted to determine Valdovinos' status.

Jose Guadalupe Rojas

The Union excepts to the RD's recommendation that the Board sustain the challenge to the ballot cast by Jose Guadalupe Rojas based on the RD's finding that Rojas retired and thus ceased to be an employee.

In support of its exception, the Union submitted a declaration by the office administrator of the Juan de la Cruz pension fund stating that, under the terms of the pension plan, a worker may collect a pension once it has vested regardless of whether he continues to work. Here, Mr. Rojas indicated a desire to return to work once the strike was over, but, with seeming inconsistency, he also communicated in a letter to the Company his intent to retire. While the Union has shown that receipt of a pension does not necessarily signal retirement, we, nevertheless, cannot reconcile Mr. Rojas' stated intent to the Company to retire with his stated intent to the Regional Director to return to work. Therefore, this ballot is also to be held in abeyance, and, if it proves to be outcome determinative, it shall be investigated further to determine whether Mr. Rojas abandoned interest in his job by retiring.

Refugio Jimenez

The Union excepts to the RD's recommendation that the Board sustain the challenge to the ballot cast by Refugio Jimenez because, according to the Employer, Jimenez was discharged for

cause on October 17, 1986, one day before the close of the two-week eligibility period which ended on October 18.

The Union's exception has merit. While the NLRB conditions voter eligibility on employment during both the eligibility period and the date of the election (Universal Paper Goods v. N.L.R.B. (9th Cir. 1981) 638 F.2d 1159), the Agricultural Labor Relations Act (ALRA or Act) requires only that a worker be employed at any time during the payroll period immediately preceding the filing of the petition. (Lab. Code § 1157, Cal. Code Regs., tit. 8, § 20352(a)(1).) Jimenez was so employed and is therefore eligible to vote regardless of the fact that he was discharged during the eligibility period. Giannini & Del Chiaro Co. (1980) 6 ALRB No. 38.)^{7/}

Manuel Bravo Jimenez

The Union excepts to the RD's determination that Manuel Bravo Jimenez is a commercial worker and therefore ineligible to vote. In making that determination the RD relied on the Employer's representation that Bravo worked as a gardener maintaining the grounds and roads throughout the facility, and only occasionally moved chickens when extra help was needed. The Union, however, submitted a declaration signed by Bravo stating that his main job was to move chickens, unload them, and put them

^{7/}In adopting the RD's recommendations concerning the other voters who had been terminated, we take no position with respect to the RD's statement that the grievance-arbitration procedure of a collective bargaining agreement is unavailable to workers who have been discharged after its expiration. That issue was not raised by the parties and need not be reached to resolve the challenged ballots in question.

in the houses. This additional information indicates that Bravo is an agricultural employee. The challenged ballot, therefore, shall be held in abeyance, and, if it proves to be outcome determinative, shall be investigated further to determine Bravo's status.^{8/}

Armando Pena and Benito Rodriguez

The UFW excepts to the RD's determination that Pena voted twice, once at the Moorpark processing plant and once at the Moorpark Moose Lodge, and that, therefore, either one, but not both, of his ballots should be counted. The Union submitted a declaration signed by Pena stating that he voted only at the processing plant. Given the direct conflict between the RD's determination and Pena's declaration, we cannot determine which ballot, if any, should be counted. Therefore, if the ballots prove to be outcome determinative, a further investigation shall be conducted to determine which ballot was, in fact, cast by Pena, and which ballot, if any, should be counted.

The RD determined that one other eligible voter, Benito Rodriguez, also voted twice. He recommended that only one of his ballots be counted, but failed to state any ground for determining which ballot to count and which to discard. Although neither party has excepted to this recommendation, we find it incumbent upon the RD to state some rationale for counting one ballot rather than the other. We cannot, on the facts presented, determine

^{8/} Because Bravo is classified as a general laborer, a classification not specifically addressed by the NLRB, preemption is not a concern.

which ballot, if any, should be counted and cannot, therefore, make a ruling on this recommendation. Accordingly, Rodriguez' ballots shall also be held in abeyance. If they prove to be outcome determinative, a further investigation shall be conducted to determine which ballot, if any, should be counted.^{9/}

Reymundo Rangel and Juan Origel

The UFW excepts to the fact that the RD found Rangel, a diesel truck driver, to be a commercial employee, while at the same time he found Juan Origel, also classified as a diesel truck driver, to be an agricultural employee. The Union submitted a declaration signed by Rangel stating that his job was to load his truck with dead chickens, drive the truck to Los Angeles, and dispose of the cargo.

The NLRB determined that the job classification "dead chicken pick-up" is agricultural, while the classifications "delivery truck and trash truck drivers" are commercial. The NLRB's determination makes no reference to "diesel truck driver," which appears as a separate job classification in the Employer's payroll records. Since the NLRB has apparently failed to address

^{9/}We are concerned with the Regional Director's explanation with respect to the ballots cast by Pena and Rodriguez. The RD stated:

Mr. Pena and Mr. Rodriguez each voted twice during the decertification election. Thus, although there were 497 ballots actually cast, there are only 495 ballots in the challenge [sic] ballot envelopes.
(Report at p. 96, fn. 30.)

If further investigation of the ballots cast by Pena and Rodriguez is necessary, the Regional Director's Supplemental Report should explain the stated discrepancy between the number of votes cast and the number of ballots in the challenged ballot envelopes.

this particular job classification, we are free to make a determination in this regard. Therefore, the challenges to the ballots of Juan Origel and Reymundo Rangel shall be placed in abeyance, and if they prove to be outcome determinative, the Regional Director shall conduct a further investigation to determine whether Origel and Rangel are agricultural or commercial employees.

Jose Engilberto Lozano Carlin

The Union excepts to the RD's recommendation that the Board sustain the challenge based on the finding that Carlin was terminated or permanently replaced before the commencement of the strike on June 28, 1986.

It is undisputed that Carlin, along with a number of fellow employees failed to report to work on June 22 in order to attend a march, led by Cesar Chavez, to protest low wages at Egg City. According to Carlin, when he returned to work the following day, he was told he had been replaced.

It is irrelevant whether Carlin was replaced on June 23, as he says, or on June 29, as shown in records provided by the Company to the Employment Development Department. Carlin was replaced for his participation in a one-day concerted walkout to protest low wages, and nothing in the record suggests that the walkout was something other than protected, concerted activity. As a striker, Carlin is eligible to vote. (George Lucas & Sons (1977) 3 ALRB No. 5 .) The challenge to his ballot is, therefore, overruled.

Jesus Chavez

The Union excepts to the RD's recommendation that the Board sustain the challenge to Chavez' ballot based on the finding that he had been laid off in early May 1986, and subsequently lost his seniority by failing to respond to a recall notice later in the month. This exception has no merit. Even assuming, as the Union contends, that Chavez was laid off in June 1986 with seniority intact, and, therefore, had a reasonable expectation of recall, the fact remains that Chavez was not recalled and did not work during the eligibility period. While the NLRB extends the franchise to seasonal employees who happen to be on layoff status during the eligibility period but who have a "reasonable expectation of employment," the ALRB has specifically declined to do so. As the Board recently explained in Comite 83, Sindicato de Trabajadores Campesinos Libres (1987) 13 ALRB No. 16 (Hiji Brothers):

Among the features which differentiate the ALRA from its federal counterpart are those which govern representation matters. Departures from the NLRA include a statutorily fixed showing of interest, a seven-day election rule, "wall-to-wall" and (generally) statewide bargaining units and, of particular interest here, specific voter eligibility criteria. We take note of the fact that those provisions which set the ALRA apart were drafted with knowledge of a long history of NLRB rulings affecting a wide range of eligibility questions. The clear language of section 1157 suggests that those precedents were rejected in favor of a single narrow rule which limits eligibility to those employees who in fact worked during the applicable payroll period or, as the rule was extended in McLellan, would have worked but for an absence due to illness or vacation. Indeed, since the NLRB's "reasonable expectation of employment" doctrine in seasonal industries predates the enactment of the ALRA, had the Legislature intended this Board to follow the NLRB in this regard, it could easily have adopted the NLRB's standard, [fn. omitted] (Id., at p. 13.)

For the reasons stated in Hiji Brothers, we must conclude that Chavez is not eligible to vote.

ORDER

The Regional Director is hereby directed to count all ballots whose challenges we, in agreement with the RD, have overruled. In addition, the RD is directed to count the ballots cast by Refugio Jimenez and Jose Engilberto Lozano Carlin.

The challenges to the ballots cast by processing plant employees and the ballots cast by Raul J. Gutierrez, Jose Javier Espinosa, Ismael Marquez, Encarnacion J. Gonzalez, Jesus Martinez, Adolfo Martinez, Rafael Linares Zamora, Lilia V. Godinez, Imelda Blanco Naranjo, Adela Rico de Garcia, Salvador A. Ceja, Rudolfo Lugo Parra, Pedro S. Moncada, Flora Salgado, Consuelo Morales Garcia, Angelina de Rodriguez, Ignacio R. Rodriguez, Rafael S. Sandoval, Lilia Valle Castro, Celia Anaya, Enriqueta Zaragoza, Guadalupe Alcaraz, Anita Garcia Torres, Jesus R. Garza, Otoniel Tamayo Rodriguez, Rodrigo Martinez, Pedro Rangel Rangel, Samuel Salgado Melgoza, Arturo A. Cortez, Manuel Alvarez Madrigal and Jesus Chavez have been sustained, and those ballots shall not be counted.

The Regional Director is further directed to hold in abeyance the ballots cast by Samuel C. Valdovinos, Jose Guadalupe Rojas, Manuel Bravo Jimenez, Reymundo Rangel, Juan Origel, Armando Pena and Benito Rodriguez.

The Regional Director is ordered to prepare and serve upon the parties a Tally of Ballots. If the election remains unresolved, the Regional Director shall conduct such further

investigation as may be necessary and shall prepare a Supplemental Report on Challenged Ballots setting forth his findings and recommendations.

Dated: April 7, 1988

BEN DAVIDIAN, Chairman ^{10/}

JOHN P. McCARTHY, Member

GREGORY L. GONOT, Member

IVONNE RAMOS RICHARDSON, Member

^{10/}The signatures of Board Members in all Board Decisions appear with the signature of the Chairman first, if participating, followed by the signatures of the participating Board Members in order of their seniority. Member Smith did not participate in the consideration of this matter.

CASE SUMMARY

The Careau Group, dba Egg City
(UFW)

14 ALRB No. 2
Case No. 86-RD-6-SAL

REGIONAL DIRECTOR'S (RD'S) REPORT ON CHALLENGED BALLOTS

On November 3, 1986, a decertification election was held. In order to preserve voter eligibility questions for the Board, all 497 voters cast challenged ballots. The RD recommended that the Board: (1) sustain the challenges to votes cast by workers, both strikers and replacements, employed in the processing plant, based on determination that the operation is commercial because of the percentage of product grown by other egg producers; (2) overrule the challenges to the votes cast by seven employees whom the RD found to be agricultural, notwithstanding the National Labor Relations Board's determination that they were commercial; (3) overrule the challenges to votes cast by striking agricultural employees provided they were otherwise eligible; (4) overrule the challenges to votes cast by replacement agricultural employees, provided they were otherwise eligible; (5) sustain the challenges to votes cast by workers on leave of absence who had, as of the commencement of the eligibility period, overextended their leaves without permission, and overrule the challenges in one case where the authorized leave had not yet expired; (6) sustain the challenges to votes cast by employees who had been laid off and not recalled prior to the eligibility period; (7) sustain the challenges to votes cast by retired workers; (8) sustain the challenges to employees who had quit or who had been terminated prior to commencement of the liability period, or (in one case) during the eligibility period; (9) sustain the challenges to votes cast by workers classified as "ranch painter", and "general laborers" who performed gardening work; (10) sustain the challenges to votes cast by employees hired after the close of the eligibility period; and (11) overrule the challenges to votes cast by two eligible voters who voted twice, but count only one of the ballots each of them cast.

BOARD DECISION

Both the Employer and the United Farm Workers of America, AFL-CIO, filed exceptions to portions of the RD's Report. In agreement with the Employer, the Board held that the doctrine of preemption precluded it from declaring workers to be agricultural where the NLRB had made a prior determination that they were commercial. The Board also found merit to the Union's exception that one employee who had been discharged during the eligibility period was eligible to vote. Board regulations require only that an employee be employed at any time during the eligibility period and need not be employed on the date of the election as well. In agreement with the Union, the Board also found that one employee who had been discharged prior to the June 28, 1986, strike was eligible to vote because he had been discharged earlier for participating in a

one-day concerted walkout to protest low wages. The Board also determined that five other ballots, also the subject of Union exceptions, should be placed in abeyance, and investigated further, if they prove to be outcome determinative. The Board also ordered, sua sponte, the ballots of the two voters who voted twice be held in abeyance. In all other respects, the Board adopted the RD's recommendations. The Board directed the RD to issue a Tally of Ballots, and, should the election remain unresolved, to conduct further investigation, and to issue a Supplemental Report on Challenged Ballots.

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

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