French Camp, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

SAN JOAQUIN TOMATO GROWERS, INC./ LCL FARMS, INC., Employer	)	Case No. 89-RC-4-VI
and	)	16 ALRB No. 10
UNIITED FARM WORKERS OF AMERICA, AFL-CIO, Petitioner.	)	

DECISION ON CHALLENGED BALLOTS

On August 2, 1989, the United Farm Workers of America, AFL-CIO (UFW), filed a petition for certification as the exclusive bargaining representative for all the agricultural employees of San Joaquin Tomato Growers, Inc.(SJTG)/LCL Farms, Inc., (LCL) (collectively, "Employer"). The UFW alleged therein that a strike, involving approximately 250 employees, was in progress at the Employer's operations.

The Visalia Regional Director (RD) conducted a secret ballot election among the agricultural employees of the Employer on August 11, 1989. The Official Tally of Ballots showed the following results:

UFW	13
No Union	22
Challenged Ballots	185
Total Including Unresolved ..... Challenged Ballots	220

As the challenged ballots were sufficient in number to affect the outcome of the election, the RD, pursuant to Title 8,

California Code of Regulations (Regulations) section 20363(a) conducted an investigation, insofar as he deemed necessary, to determine the eligibility of the challenged voters. The RD gave the Employer an opportunity to present evidence in that regard.[1/] The Employer sought to raise factual issues regarding peak employment within the meaning of Labor Code section 1156.4,[2/] and preelection strike violence. Through its counsel's letter of August 30, 1989, the Employer stated it would not respond to the individual challenges because of its belief that the violence issue should be resolved first.

On December 5, 1989, the RD issued the attached Report on Challenged Ballots (CBR). After conducting his investigation of the 96 ballots, the RD elected not to hold a hearing. The Employer argued that it had been denied due process because there had not been a hearing and an opportunity to examine the challenged voters.[3/] The RD recommended that the 96 challenges listed in CBR Appendices A, B, and C, be overruled and the ballots be counted.[4/] The RD further recommended that the remaining

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[1/] See Challenged Ballot Report (CBR), p. 4.

[2/] All section references are to the California Labor Code unless otherwise specified.

[3/] A hearing at the regional director level, including examination of witnesses, is discretionary and is not required unless there are material factual disputes. (Regulations section 20363. See also Triple E Produce Corporation (1990) 16 ALRB No. 5; Lawrence Vineyards Farming Corporation (1977) 3 ALRB No. 9; John V. Borchard Farms (1976) 2 ALRB No. 16.)

[4/] It appears that the RD selected for resolution those ballot challenges which could be most quickly resolved and which appeared

(fn. 4 cont. on p. 3)

challenged ballots be held in abeyance until such time as they might prove to be outcome determinative. Thereafter, both SJTG and LCL independently filed exceptions to the CBR. Many of the exceptions involve issues more appropriately addressed in election objection proceedings, as set forth in section 1156.3(c). In support of the challenges, the Employer incorporated by reference the declarations submitted to the Board in conjunction with its election objections filed on August 17, 1989.[5/] SJTG also challenged the conclusion that it was an "agricultural employer"; LCL did not. No exceptions were filed by the UFW.

Upon consideration of the entire record, the Board has decided, for the reasons stated below, to affirm in part the findings and recommendations of the RD, and to remand the remainder of the case for the investigation of additional challenged ballots sufficient to resolve the election.

(fn. 4 cont.)

to be sufficient in number to decide the election. This practice was most recently discussed at Ace Tomato Co., Inc. (1990) 16 ALRB No. 9.

The Board presumes at this point that the remaining 89 challenged ballots were not addressed by the RD because he did not consider them necessary in determining the outcome of the election.

Member Shell continues to favor a policy applicable to all elections which would require that every challenged ballot be immediately investigated and resolved. (See Triple E Produce Company (1990) 16 ALRB No. 5, fn. 1, at p. 2.)

[5/] The Employer's arguments in opposition to certifying the election on all bases other than voter eligibility do not affect the individual challenged ballots and are deferred to the election objection process under Labor Code section 1156.3(c). This process extends to the correctness of allegations made in the petition for certification, e.g., the existence of a strike or the occurrence of peak employment.

Agricultural Employer

SJTG has challenged its treatment as an employer through the challenged ballot exception process. The RD does not discuss the agricultural employer issue in the CBR and there are no facts, contained therein, which indicate how the determination of the "employer" was made. Section 1156.3(c) provides that any person may file a petition asserting that the allegations in the petition for certification are incorrect. Only if the objecting party states a prima facie case, however, is the Board required to conduct a hearing to determine whether the election should be certified.

The Board declines to address the "agricultural employer" issue at the challenged ballot stage. The issue is not tied to any ground for challenge under section 20355 which establishes eligibility criteria. The matter is therefore deferred to the post-election objections procedure under Regulations section 20365. (Exeter Packers, Inc. (1982) 8 ALRB No. 95.)[6/]

6/In Exeter Packers, Inc., supra, an election case, Exeter filed post-election objections contending that it was not the agricultural employer of the employees who voted in the election. Thirty-eight individuals who voted challenged ballots appeared on the employee list of Manuel Mireles, the alleged custom harvester, for the relevant payroll period. The Board, in considering the challenged ballots cast by the 38 individuals who worked for Mireles, noted that:

> "the opening of the 38 challenged ballots may determine whether the UFW received a majority of the ballots opened, but will not resolve the issue of whether the employees who voted were agricultural employees of Exeter Packing, Inc. or of Manuel Mireles. That issue will be decided, if necessary, in a hearing on Exeter's post-election objections. If the UFW fails to receive a majority vote after the 38 ballots are counted and after any appropriate further investigation of the three remaining challenges, there will be no necessity for a hearing."

Employees Not on the Eligibility List (Appendix A)

The eligibility issue presented by the challenged ballots in Appendix A is whether employees on the payroll before the strike were "economic strikers." The RD found that the 70 ballots in Appendix A, which had been challenged because the voters' names did not appear on the pre-petition eligibility list (Regulations §20355(a)(8)), were cast by individuals on the Employer's payroll records for periods ending immediately before the strike. The individuals signed declarations on the day of the election stating that they were on strike and had not returned to work. Applying section 1157, Regulations section 20352(a)(4), and this Board's decisions in George Lucas and Sons (1977) 3 ALRB No. 5 and Valdora Produce Company (1977) 3 ALRB No. 8, the RD concluded that the individuals were eligible to vote as economic strikers.[7/]

Once economic striker status is established, it can be lost by, inter alia, activity inconsistent with a continuing interest in the struck job. Because the Employer submitted no evidence that any of the 70 employees had accepted other employment, the RD applied the standards established in Pacific Tile and Porcelain Co. (1962) 137 NLRB 1358 [50 LRRM 1394] to conclude that none of the individuals had forfeited their status as economic strikers.

In its brief, the Employer contended that there were no economic strikers because the employees did not go on strike, that they withheld their labor solely due to fear, and that strike

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[7/]Both Lucas and Valdora, supra, involve economic strikes which began before the adoption of the Agricultural Labor Relations Act

(fn. 7 cont. on p. 6)

violence precluded the existence of a strike. Numerous declarations were submitted by the Employer with regard to this contention. Only one declaration by an economic striker asserted that the declarant withheld his labor because of fear of the alleged violence. This declaration was made by Hilario P. Solano.

In responding to the Employer's argument, the RD relied on Coors Container Company (1978) 238 NLRB 1312 [99 LRRM 1680], Ashtabula Forge (1984) 269 NLRB 774 [115 LRRM 1295], and Limpert Brothers, Inc. (1985) 276 NLRB 1263 [120 LRRM 1263]. He concluded that a "strike is the withholding of labor and that anyone who withholds labor, regardless of motive, is a striker." The RD therefore recommended overruling these challenges.

The Board examined economic striker eligibility in Triple E Produce Corporation (1990) 16 ALRB No. 5. The present case raises an identical issue. In Triple E, supra, the Board accepted the regional director's conclusion as to the existence of a strike[8/] but did so on the basis that employees who were on the pre-strike payroll and who signed declarations that they were on

(fn. 7 cont.)

(Act) and therefore fall under the second paragraph of section 1157. The Board has not adopted regulations defining economic striker eligibility, but instead has relied on case law to make individualized determinations.

[8/] In Triple E, the regional director concluded that a strike is a withholding of labor regardless of motive. An economic strike is a withholding of services by employees to induce their employer to effect a change in their wages, hours, or working conditions. (Royal Packing Company (1982) 8 ALRB No. 16.) The Board has taken the position that the distinctive feature of a strike is the "withholding of labor from the employer." (D'Arrigo Bros, of California (1977) 3 ALRB No. 34.)

strike were qualified to vote as employees whose work had ceased as a consequence of a current labor dispute. This status could be rebutted by a showing that the subject employees had abandoned interest in the job. Here the Employer failed to introduce such evidence.

The holding in Triple E, supra, was based on the Board's conclusion that even absent the authority found in Lucas, supra, and Valdora, supra, the regional director's determinations of economic striker status were consistent with the federal approach (see, e.g. Title 29 U.S.C. § 152(3)) to the extent applicable under section 1148. Applying Triple E to the Appendix A voters here, we find that all of them meet the same criteria for economic strikers except Hilario P. Solano.

The worker Hilario P. Solano presents a special case. In the declaration provided the RD, Solano alleged the aforementioned elements essential to eligibility as an economic striker. However, in a declaration given to Employer's counsel, dated August 17, 1989, Solano stated that he attended a UFW meeting on August 4, 1989, "To see what the people coming into the field were talking about." As a result of the remarks at the UFW meeting about the need for violence, Solano stated that he did not work in "that field" for LCL Farms until August 17, 1989 (after the election). It cannot be determined whether Solano worked elsewhere for LCL. Aside from credibility issues, this set of facts raises the issue of whether the individual's motive for honoring the strike is properly considered in making the eligibility determination.

We choose, however, to defer action on the Solano challenge while remanding this matter to the RD for the investigation of additional challenged ballots sufficient to decide the election. The Board accepts the RD's recommendation that the challenges to all other Appendix A ballots be overruled since the remaining individuals meet the criteria for eligibility as economic strikers.[9/]

Economic Striker Eligibility -- Individuals Not on the Pre-strike Payroll (Appendix B)

The RD found that the sixteen individuals listed in Appendix B would have been eligible as economic strikers but for the absence of their names from the last payroll immediately preceding the strike. He reached this conclusion because they had worked under the names of other employees actually on the pertinent payroll, and had failed to timely submit work tickets or had submitted their tickets through the individual under whose name they had worked.

Where the RD recommended that a challenge be overruled, he had a declaration from the challenged voter stating that the individual had worked before the strike and had gone on strike against the Employer. The fact that each of these challenged voters had worked was corroborated by a declaration from at least one other worker whose name actually appeared on the pre-strike

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[9/]The Employer raised, but failed to cite authority for, the proposition that strike violence renders a strike void ab initio, and thereby disenfranchises those who would otherwise qualify as economic strikers. This issue is directly related to employee freedom of choice and is hereby deferred to the election objection process.

payroll. Additionally, each worker appeared on the LCL master employee list.

The Employer excepted to the finding that the individuals in Appendix B worked before the strike, and to the RD's reliance on declarations of the challenged voters and those corroborating the employee status of the challenged voters. No counter declarations, documentary evidence or authority was submitted by the Employer.[10/]

In Ace Tomato Co., Inc. (1990) 16 ALRB No. 9, we concluded that individual strikers, regardless of whether their names appeared on the pre-strike payroll, are eligible if they can demonstrate that they (1) worked for compensation during that period, and (2) ceased work in connection with a current labor dispute resulting in a strike against the current employer.

Once the RD had determined that the individuals were employees within the Board's standard for eligible economic strikers, it was the Employer's burden to rebut the RD's conclusion. The Employer did not do this. The Employer also failed to submit evidence demonstrating that any of the economic strikers in Appendix B had abandoned interest in the struck jobs. Accordingly, we adopt the RD's recommendation that all of the ballots in

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[10/]The employer could raise an issue warranting a hearing by showing a material disputed issue of fact, for example, the strikers did not work or the employer prohibited the practice of working "off payroll," i.e., having more than one individual working under one payroll name.

Appendix B be opened and counted.[11/]

Strikers Who Returned to Work After the Eligibility Period (Appendix C)

Ten individuals, all of whom appeared on the LCL master employee lists and also appeared on the pre-strike payroll, worked until they went on strike on July 24, 1989. They returned to work for the Employer after the eligibility period but before the day of the election. Three of these performed work for LCL at SJTG on election day after voting. The Employer took exception to the RD's recommendation that all challenges to the ballots of this group (Appendix C) be overruled. The Employer failed to submit any declaratory or documentary evidence which would controvert the RD's factual findings.

The RD recommended overruling the challenges to all ten ballots cast by economic strikers who returned to work after the eligibility period. As to the three economic strikers who returned to work for the struck Employer after the election, the RD's recommendation is clearly correct. Post-vote conduct is of no relevance to voter eligibility.

The remaining seven challenged ballots raise the issue of whether economic strikers who returned to work after the eligibility period, but prior to the election, are eligible to vote as

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[11/] A showing that an economic striker resumed working for the struck employer prior to the election would also be sufficient to overcome the presumption of eligibility to vote as an economic striker, but it is the employer's burden to make such a showing. Since the Employer made no showing that these employees had returned to work for the Employer, the Employer has failed to rebut the presumption that these employees retained their status as economic strikers eligible to vote in the election.

economic strikers. Clearly they cannot qualify under the first sentence of Labor Code section 1157, which provides that "All agricultural employees of the employer whose names appear on the payroll applicable to the payroll period immediately preceding the filing of the petition of such an election shall be eligible to vote." Eligibility therefore must arise from economic striker status. The Board has held that, in the absence of special circumstances, acceptance of employment from the employer by strikers amounts to an abandonment of the strike, and rebuts the presumption of continued eligibility accorded economic strikers.[12/] (Pacific Tile, supra.)

Here the conduct of seven striking employees in resuming work for the Employer after the pre-petition payroll period, but prior to the election, was not specifically raised by the Employer. However, the conduct of the seven individuals was a matter contained in the Employer's records and necessarily reviewed by the RD. Since there was no showing here of special circumstances sufficient to reinstate the presumption of continuing eligibility, these challenges are sustained.

ORDER

The challenges to the ballots in Appendix A, with the exception of that pertaining to Hilario P. Solano, are hereby overruled in accordance with the recommendation of the Regional Director. The Solano challenged ballot shall be held in abeyance

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[12/]See also Ace Tomato Co., Inc., (1990) 16 ALRB No. 9 and Mid-State Horticulture Co., (1976) 4 ALRB No. 101.

until such time as it may become necessary to determine the outcome of the election.

The Appendix B challenges are overruled in accordance with the recommendation of the Regional Director. The challenges to the Appendix C ballots of Jesus Garcia, Hariberto Mendes and Miguel Quintana are overruled, all others are sustained.

The Regional Director is directed to open and count the 88 ballots subject to the challenges which we have overruled, and thereafter to prepare and serve upon the parties a revised Tally of Ballots. Since these ballots are insufficient in number to resolve the election, the Regional Director is further directed to proceed in accordance with Regulations section 20363 to investigate as many of the remaining challenged ballots as necessary to resolve the election.

Dated: July 25, 1990

BRUCE J. JANIGIAN, Chairman[13/]

GREGORY L. GONOT, Member IVONNE

RAMOS RICHARDSON, Member JOSEPH C.

SHELL, Member

[13/]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 Ellis did not participate in this case.

CASE SUMMARY

San Joaquin Tomato Growers, Inc./
L.C.L. Farms, Inc.

16 ALRB No. 10
Case No. 89-RC-4-VI

Background

On August 2, 1989, pursuant to a Petition for Certification filed by the United Farm Workers of America, AFL-CIO (UFW or Union), the Agricultural Labor Relations Board (ALRB or Board) conducted a representation election among all agricultural employees of San Joaquin Tomato Growers, Inc./L.C.L. Farms, Inc. (Employer) in San Joaquin County, California. The petition alleged that a strike was in progress. The initial Tally of Ballots revealed 13 votes for the UFW, 22 votes for no union, and 185 Challenged Ballots. As the latter were sufficient in number to determine the outcome of the election, the Regional Director (RD) of the Board's Visalia Regional Office conducted an administrative investigation of 96 ballots comprising three distinct groups. The RD determined that 70 of the challenged ballots (Appendix A) were cast by economic strikers. The RD recommended that the 70 challenges be overruled and that those ballots be counted. Sixteen challenged ballots were cast by persons claiming economic striker status but whose names did not appear on the prestrike payroll (Appendix B). The RD recommended overruling the challenges because the employment of the individuals was corroborated in one of several ways: they worked under the names of other employees who were on the payroll, or they failed to timely submit work tickets. In each case another employee on the pertinent payroll vouched for the challenged employee. The third group of challenges (Appendix C) consisted of ten workers. Seven of these returned to work for the employer before the election while three returned to work for the Employer on the day after the election. Further, the RD recommended that the remaining challenged ballots be held in abeyance. The Employer timely filed challenged ballot exceptions. The Board affirmed the recommendations of the RD in part. Because the number of resolved challenged ballots was insufficient to resolve the election, the Board remanded the remainder of the case for the investigation of additional challenged ballots.

Board Decision

With respect to 69 of the 70 Appendix A ballots, the Board adopted the RD's recommendation that the challenges to the ballots cast by economic strikers be overruled. The Employer contended that the employees withheld their labor solely due to fear and therefore, there were no legitimate "strikers". The Employer submitted no authority for the proposition that violence rendered the strike void ab initio. The Board concluded that this case was restricted to resolution of challenged ballot matters rather than election objections. The issue for determination was one of eligibility. Applying Triple E Produce (1990) 16 ALRB No. 5, the Board found that the eligibility of "economic strikers" as determined by the RD under Board cases relating to pre-Act strikers was consistent

with applicable NLRA precedent. The strikers were therefore eligible under the Agricultural Labor Relations Act. In response to the Employer's argument that it had been denied due process because there had not been a hearing and opportunity to cross-examine the challenged voters, the Board concluded that no hearing was required absent material issues in dispute. The Employer's assertions regarding the impact of the alleged violence on the individual challenged balloters were supported in only one instance, that of the employee Hilario P. Solano, who gave conflicting declarations. The Board deferred action on the challenge to Solano's ballot because of the violence issue. The Board consequently relied on the adequacy of the RD's investigation. The Board directed the RD to open and count 69 of the "economic striker" ballots.

The Board overruled the Appendix B challenges to persons who would have been eligible as economic strikers but for the absence of their name from the pre-strike payroll. While the Employer challenged the adequacy of the determination, reliance on declarations of those challenged, and the supporting documentation, the Employer did not submit evidence to rebut the finding. The Board followed Ace Tomato Co., Inc. (1990) 16 ALRB No. 9 in concluding that employees who performed compensated work, and ceased that work in connection with a current dispute resulting in a strike against the Employer, were eligible even though their names did not appear on the pre-strike the payroll where their declarations of employment were corroborated by others who were on the pertinent payroll.

The Board overruled the challenges to three Appendix C ballots cast by employees who returned to work after the election on the basis that post-vote conduct was of no relevance to voter eligibility. However, it sustained the challenges to the seven other ballots because the voters had accepted employment from the Employer thereby abandoning the strike and rebutting the presumption of continuing eligibility accorded economic strikers.

The Board ordered the RD to open and count 88 of the challenged ballots. It remanded the case to the RD for investigation of sufficient additional challenged ballots to determine the outcome of the election. One Board member objected to holding in abeyance the remaining ballots based on the belief that all challenged ballots should be investigated immediately following the election.

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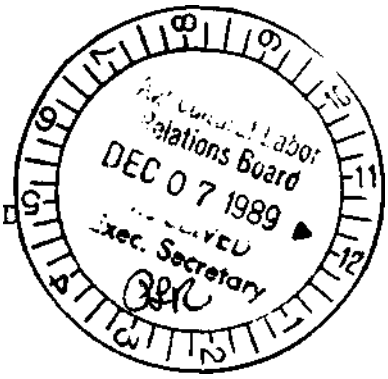

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

SAN JOAQUIN TOMATO GROWERS, INC./LCL FARMS, INC., Employer, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Petitioner.	CASE NO. 89-RC-4-VI REGIONAL DIRECTOR'S CHALLENGED BALLOT REPORT

On August 2, 1989, a Petition for Certification was filed by the United Farm Workers of America, AFL-CIO, (herein "UFW") to represent the agricultural employees of San Joaquin Tomato Growers, Inc./LCL Farms, Inc. (herein "San Joaquin").

On August 11, 1989, a representation election was held for the agricultural employees of San Joaquin and the tally of ballots showed the following results:

UFW	13
No Union	22
Unresolved Challenged Ballots . . .	185
Total Including Unresolved Challenged Ballots	220
Void Ballots	0

As the challenged ballots were sufficient in number to determine the outcome of the election, the regional director, pursuant to Title 8, California Code of Regulations Section 203363(a), conducted an investigation of the eligibility of the following challenged voters listed in Appendices A through C.

The challenges are grouped as follows:

Appendix A, Strikers who Appear on the Payroll Preceding the July 24, 1989 Strike.

Appendix B, Strikers who Worked in the Payroll Period Preceding the July 24, 1989 Strike who do not Appear in the Payroll Immediately Preceding the Strike.

Appendix C, Strikers who Returned to work After the Eligibility Period.

The Employer is a harvester of tomatoes. It employs labor contractors to provide harvest employees. On July 24, 1989, its employees began a strike.[1/]

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1. San Joaquin's contention that there was no strike or that the individuals withholding their labor were not strikers, is addressed below. Furthermore, the employer has refused to provide its position regarding the challenged ballots until this question has been addressed.

Strikers Who Appear On The
Payroll Preceding The July 24,
1989 Strike

All 70 employees named in Appendix A identified themselves as strikers when they appeared at the election. None were listed on the eligibility list provided by the employer, but all of them appear on the payroll records provided by the employer for the payroll period ending immediately before the start of the strike on July 24, 1989. All signed declarations on the date of the election, August 11, 1989, stating that they were on strike and had not returned to work. They all also appear on the LCL master employee lists.[2/]

The statute and board regulations provide that economic strikers, whether replaced or not, are eligible voters in any election conducted within 12 months of the start of the strike. Labor Code Section 1157; California Code of Regulations Section 20852(a)(4).

Under George A. Lucas & Sons (1977) 3 ALRB No. 5, employees who cease work on the date that a strike begins, who have been employed up to that time, are presumed to be strikers. In the case of the employees listed in Appendix A, all have declared themselves to be on strike on the date of the election. Under Valdora Produce Company (1977) 3 ALRB No. 8, it is presumed that a striker who was employed in the unit in the payroll

2. These lists consisted of master employee lists broken down alphabetically by crew foreman. Jimmy Chavez, owner of LCL, explained to the board agent in charge of the election at the time of the election that whereas not all workers would appear in LCL's computer printouts because, e.g., some worked under other workers' names, all workers who had harvested tomatoes appeared in the alphabetized crew lists.

period preceding the start of the strike continues to be on strike and has a continuing interest in the struck job.

Once the status of an economic striker attaches to an employee, it continues until it is affirmatively shown that the striker has abandoned interest in the struck job. Valdora Produce, supra; Pacific Tile and Porcelain, Inc. (1962) 137 NLRB 1358. Under Pacific Tile, acceptance of another job, even where the employee filled out forms describing himself as a permanent employee, does not establish abandonment of interest in the struck job or the strike.

The investigation of challenged ballots disclosed no evidence that any of the employees had accepted other employment prior to the date of the election. No evidence that any of the employees listed in Appendix A had accepted other employment or otherwise abandoned interest in the struck job was offered by any party. Under Pacific Tile, once it has been established that a challenged voter is an economic striker any party contesting the voter's eligibility has the burden of coming forward with evidence sufficient to establish that the striker has abandoned interest in the strike. Mere failure to participate actively in picketing or acceptance of another job paying higher wages, does not meet this burden.

The employer contends in its only submission to the region that none of the employees were on strike, in that their absence from work may have been motivated by fear of violence in connection with the strike and that therefore, either none

of its employees voluntarily went on strike or each individual alleged to be a striker withheld labor only because they feared violence from non-employees and employees supporting the strike. However, none of the workers listed in Appendix A indicated they they joined the strike because of fear of violence. Therefore, it is clear that whatever effect the alleged fear and violence may have had on other workers, it does not affect the economic striker status of workers who state that they went out on strike against the company.

In any case, National Labor Relations Board precedent is clear that a strike is the withholding of labor and that anyone who withholds labor, regardless of motive, is a striker. Coors Container Company (1978) 238 NLRB 1312, 1318; Ashtabula Forge (1985) 269 NLRB 774. Futhermore, in Limpert Brothers, Inc. (1986) 276 NLRB 364, the individuals at issue testified that they stayed away because they were afraid of vandalism and confrontations with strikers. Nevertheless, the national board found that they were strikers with all the incidents of such status. Clearly, subject to a demonstration that they have abandoned interest in the struck job, voting is one of these incidents.

Therefore, because none of the parties submitted evidence to contradict the statements of the 70 workers listed in Appendix A, I credit their statements that they went out on strike on July 24, 1989. Moreover, because they were economic strikers at the time of the election, I find they were eligible to vote and I am hereby recommending that the challenges to their votes be overruled.

Strikers who Worked in the Payroll
Period Preceding the July 24, 1989,
Strike who do not Appear in the Payroll
Immediately Preceding the Strike_

The challenged ballot investigation disclosed that each time a worker emptied two buckets they received a ticket which could be redeemed for $.90. The investigation also disclosed that it was not uncommon for workers, especially from the same family, to receive pay under another employee's name. The investigation further disclosed that some employees did not promptly submit tickets they had earned or that they were holding for other employees. In either case, the names of these workers would not appear on payroll records.

The workers in Appendix B worked during the payroll period encompassing July 14, 1989 through July 22, 1989, i.e., the payroll preceding the start of the strike at San Joaquin. These workers state in declarations signed under penalty of perjury that they worked for San Joaquin until July 24, 1989, when they went out on strike against the employer. Some workers further state that they worked under another employee's name. Others state that they did not cash the tickets until after the eligibility period. Each worker's statement is corroborated by at least one other worker whose name appears in the pre-strike payroll. Additionally, each worker appears in the LCL master employee list.[3/]

I have identified below each striker whose tickets

3. See footnote 2, supra.

were not submitted promptly during the payroll period. In each case, the employee stated in their own declaration that they worked during the payroll period preceding the strike, and that their tickets were not promptly submitted. In each case, as noted above, another employee who does appear on the payroll for that period corroborates the challenged striker's statement that they were present and working during the payroll period immediately preceding the strike. I have treated them the same as those who worked under a different employee's name.

Juan Ochoa Ayala states in his challenge declaration that he worked during the week preceding the strike and that his tickets were cashed by his wife Lidia A. Ochoa. Lidia Ochoa states that she worked during the week preceding the strike at San Joaquin but that she did not cash her tickets until after the end of the eligibility period. These workers both appear on the LCL master employee lists and they both state that they joined the strike on July 24, 1989. Additionally, a worker who is personally acquainted with the Ochoas because he worked in the same crew and who appears in the payroll for the week preceding the strike, confirms that they were working for San Joaquin during the week preceding the strike. Based on the above, I recommend that the challenges to these ballots be overruled.

Pedro Bautista states under penalty of perjury that he worked for San Joaquin during the week preceding the strike until he joined the strike on July 24, 1989, but that he did not cash his tickets until after the end of the eligibility period. His name appears on the LCL master employer lists. Additionally, a

co-worker who is personally acquainted with Bautista and who worked during the week preceding the strike states that Bautista also worked for San Joaquin during that week. I recommend that the challenge to this ballot be overruled.

Martin Juarez states that he worked for San Joaquin until he went out on strike on July 24, 1989. Juarez further states that he gave his tickets to his father, Austreberto Juarez, to cash. Martin's name appears on the LCL master employee lists. Chela G. Juarez states that she worked for San Joaquin until she joined the strike on July 24, 1989. Her name appears on the LCL master employee lists. Additionally, she states that she gave her tickets to her husband, Austreberto Juarez, to cash. Austreberto Juarez' name appears on the LCL master employee lists. He also appears on the payroll preceding the strike. Additionally, Austreberto Juarez corroborates Martin Juarez and Chela G. Juarez[1] statements that they worked during the week preceding the strike. Based on the above I recommend that the challenges to the ballots of Martin Juarez and Chela G. Juarez be overruled.

Juan Manual Naranjo states that he worked for San Joaquin until he joined the strike on July 24, 1989. He states that the did not cash his tickets until after the election. His name appears on the LCL master employee lists. Additionally, his brother, who worked in the same crew and who appears on the payroll for the week preceding the strike states that he saw Juan Manuel Naranjo working for San Joaquin during that week. Therefore, I recommend that the challenge to this ballot be overruled.

Alfredo E. Naranjo states that he worked for San Joaquin until he went out on strike on July 24, 1989. Santiago Naranjo, Alfredo's father states that he worked for San Joaquin until he joined the strike on July 24, 1989. He further states that he and his son, Alfredo Naranjo, gave their tickets to his other son, Francisco Naranjo, to cash. Francisco Naranjo appears on the payroll preceding the strike. Alfredo Naranjo's and Santiago Naranjo's names appear on the LCL master employee lists. Additionally, Francisco Naranjo confirms that both Alfredo E. Naranjo and Santiago Naranjo worked during the week preceding the strike. Therefore, I recommend that the challenges to these ballots be overruled.

Rosalba Medina de Ortiz states that she worked for San Joaquin until she joined the strike on July 24, 1989. During this time she gave her tickets to Pedro Medina, her father, to cash. Her name appears on the LCL master employee lists. Additionally, a worker who appears in the pre-strike payroll and

who is acquainted with her because they worked in the same crew, confirms that Rosalba Medina de Ortiz worked for San Joaquin during the payroll period preceding the strike. Based on this information, I recommend that the challenge to her vote be overruled.

J. Jesus Ochoa states that he worked for San Joaquin until he went on strike on July 24, 1989. He further states that he gave his tickets to another worker to cash and his statement is corroborated by that worker. J. Jesus Ochoa's name appears on the LCL master employee lists. Additionally a worker who worked during the week preceding the strike, who worked in the same crew as Ochoa and who was Ochoa's neighbor during the tomato season states that J. Jesus Ochoa worked during that week also. Based on the foregoing I recommend that the challenge to this ballot be overruled.

Javier Sandoval, Maria Sandoval and Teresa C. Sandoval all state in declarations signed under penalty perjury that they worked for San Joaquin until July 24, 1989, when they went out on strike against the employer. They all appear on the LCL master employee lists. They also all state that they had not cashed in their tickets by the time of the election. Additionally, a worker whose name appears in the payroll preceding the election and who is personally acquainted with these workers because she worked in the same crew states that she saw them working during the week preceding the strike. Based on the foregoing I recommend that the challenges to these ballots be overruled.

Yolanda Sandoval de Vargas states under penalty of perjury that she worked for San Joaquin until she went out on strike

on July 24, 1989. She further states that she gave her tickets to her husband, Isidro Vargas to cash. Isidro Vargas[1] name appears on the pre-strike payroll. Yolanda's name appears on the LCL master employee lists. Additionally, a worker who is also her neighbor and who worked during the week preceding the strike states that she saw Yolanda Sandoval de Vargas working that week. I recommend that the challenge to this ballot be overruled.

Romelia J. Saucedo states that she worked for San Joaquin until she went out on strike on July 24, 1989. She further states that she gave her tickets to her husband, Pedro Saucedo, to cash. Her name appears on the LCL master employee lists. Additonally, Pedro Saucedo whose name does appear in the pre-strike payroll confirms that Romelia Saucedo worked for the employer during the week preceding the strike. I recommend that the challenge to this ballot be overruled.

Mario A. Vargas states that he worked for San Joaquin until he joined the strike on July 24, 1989 and that during this time he worked under the name of his father, Mario D. Vargas. Mario A. Vargas' name appears in the LCL master employee lists Mario D. Vargas confirms that he cashed his son's tickets and his name appears in the pre-strike payroll. Additionally, a worker who is personally acquainted with Mario A. Vargas because he worked in the same crew and who worked during the pre-strike payroll period states that he saw Mario A. Vargas working during the week preceding the strike. Based on all of the above I recommend that the challenge to this vote be overruled.

The workers in Appendix B all stated under penalty of

perjury that they worked for San Joaquin until July 24, 1989 when they went out on strike. Their names all appear on the LCL master employee lists. A second worker confirms that each of the Appendix B workers worked during the week preceding the strike. Therefore, I recommend that the challenges to the ballots of the workers listed in Appendix B be overruled.

Strikers who Returned to Work After the Eligibility Period

The workers in Appendix C all appear on the LCL master employee lists. They also appear in the pre-strike payroll. Additionally, they all state that they worked for San Joaquin until they went on strike on July 24, 1989.

These workers all returned to work for the employer after the eligibility period which encompassed July 23, 1989 through July 29, 1989. Three workers, Jesus Garcia, Heriberto Mendes and Miguel Quintana returned to work on the date of the election. None of these three workers performed work for San Joaquin prior to voting.

The issue presented by the above recitation of facts is whether strikers who offer to return to work and are rehired after the eligibility period are eligible to vote. For the reasons discussed below, I conclude that they are.[4/] In Bio-Science Laboratories v. NLRB (1976) 93 LRRM 2156, the Ninth Circuit Court of Appeals upheld the National Board's findings that economic strikers who have offered to return to work and who are on a

4. Marlin Brothers (1977), 3 ALRB No. 17, to the extent that it can be interpreted to support the opposite conclusion appears to apply to the second paragraph of Labor Code section 1157 regarding a strike which commenced prior to the effective date of that section.

preferential hiring list on the date of the election, are eligible to vote.

Similarily in John A. Thomas Crane (1976) 224 NLRB 214 the Board held that several economic strikers who had offered to return to work but who had not been reinstated at the time of the election were eligible to vote.[5/] [6/]

Consequently, if economic strikers who have offered to return to work but who are not re-employed because no positions are available prior to an election are eligible to vote in that election, it follows that economic strikers who offer to return to work and who are allowed to work because of the fortuitous circumstance that a job is available, should also be eligible to vote.

Moreover, in Bio-Science the court noted that in 1959 the NLRA was amended to allow strikers who had been permanently replaced to vote in an election conducted within 12 months of the inception of the strike in order to limit an employers potential for "union busting" in that prior the 1959 amendments "[E]mployers could provoke a strike, hire replacements, petition for an election and since only replacements could vote, be reasonably assured that the union would be voted out. See Senate Report,

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5. Under the NLRA in order for an employee to be eligible to vote in a election they must be employed in the payroll period preceding the notice and direction of election and on the date of the election. Gulf States Asphalt Co. (1953) 106 NLRB 1212.

6. See also C.H. Guenther and Sons, Inc. v. NLRB (5th Cir. 1970) 427 F2d 983, 74 LRRM 2343 where the court held that employees on a preferential hiring list remain part of the bargaining unit for the purpose of determining continued majority status of the union.

Labor Management Relations Act of 1959, 1959 U.S. Code & Cong. Admin. News 2348-49."

Similarly, if economic strikers who are rehired after the eligibility period are not eligible to vote, an employer could manipulate to its advantage the voter eligibility of economic strikers who have offered to return to work by reinstating them after the eligibility period, but before the day of the election, thus making them ineligible to vote. This result would also have the concommitant adverse effect of prolonging labor disputes in that in order to maintain their eligibility to vote, economic strikers would not be able to end the dispute by offering to return to work unless they wished to risk being made ineligible to vote by the employer reinstating them after the eligibility period but before the election.

Furthermore, the voter eligibility of reinstated economic strikers can be inferred from the National Board's treatment of the ballot of Thaycel Allison in Southwest Engraving Co. (1972) 198 NLRB 694. In that case, the election was conducted in November 1970. The Administrative Law Judge recommended that the challenge to the vote of Allison, an economic striker who had offered to return to work, be overruled even though Allison had not responded to an offer of employment by the employer, in October 1970. The ALJ reasoned that because the offer was ambiguous the employee was unable to determine what type of work was being offered and thus the offer was not a bona fide offer of reinstatement.

However, the National Board disagreed with the ALJ, finding that the offer was not ambiguous. It sustained the chal-

lenge to Allison's vote because Allison had not responded to the offer and this it found amounted to a rejection of the offer of reinstatement. Because the Board sustained the challenge to Allison's vote when he did not accept an offer of reinstatement it can be inferred that had he accepted said offer the challenge to Allison's vote would have been overruled.

Thereafter, in PBR Company (1975), 216 NLRB 602 the National Board held that an economic striker who returned to work for the employer with the union's acquiescence performing the same type of work but at a lower rate of pay on a subcontracting basis eligible to vote in an election. It is clear from this case that the mere fact that the striker returned to work for the employer did not disqualify him from voting.

Based on all the above reasons I conclude that strikers who returned to work after the eligibility period and on or before the day of the election are eligible to vote. Consistent therewith I recommend that the challenges to the employees listed in Appendix C be overruled.

Recommendation

It is hereby recommended that the challenges to the ballots of the individuals listed in Appendix A, B, and C be overruled and the ballots be counted. The regional director further recommends that the remaining challenged ballots be place in abeyance pending further investigation if they are outcome determinative.

Conclusion

Pursuant to Title 8, California Code of Regulations, Section 20363, exceptions to the conclusions and recommendations of the regional director are to be filed with the executive secretary by personal service within five (5) days or by deposit in registered mail postmarked within five (5) days following service upon the parties of the regional director's report. An original and six (6) copies of the exceptions shall be filed and shall be accompanied by seven (7) copies of declarations and other documentary evidence in suport 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.

Dated: 12/5/89

Respectfully Submitted,

Lawrence Alderete

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Appendix A

1. Aguilar, Rosario Lopez
2. Andrade, Trinidad
3. Avalos, Emiliano
4. Ayala, Jose
5. Barajas, Albaro Mata, Jr.
6. Bautista, Maria G.
7. Bautista, Roberto M.
8. Canela, Maria E. Gomez
9. Canel, Juan Manuel Zambrano
10. Chavez, Pedro
11. Chavez, Pablo Rosel
12. Chavez, J. Gordiano
13. Cordova, Elvia A de
14. Cordova, Luis F.
15. Cruz, Margarito Suarez
16. Cruz, Jose Manuel Villanueva
17. Ceja, Alejandro
18. Diaz, Juan
19. Elia, Mario Uvaldo
20. Garcia, Elias Aguilar
21. Garcia, Esther Mendez

22. Garcia, Ramon Ramirez
23. Garibay, Margarito
24. Gonzalez, Jose
25. Juarez, Austreberto
26. Suarez, Jesus C.
27. Suarez, Nicolas Cruz
28. Leon, Ramiro Flores
29. Leon, Roberto Meza
30. Linares, Armando
31. Lua, Jorge
32. Lua, Salbador
33. Magallon, Cruz
34. Magdaleno, Rafael
35. Magdaleno, Jose Socorro Mendez
36. Manzo, Jose Ma P
37. Mata, Gerardo B.
38. Mata, Alvaro Mendoza
39. Medina, Pedro
40. Medina, Jorge Martinez
41. Mendez, Aureliano Diaz
42. Mendez, Gabriel Garcia

43. Naranjo Francisco

44. Navarro, Jose Remedias Mata

45. Ochoa Jose E.

46. Ochoa Marios Vargas

47. Perez, Elidio C.

48. Quiroz, Miguel Perez

49. Ramirez, Ramon

50. Ramirez, Olga

51. Romero, Salvador

52. Romero, Salvador

53. Salas, Fernando N.

54. Sanchez, Javier

55. Saucedo, Pedro

56. Silva, Maria Del Rosario

57. Solano, Hilario P.

58. Solorio, Rogelio 0.

59. Toro, Dolores

60. Torres, Jose Luis
61. Valencia, Francisco J.
62. Vargas, Rigoberto A.
63. Vargas, Francisco Godoy
64. Vazquez, Raul
65. Vega, Jose
66. Velez, Francisco Banuelos
67. Zacarias, Martin Sanchez
68. Zacarias, Luis
69. Zacarias Marie Martha Lua
70. Zambrano, Isidro Vargas

Appendix B

1. Ayala Juan Ochoa
2. Bautista, Pedro
3. Juarez, Martin
4. Juarez, Chela G.
5. Naranjo, Juan Manuel
6. Naranjo, Alfredo
7. Naranjo, Santiago
8. Ortiz, Rosalba Medina de
9. Ochoa, J. Jesus
10. Ochoa, Lidia A.
11. Sandoval, Javier
12. Sandoval, Maria
13. Sandoval, Teresa C.
14. Saucedo, Romelia J.
15. Vargas, Yolanda Sandoval de
16. Vargas, Mario A.

1. Farfan, Fulgencio Rogel
2. Garcia, Jesus
3. Izquierdo, Efren G.
4. Manzo, Jose G.
5. Mendez, Heriberto
6. Mendoza, Vicente Mendez
7. Quintana, Miguel
8. Ramirez, Jesus
9. Silva, Olegario
10. Villasenor, Benito R.