

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

ACE TOMATO CO., INC.,)	
)	Case No. 89-RC-5-VI
Employer,)	
)	
and)	16 ALRB No. 9
)	
UNITED FARM WORKERS OF)	
AMERICA, AFL-CIO,)	
)	
Petitioner.)	
)	

DECISION AND ORDER ON CHALLENGED BALLOTS

The United Farm Workers of America, AFL-CIO (UFW), filed a petition for certification on August 4, 1989, and an amended petition on August 8, 1989. The UFW alleged in its petition for certification that a strike was in progress and that approximately 400 employees were engaged in the strike.^{1/}

The Visalia Regional Director (RD) conducted a secret ballot election among the agricultural employees of Ace Tomato Co., Inc. (Employer) on August 10, 1989. The Official Tally of Ballots showed the following results:

UFW	71
No Union	45
Challenged Ballots	212
Total Including Challenged Ballots	328
Void Ballots	2

^{1/}The petition for certification form in questions 9 and 12b seeks the approximate number of employees and the approximate number on strike. The UFW responded to both questions with "Approx. 400."

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, of the eligibility of the challenged voters. The RD gave the Employer an opportunity to present evidence in that regard.^{2/} The Employer seeks to raise factual issues regarding pre-election strike violence and peak employment within the meaning of Labor Code section 1156.4.^{3/} Through its counsel's letter of August 31, 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 November 28, 1989, the RD issued the attached Report on Challenged Ballots (CBR). He recommended that the challenges listed in CBR Appendices A, B, C, and D, totaling 93, be overruled and the ballots be counted. The RD further recommended that the sixteen challenges in Appendix E be sustained and the remaining challenged ballots be held in abeyance until such time as they may prove to be outcome determinative. Thereafter, the Employer filed exceptions to the CBR on 98 separate grounds. Many involved issues most appropriately addressed in election objection proceedings. In support of the challenges, the Employer incorporated by reference the declarations submitted to the Board in conjunction

^{2/}Challenged Ballot Report (CBR), p. 4.

^{3/}All section references are to the California Labor Code unless otherwise specified.

with its election objections filed on August 16, 1989.^{4/} No exceptions were filed by the UFW.

On consideration of the entire record, the Board has decided, for the reasons stated below, to affirm the findings and recommendations of the RD.

The RD selected five groups of challenged ballots, consisting of 109 ballots, for investigation.^{5/} After conducting

^{4/} 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.

^{5/}It appears that the RD selected for resolution those ballot challenges which could be most quickly resolved and which appeared to be sufficient in number to decide the election. The Board has accepted this practice provided the RD selects a number of ballots which, in the reasonable exercise of discretion, appears large enough to result in a clear majority when added to the ballots received by any one of the choices. This approach has been used since the inception of the Agricultural Labor Relations Act and is consistent with the NLRB practice. (See National Labor Relations Board v. A. J. Tower Co. (1946) 329 U.S. 324 [67 Sup.Ct. 324]; Carlisle Paper Box Co. v. N.L.R.B. (1968) 398 F.2d 1 [68 LRRM 28311; S. & S. Corrugated Paper Mach. Co. (1950) 89 NLRB 1363 [26 LRRM 1112].) Morris, *The Developing Labor Law* (2nd ed. 1983), p. 398, states,

... If the number of challenged ballots is sufficient to affect the outcome of the election, the validity of the challenges must be determined. The regional director or Board need rule only on what is necessary to decide the election. If the number of challenged ballots is insufficient to affect the outcome, the challenges will not be resolved. ..." (Emphasis added.)

(See also McGuinness & Norris, *How to Take A Case Before the NLRB* (5th ed. 1986), p. 244.)

The Board presumes at this point that the remaining 103 challenged ballots were not addressed by the RD because he did not consider them necessary in determining the outcome of the election.

(fn. 5 cont. on p. 4)

the investigation, 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 cross-examine the challenged voters. A hearing at the RD level, including direct and cross-examination, is discretionary and is not required unless there are material issues in dispute. (Regulations section 20363.) (Capco Management Group, Inc. (1989) 15 ALRB No. 13; Franzia Bros. Winery (1978) 4 ALRB No. 100; Lawrence Vineyards Farming Corporation (1977) 3 ALRB No. 9.) 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 56 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

(fn. 5 cont.)

Members Ellis and Shell continue 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.)

individuals were eligible to vote as economic strikers.^{6/}

Once economic striker status is established, it can be lost by, *inter alia*, activity inconsistent with a continuing interest in the struck job. Because there was no evidence that any of the 56 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 violence precluded the existence of a strike. Numerous declarations were submitted by the Employer with regard to this contention. However, the declarations failed to establish that any of those seeking eligibility as economic strikers withheld their labor because of fear of the alleged violence.

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.

^{6/}Both Lucas and Valdora, *supra*, involve economic strikes which began before the adoption of the Agricultural Labor Relations Act (Act) and 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.

The Board examined economic striker eligibility in Triple E Produce Corporation (1990) 16 ALRB No. 5. The present case raises the same issue. In Triple E, supra, the Board accepted the regional director's conclusion as to the existence of a strike^{7/} but did so on the basis that employees who were on the pre-strike payroll and who signed declarations that they were on strike and had not returned to work 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 they meet the same criteria for economic strikers. The RD's recommendations as to the Appendix A challenges are therefore adopted.^{8/}

^{7/}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.) The Board does not here reach the issue of motivation because the Employer has submitted no evidence on the motivation of the challenged economic strikers.

^{8/}The Employer advanced but failed to cite authority for the proposition that strike violence renders a strike void ab initio,

(fn. 8 cont. on p. 7)

Voters Incorrectly Challenged as "Not on List"

The eight individuals in Appendix B were initially challenged as "not on list." Thus, for example, Eva Alconta Soto and Augustin Hernandez Diaz were challenged although the names Eva A. Soto and Augustin H. Diaz appeared "on the list." The RD recommended that these eight challenges be overruled. This recommendation was based on both employee declarations and social security numbers coinciding with those for individuals "on the list" with slight name variations. The Employer took exception to the reliance on social security numbers and the absence of a hearing. Neither evidentiary support nor legal authority was presented by the Employer in support of its position.

For the reasons noted in Capco Management Group, Inc., supra, no hearing is required. The Board is entitled to rely on the adequacy of an RD's investigation absent specific assertions substantiated by documentary evidence. (Farmer John Egg Enterprises, Inc. (1984) 10 ALRB No. 15, and Mayfair Packing Company (1983) 9 ALRB No. 66.) An employer's conclusory statements in its brief are insufficient, absent germane declaratory support, to overturn an RD's recommendations. (Sequoia Orange Co., et al. (1987) 13 ALRB No. 9.)

The Board has previously examined challenges involving minor spelling and name variations. It has upheld the regional director's conclusion that the voter and the person appearing

(fn. 8 cont.)

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.

in the payroll records were the same person by looking at circumstantial evidence and by comparing names and/or signatures in an employer's records. The Board has also noted that minor spelling variations or the use of two last names is common among Spanish-surnamed persons. (Karahadian & Sons, Inc. (1979) 5 ALRB No. 19, Valdora Produce Co., supra.) Therefore, the Board adopts the RD's recommendations as to the Appendix B challenges.

Economic Striker Eligibility -- Individuals Not on the Pre-strike Payroll

The RD found that the twenty individuals listed in Appendix C 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, had failed to timely submit work tickets or had been left off the list but had pay stubs as evidence of their employment.

Where the RD recommended that a challenge be overruled, he had a declaration from the challenged voter that the individual had worked before the strike. This was corroborated by a declaration from at least one other worker whose name actually appeared on the pre-strike payroll.

The Employer excepted to the finding that the individuals in Appendix C 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. The Employer also excepted to the use of documents (payroll stubs and tickets) for verification. (Employer's Exceptions, December 7, 1989,

Nos. 38-73.) No counter declarations, documentary evidence or authority were submitted by the Employer.

The eligibility of employees not literally "on the payroll" was reviewed most recently in Hiji Brothers, Inc. (1987) 13 ALRB No. 16. Although the case did not deal with the eligibility of individuals who appear on neither the pre-petition payroll nor the pre-strike payroll, broad rules were confirmed or established. First, the phrase "whose names appear on the payroll" in the first paragraph of section 1157, defining eligible agricultural employees, has been held to mean employees who actually performed some work. (Yoder Brothers, Inc. (1976) 2 ALRB No. 4.) Second, the "performance of work" means paid or compensated work during the applicable payroll period, except in the case of economic strikers. Third, the Board will look to the employees' work history, the pattern of benefit payments on behalf of the employee, and any other relevant evidence which could bear on the question of whether the employee held a current job during the relevant period. (Rod McLellan Co. (1977) 3 ALRB No 6.) Separate from Hiji, supra, the Board has also established that employees who do not appear on the payroll, either for purposes of convenience or because they are working on a family unit basis, must still be treated as eligible. (M. V. Pista and Co. (1976) 2 ALRB No. 8, Regulations section 20310(d)(2).)

It is appropriate to apply these same concepts here in determining the eligibility of alleged economic strikers whose names do not appear on the pre-strike payroll, because, when determining questions of eligibility, there is no rational basis for applying to alleged economic strikers tests different from

those applied to "agricultural employees." If such strikers can establish to the RD's satisfaction that they performed compensable work during the pre-strike period, the fact that they did not appear on the actual payroll for the period should not disenfranchise them.^{9/}

We conclude that individual strikers are eligible, regardless of whether their names actually appeared on the pre-strike payroll, 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.

Here 12 of the 20 challenged ballots were cast by individuals claiming to have worked on a family unit basis. The remaining eight were the family members under whose names the first group claimed to have worked. Although these eight persons were not on the payroll themselves, their employee status was verified by payroll stubs, tickets or the declarations of co-workers.

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 failed to submit evidence demonstrating that any of the economic strikers in Appendix C had abandoned interest in the struck jobs. Accordingly, we adopt the RD's

^{9/} 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.

recommendation that all of the ballots in Appendix C be opened and counted.^{10/}

Non-strikers Who Worked During the Eligibility Period but Do Not Appear on the Eligibility List

The fourth group of challenges, Appendix D, consisted of nine workers. They declared that they worked during the eligibility period, i.e., the week preceding the filing of the petition, but were not included on the eligibility list. Four worked under the name of another family member. In each case, the individual's declaration was corroborated by the declarations of a person whose name did appear on the eligibility list, or by pay stubs for work performed during the eligibility period. The RD recommended counting all of these ballots.

The Employer took exception to these recommendations (Employer's Exceptions, December 6, 1989, Nos. 74-91), but submitted no evidence contravening the RD's CBR. The burden of producing evidence sufficient to raise a material issue is on the party challenging the result. The RD's investigation does not depend on information solicited from an employer, although an opportunity for such input was provided. (Sam Andrews' Sons (1976) 2 ALRB No. 28.) For this reason and the reasons specified

^{10/}A showing that an economic striker resumed working for the struck employer prior to the election would also be sufficient to cause the loss of eligibility to vote as an economic striker, but it is the employer's burden to make such a showing. Four of the employees listed in Appendix C declared that they had not returned to work for the Employer, whereas the remaining 16 employees in Appendix C did not make similar statements. However, since the Employer made no showing that these 16 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.

in the preceding section, the RD's recommendations as to this group are adopted.

Employees from Prior Years Who Joined the Strike Before Reporting to Work

Finally, the 16 individuals in Appendix E did not work for the Employer in the payroll period prior to the start of the strike, but had worked there in prior years. Fifteen of these had not been recalled. The sixteenth had worked in early July. He then went to work for another employer. Relying on Hiji Brothers (1987) 13 ALRB No. 16, in which the Board denied voter eligibility to workers on layoff status even if they have a reasonable expectation of being rehired, the RD recommended sustaining the challenges.

The Employer filed a single exception to the RD's recommendation because it did not have an opportunity to review the declarations relied on by the RD. However, the Employer submitted neither evidence nor legal authority supporting eligibility for those persons in Appendix E. As stated repeatedly in this decision, mere conclusory statements, which are otherwise unsupported, are insufficient to cause the Board to question the RD's recommendations. (Sequoia Orange Co., et al., supra.) Furthermore, the factual pattern involving the Appendix E voters clearly establishes that they were not employees and would fall within the exclusions of Hiji Brothers, supra.

ORDER

The challenges to the ballots in Appendices A, B, C and D are hereby overruled in accordance with the recommendation of the

Regional Director. The challenges to the Appendix E ballots are sustained, also in accordance with the recommendation of the Regional Director.

The Regional Director is directed to open and count the 93 ballots subject to the challenges which we have overruled, and thereafter to prepare and serve upon the parties a revised Tally of Ballots.

Dated: July 12, 1990

BRUCE J. JANIGIAN, Chairman^{11/}

GREGORY L. GONOT, Member

IVONNE RAMOS RICHARDSON, Member

JIM ELLIS, Member

JOSEPH C. SHELL, Member

^{11/}The signatures of Board Members in all Board Decisions appear with the signature of the Chairperson first, if participating, followed by the signatures of the participating Board Members in order of their seniority.

CASE SUMMARY

Ace Tomato Co., Inc.
(UPW)

16 ALRB No. 9
Case No. 89-RC-5-VI

Background

On August 10, 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 Ace Tomato Co., Inc. (Employer) in San Joaquin County, California. The petition alleged that a strike was in progress. The initial Tally of Ballots revealed 21 votes for the UFW, 45 votes for no union, and 212 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 109 ballots comprising five distinct groups. The RD determined that 56 of the challenged ballots (Appendix A) were cast by economic strikers. The RD recommended that the 56 challenges be overruled and that those ballots be counted. The RD found that eight ballots challenged as not on the eligibility list (Appendix B) were actually cast by individuals whose names appeared on the list under slight variations of their names, the RD recommended that the challenges be overruled. Twenty challenged ballots were cast by persons claiming economic striker status but whose names did not appear on the prestrike payroll (Appendix C). 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, they had documentation such as pay stubs, or they failed to timely submit work tickets. In each case another employee on the pertinent payroll vouched for the challenged employee. The fourth group of challenges (Appendix D) consisted of nine workers. They asserted that they had worked under the name of another, or had documentation of employment during the prepetition eligibility period. The RD recommended overruling the challenges for the same reasons as the Appendix C challenges. The fifth group of 16 individuals (Appendix E) previously worked for the Employer and joined the strike before reporting for work. The RD recommended sustaining these challenges. Further, he recommended that the remaining challenged ballots be held in abeyance. The Employer timely filed challenged ballot exceptions.

Board Decision

The Board adopted the RD's recommendation that the Appendix A challenges to the 56 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 involved challenged ballot

procedures 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 ALRA. 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 assertions of the Employer regarding the impact of the alleged violence on the individual challenged balloters were unsubstantiated. The Board consequently relied on the adequacy of the RD's investigation. The Board directed the RD to open and count the 56 "economic striker" ballots.

The Board accepted the RD's conclusion that those on Appendix B were actually on the list under some variation of their proper names and overruled the challenges. The Board overruled the Appendix C challenges to persons who would have been eligible as economic strikers but for the absence of their name from the prestrike 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 earlier precedent 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.

The Board accepted the RD's recommendation to overrule the Appendix D challenges to the eligibility of those non-strikers whose names did not appear on the eligibility list even though they had worked during the eligibility period. The Employer had failed to submit evidence contravening the finding that the individuals had worked.

The Appendix E challenges were sustained by the Board. Relying on Hiji Brothers (1987) 13 ALRB No. 16, where it denied eligibility to workers in layoff status, the Board concluded that workers from prior years who joined the strike before being recalled were ineligible.

The Board decided to hold in abeyance the remaining ballots and to consider them only if they proved outcome determinative following the issuance of a revised tally of ballots. Two Board members objected to holding the remaining ballots based on the belief that all challenged ballots should be investigated immediately following the election.

* * *

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



ACE TOMATO CO., INC.)
)
 EMPLOYER,)
)
 and)
)
 UNITED FARM WORKERS OF)
 AMERICA, AFL-CIO,)
)
 PETITIONER.)

CASE NO. 89-RC-5-
 REGIONAL DIRECTOR'S
CHALLENGED BALLOT REPORT

On August 4, 1989, a Petition for Certification was filed by the United Farm Workers of America, AFL-CIO, (herein "UFW") to represent the agricultural employees of Ace Tomato Co., Inc. (herein "Ace").

On August 10, 1989, a representation election was held for the agricultural employees of Ace Tomato and the tally of ballots showed the following results:

UFW	71
No Union	45
Unresolved Challenged Ballots . . .	212
Total including unresolved	
Challenged Ballots	328
Void Ballots	2

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 E.

The challenges are grouped as follows:

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

Appendix B, Voters Challenged as not on List who After Further Review were Found on the Eligibility List.

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

Appendix D, Non-Strikers who do not Appear on the Eligibility List.

Appendix E, Employees From Prior Years, who Joined the Strike Before Reporting to Work in 1989.

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/}

1. Ace Tomato'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 56 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 10, 1989, stating that they were on strike and had not returned to work.

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 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 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. Furthermore, 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 56 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.

Voters who were Incorrectly
Challenged as not on List

Upon further examination, the workers listed in Appendix B were found on the eligibility list. Moreover, all these workers signed a declaration under penalty of perjury wherein they state that they worked during the eligibility period. Therefore, because it is clear that these workers worked during the eligibility period, I will recommend that the challenges to their vote be overruled.

Santiago Rocha Aguayo was found on the eligibility list as Santiago A. Rocha. The social security numbers of both these individuals are the same.

Eva Alcantar Soto was found on the eligibility list as Eva A. Soto. The social security numbers of these two individuals are the same.

Manuel Ballesteros appeared on the eligibility list as Manuel B. Dallesteros. Both individuals have the same social security number.

Augustin Hernandez Diaz was found under the name Augustin H. Diaz. The social security numbers of these two individuals are the same.

Maria Raquel Flores Castro Garcia was found under the name Maria R. C. Flores. The social security numbers of both these individuals are the same.

Jesus Prementel appeared in the eligibility list as Jose E. Prementel. Both individuals have the same social security number.

Maurilio Quintero appeared on the eligibility list as Mauritio Quintero. However, the social security number of both Quinteros match.

Valente Saavedra appeared on the eligibility list as Valente V. Saavedra. Both individuals have the same social security number.

Notwithstanding the slight variance in the names shown on the eligibility list and challenge envelope of some of the individuals discussed above, it is sufficiently clear that the individuals who have similar names are the same person because they had the same social security number.

Therefore, I conclude that eight (8) individuals listed in Appendix B worked during the eligibility period and I recommend that the challenges to their ballots 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 he 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 C worked during the payroll period encompassing July 14, 1989 through July 20, 1989, i.e.,

the payroll preceding the start of the strike at Ace. These workers state in declarations signed under penalty of perjury that they worked for Ace 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 their 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.

I have identified below, each striker whose tickets 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.

Lorena Aguilera states that she went on strike on July 24, 1989 and had not returned by the date of the election. She further states that she worked in the payroll period immediately preceding July 24, 1989, in the crew of Fidel Moreno, but that her mother Roselia Cortez Aguilera submitted all her tickets for her.

Rosalia Cortez Aguilera states under penalty of perjury that she worked in the payroll period preceding the strike before she went out on strike on July 24, 1989. She also provided pay stubs which show that she had been paid for work performed before the strike on June 19 and 20, 1989.

Rosalia Cortez Aguilera does not appear on the payroll preceding the strike. However, another employee who appears on the payroll preceding the strike who knows both Lorena Aguilera and Roselia Cortez Aguilera because she worked in the same crew and because she was their neighbor during the tomato season states that both were present and working during the payroll period before the strike.

Based on the above, I conclude that both Roselia Cortez Aguilera and Lorena Aguilera were strikers who worked in the payroll period preceding the strike. Therefore, I recommend that the challenges to these ballots be overruled.

Elias Castillo Cabrera gave a declaration at the election stating that he had worked at Ace since the middle of July 1989. He presented pay stubs at a follow-up interview showing that he worked at Ace from July 5 through July 22, 1989, and he identified himself as a striker. Based on the foregoing, I conclude that he was a striker who worked in the payroll period preceding the strike and I recommend that the challenge to this ballot be overruled.

Arnoldo Camacho, Francisca Camacho and Victor Camacho all stated that they worked until the start of the strike on July 24, 1989, including in the payroll period ending immediately before the start of the strike. They remained on strike until

after the election. None of the three had submitted their tickets as of the taking of their followup declarations after the election. The Camachos' statements that they worked during the payroll period preceding the start of the strike are corroborated by the declarations of employees who know the three Camachos both at and away from their work because they are related to them. These employees, who appear on the payroll records for the period preceding the strike, state that Arnoldo, Francisca and Victor Camacho were all working in the payroll period preceding the strike. Based on all of the above, I conclude that Arnoldo, Francisca and Victor Camacho were all strikers who worked during the payroll period preceding the strike and I recommend that the challenges to these ballots be overruled.

Lindolfo Hernandez Camacho states that he went out on strike against Ace on July 24, 1989. Although his name does not appear in the payroll records for the period immediately preceding the strike he states that his wife cashed the tickets which they both earned. His wife, Evangelina Camacho, does appear in the payroll records for the period immediately preceding the strike. She also corroborates Mr. Camacho's statement that she cashed both their tickets. Based on the above I conclude that Lindolfo Camacho was a striker who worked during the payroll period preceding the strike and I recommend that the challenge to his vote be overruled.

Laura Espinosa declares that in the week before she went on strike on July 24, 1989, she worked at Ace under the name

of her mother, Rosamaria Espinosa. Rosamaria Espinosa's name appears on the payroll list for the payroll period ending immediately preceding the start of the strike and she states that Laura worked under her name. Additionally, another employee who appears in the payroll preceding the strike and who is personally acquainted with Laura Espinosa because she worked in the same crew prior to the strike and because she was her neighbor during the tomato season, confirms that Laura Espinosa worked the week preceding the strike. Based on this information I recommend that the challenge to this ballot be overruled.

Alicia Maldonado and Jesus Maldonado state that they worked for Ace Tomato until they joined the strike on July 24, 1989. They further state that they worked under the name of Luis Maldonado, their father. Esperanza Maldonado states that she worked at Ace Tomato until July 24, 1989, when she joined the strike.

Luis Maldonado states that his son, Jesus Maldonado and his daughters Alicia Maldonado and Esperanza Valencia Maldonado all worked at Ace until July 24, 1989, when the Maldonado family joined the strike. He further states that he cashed the tickets for his son and his two daughters. Luis Maldonado's name appears in the payroll records for the period immediately preceding the strike. Based on the above I conclude that Jesus Maldonado, Alicia Maldonado and Esperanza Valencia Maldonado were all strikers who worked in the payroll period preceding the strike and I recommend that the challenges to their ballots be overruled.

Jesus Espinosa Naranjo states that he went on strike on July 24, 1989, after having worked and having been paid the week

before the strike under his wife's name and social security number. Teresa R. Naranjo declares that Jesus Espinosa Naranjo worked under her name and social security number. Teresa Naranjo's name appears on the employer's pre-strike payroll records and she corroborates Jesus Naranjo's statement that he worked under her name in the week preceding July 24, 1989. Based on this information I recommend that the challenge to Jesus Espinosa Naranjo's ballot be overruled.

Manuel Zarate Sanchez states he worked for Ace until he went on strike on July 24, 1989. Prior to the strike, he submitted tickets he earned by giving them to his wife, Serafina Zarate. Serafina Zarate also states that she worked for Ace Tomato until she went out on strike on July 24, 1989. Although she was not found on the payroll preceding the strike at Ace, she provided payroll stubs which showed she worked for Ace from July 10, 1989 through July 22, 1989. Based on the above, I recommend that the challenges to these ballots be overruled.

Marin Zarate Sanchez states that he worked until the start of the strike, submitting his tickets through Maria C. Zarate, who confirms her husband's testimony in her declaration. Maria C. Zarate's name appears in the payroll period immediately preceding the strike. Based on the foregoing I recommend that the challenge to this ballot be overruled.

Maria E. Villanueva states that she started with Ace on July 10, 1989, and worked until she joined the strike on July 24, 1989. She provided proof that she was paid on July 12, 1989.

Additionally, two co-workers state that they saw her working for Ace during the payroll period immediately preceding the strike. I recommend that the challenge to her ballot be overruled.

Guillermo Perez Sepulveda states that he worked under his wife's name in the week preceding the strike until he joined the strike on July 24, 1989. He further states that he submitted his tickets for payment after the strike began through his wife, Josefina Luna de Perez. Josefina Luna de Perez corroborates her husband's statement and her name appears on the employer's payroll records for the payroll period immediately preceding the strike. I recommend that the challenge to this vote be overruled.

Elena Sanchez Zarate states that she worked for Ace until July 24, 1989 when she went out on strike. She further states that during this time she worked with her husband Antonio Sanchez Zarate and that she was paid under his name. Antonio Sanchez Zarate corroborates his wife's statement. Additionally, he states that he also joined the strike on July 24, 1989. Although his name was not found in the payroll immediately preceding the strike, he provided pay stubs which show that he worked for Ace from July 7, 1989 through July 22, 1989. Two Ace workers also state that they saw the Zarates working for Ace during the payroll period immediately preceding the strike at Ace. Based on the above, I recommend that the challenges to these two votes be overruled.

Raul Zarate states that he worked for Ace until he joined the strike on July 24, 1989. He further states that during this time he worked under the name of Irma Zarate. Irma Zarate's name appears in the payroll period immediately preceding the strike at Ace. She provided the region with a declaration corroborative of her husband's statement. Additionally, two workers stated that they saw Raul Zarate working for Ace during the payroll period immediately preceding the strike. Therefore, I recommend that the challenge to this ballot be overruled.

Based on the evidence discussed above, I recommend that the challenges to the votes of the workers listed in Appendix C be overruled.

Non-Strikers who Worked During the
Eligibility Period who do not Appear on the
Eligibility List

The workers listed in Appendix D state in declarations under penalty of perjury that they worked during the eligibility period. Some state they worked under someone else's name. Each worker's statement was corroborated by another worker who either stated that each worker listed in Appendix D either worked under the name they state they worked under or that they saw the worker in question working during the eligibility period. As noted previously, it was not uncommon for workers to work under another employee's name. This practice provides a plausible explanation why the names of some Appendix D workers are not listed on the eligibility list. Moreover, each Appendix D worker's statement is corroborated by at least one other worker's statement.

Maria Teresa Alcauter states that she worked under the name of her husband, Hemerico Alcauter, and that they both worked at Ace from the beginning of July 1989 through the date of the election. Hemerico Alcauter's name appears on the eligibility list. Additionally, another employee on the crew who knows her personally corroborates Maria Teresa Alcauter's statement that she worked during the eligibility period. I recommend that the challenge to her ballot be overruled.

Rigoberto Calderon states in a declaration under penalty of perjury that he worked during the week preceding the filing of the election petition. He provided pay stubs which show that he was paid for work performed on July 28, 1989, the first day of the eligibility period, and for August 4, and August 7, 1989. Because Mr. Calderon substantiated his claim that he worked during the eligibility period I recommend that the challenge to his ballot be overruled.

Monico Hernandez Diaz states that he worked during the payroll period ending immediately before the filing of the election petition and that he submitted his tickets through his wife, Maria Luisa Hernandez, whose name was found on the eligibility list. Maria Luisa Hernandez corroborates her husband's declaration. I recommend that the challenge to this ballot be overruled.

Noe Esquivel states that he worked the week preceding the filing of the election petition and that he gave his tickets to Lionel Alcauter, his nephew, for submission. Lionel Alcauter's name is on the payroll list for the week preceding the filing of

the election petition and he voted without challenge. Esquivel's statement is corroborated by another member of the crew who knows Esquivel personally and who voted without challenge. Based on this information, I recommend that the challenge to this ballot be overruled.

Gil Guzman states that he worked during the eligibility period and that Margarito Zamorano submitted Guzman's tickets for payment. Margarito Zamorano's name appears on the eligibility list. Guzman's statement that he worked the week before the filing of the election petition and that he submitted his tickets through Zamorano is corroborated by two other employees who appear on the eligibility list. I recommend that the challenge to this ballot be overruled.

Vicente Rodriguez and Maria Rodriguez, husband and wife, each state under penalty of perjury that they worked during the eligibility payroll period which ended on August 3, 1989. Each of these workers further state that they gave their tickets to Lucia C. Enriquez, Maria Rodriguez' sister, to present for payment, Lucia C. Enriquez appears on the eligibility list. Another worker, a relative of Maria Rodriguez, corroborates the Rodriguez¹ statement that they worked during the eligibility period and that they gave their tickets to Lucia Enriquez to cash. This worker also appears on the eligibility list. Based on this information, I recommend that the challenges to the Rodriguez's ballots be overruled.

Isaul Castro Rubio's name does not appear on the eligibility list. However, he states under penalty of perjury that he worked during the eligibility period. He also provided pay stubs which show that he worked on August 3, 1989, the last day of the eligibility period, and August 4 and August 5, 1989. Because Mr. Rubio substantiated his claim that he worked during the eligibility period I recommend that the challenge to his ballot be overruled.

Teodoro Montes Zamorano states that he worked at Ace during the eligibility period. Another employee who appears on the eligibility list and who voted without challenge declares that Teodoro Montes Zamorano worked each day in the payroll period ending immediately preceding the filing of the election petition. Based on the foregoing, I conclude that Teodoro Montes Zamorano worked during the eligibility period and I recommend that the challenge to this ballot be overruled.

In view of the foregoing discussion I recommend that the challenges to the ballots of the employees listed in Appendix D be overruled.

Employees From Prior Years who
Joined the Strike Before Reporting
to Work in 1989

The workers listed in Appendix E had worked for Ace in prior years. Each of these workers with the exception of Samuel Lopez signed a declaration stating that they had not been recalled to work in 1989 prior to the commencement of a strike on July 24, 1989. They further state that when the strike commenced, they joined the striking workers. None of them with the excep-

tion of Lopez allege that they performed any work for Ace Tomato in 1989.^{1/}

Although under the National Labor Relations Act workers who are on lay off status and who have a reasonable expectation of being recalled are eligible to vote, the Agricultural Labor Relations Board has not adopted this federal standard of voter eligibility. To the contrary, the ALRB has not allowed workers on lay off status to vote even if they have a reasonable expectation of being rehired. Hiji Brothers, (1987) 13 ALRB No. 16. Therefore, pursuant to Hiji I I am recommending that the challenges to the ballots cast by the voters named in Appendix E be sustained.

Recommendation

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

1. Samuel Lopez states in a declaration that he worked for Ace on July 10, 11, and 12, 1989, and then he went to work for another employer. In previous years he had worked for Ace and the other employer at the same time. However, in 1989, because of his hours with the second employer, he anticipated that he would not be able to return to work for Ace until September 1989. Because of this, Samuel Lopez has been included with the other workers who were on lay off status. Additionally, Lopez states that he joined the strike on July 24, 1989.

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 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.

Dated: 11/29/89

Respectfully submitted,

Lawrence Alderete
Lawrence Alderete
Visalia Regional Director
Agricultural Labor Relations Board
711 N. Court Street, Suite A
Visalia, California 93291

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APPENDIX A

1.	AGUAYO	ANGEL
2.	ALVARDO,	ANGELINA ZARATE
3.	BARAJAS	MARIA L.
4.	BAUSTISTA,	MARIA DE JESUS
5.	BAUSTISTA,	MARTHA ELENA BARRACAN
6.	BECERRA,	ANTONIO DUENAS
7.	CAMACHO,	EDILBERTO
8.	CAMACHO,	ESTER
9.	CAMACHO,	EVANGELINA
10.	CAMACHO,	GUILLELMO
11.	CAMACHO,	MARIA LETICIA
12.	CAMACHO,	MARIA D.
13.	CAMACHO,	MARIA G.
14.	CAMACHO,	MARIA L.
15.	CASAREZ,	JESUS AYALA
16.	CHORQ,	ALFREDO RICO
17.	CORTEZ,	ANICETO
18.	DE LA LUZ,	MARIA MARCIEL
19.	ESPINOZA,	ELIAS
20.	ESPINOZA,	LUIS
21.	ESPINOZA,	PATROCINIA A.
22.	ESPINOZA,	ROSA MARIA
23.	ESPINOZA,	MARIA N.
24.	GOMEZ,	FERNANDO
25.	GOMEZ,	JOSE A.
26.	HERNANDEZ,	CARLOS E.
27.	HERNANDEZ,	JAVIER CAMACHO
28.	HERNANDEZ,	HECTOR CAMACHO
29.	HERNANDEZ,	MANUEL
30.	HERNANDEZ,	MARIA L.
31.	HURTADO,	AMALIA
32.	LUNA DE PEREZ,	JOSEFINA
33.	MACIEL,	LETICIA
34.	MACIEL,	MARIA
35.	MALDONADO,	LUIS
36.	MALDONADO,	TERESA
37.	MALDONADO,	JAVIER VALENCIA
38.	MONTES,	MARIA T.
39.	ORDONEZ,	BLANCA
40.	ORDONEZ,	FRANCISCA
41.	ORDONEZ,	SANTOS TORRES
42.	PIMENTEL,	FEDERICO
43.	PIMENTEL,	JOSE H.
44.	PIMENTEL,	MARIA I.
45.	RICO,	JOSE ALFREDO
46.	RODRIGUEZ,	GALDINO
47.	RODRIGUEZ,	JORGE LUIS
48.	SANDOVAL,	EVERARDO
49.	SIERRA,	GUADALUPE

APPENDIX A
Continued
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50.	VALDAVINOS,	SILVERIA
51.	VILLANUEVA,	ENRIQUE
52.	ZAMBRANO,	CARMEN P.
53.	ZAMBRANO,	NORMA P.
54.	ZARATE,	IRMA
55.	ZARATE,	NORMA ALICIA
56.	ZARATE,	CARLOS ALVARADO

APPENDIX B

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|-----------------|----------------------------|
| 1. AGUAYO, | SANTIAGO ROCHA |
| 2. ALCAUTER, | EVA SOTO |
| 3. BALLESTEROS, | MANUEL |
| 4. DIAZ, | AGUSTIN HERNANDEZ |
| 5. GARCIA, | MARIA RAQUEL CASTRO FLORES |
| 6. QUINTERO, | MAURILIO |
| 7. PREMENTAL, | JESUS |
| 8. SAAVEDRA, | VALENTE |

APPENDIX C

1.	AGUILERA,	LORENA
2.	AGUILERA,	ROSELIA CORTEZ
3.	CABRERA,	ELIAS CASILLAS
4.	CAMACHO,	ARNOLDO
5.	CAMACHO,	FRANCISCO
6.	CAMACHO,	LINDOLFO HERNANDEZ
7.	CAMACHO,	VICTOR
8.	ESPINOSA,	LAURA
9.	MALDONADO,	ALICIA
10.	MALDONADO,	ESPERANZA VALENCIA
11.	MALDONADO,	JESUS
12.	NARANJO,	JESUS E.
13.	SANCHEZ,	MANUEL ZARATE
14.	SANCHEZ,	MARIN ZARATE
15.	SEPULVEDA,	GUILLERMO PEREZ
16.	VILLANUEVA,	MARIA E.
17.	ZARATE,	ANTONIO
18.	ZARATE,	ELENA SANCHEZ
19.	ZARATE,	RAUL
20.	ZARATE,	SERAFINA

APPENDIX D

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| 1. | ALCAUTER, | MARIA TERESA |
| 2. | CALDERON, | RIGOBERTO |
| 3. | DIAZ, | MONICO HERNANDEZ |
| 4. | ESQUIVEL, | NOE |
| 5. | GUZMAN, | GIL |
| 6. | RODRIGUEZ, | MARIA |
| 7. | RODRIGUEZ, | VICENTE |
| 8. | RUBIO, | ISAUL CASTRO |
| 9. | ZAMORANO, | TEODORO |

APPENDIX E

1.	DE LA MORA,	TERESA
2.	GUTIERREZ,	HERMILIA
3.	GUTIERREZ,	JOSE LUIS
4.	GUTIERREZ,	MARIA
5.	MORA,	MARIA EUGENIA
6.	MARTIN,	SANDRA
7.	MARTIN,	EDUARDO
8.	MARTIN,	JUAN CARLOS
9.	PIMENTEL,	ROSARIO
10.	PIMENTEL,	VICENTE
11.	PEREZ,	ROBERT SEPULVEDA
12.	SANCHEZ,	IGNACIO
13.	TORRES,	BONIFACIO PEREZ
14.	TORRES, Jr.	BONIFACIO
15.	TORRES,	TERESA
16.	LOPEZ,	SAMUEL