

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

SAN JOAQUIN TOMATO GROWERS,)	
INC./LCL FARMS, INC.,)	
)	Case No. 89-RC-4-VI
Employer,)	
)	
and)	
)	17 ALRB No. 3
UNITED FARM WORKERS)	
OF AMERICA, AFL-CIO,)	
)	
Petitioner.)	
)	

SUPPLEMENTAL DECISION ON CHALLENGED BALLOTS

On August 2, 1989, the United Farm Workers of America, AFL-CIO (UFW or Union) filed a Petition for Certification as the exclusive bargaining representative of the agricultural employees of San Joaquin Tomato Growers, Inc./LCL Farms, Inc. (Employer).

On August 11, 1989, a representation election was conducted by the Agricultural Labor Relations Board (ALRB or Board) among the employees of the Employer in and around San Joaquin County, California. The official Tally of Ballots served upon the parties immediately following the election revealed the following results:

UFW	13
No Union	22
Challenged Ballots	<u>185</u>
Total	220

As the challenged ballots were sufficient in number to affect the outcome of the election, the Visalia Regional Director

proceeded to investigate the challenges in accordance with established Board practice as set forth in Title 8, California Code of Regulations, section 20363(a).

He conducted an investigation into the number of challenged ballots he believed at the time would be necessary to ascertain whether any of the choices on the ballot had received a majority of the valid votes cast. On December 5, 1989, he issued his initial Report on Challenged Ballots in which he made findings concerning 96 of the challenges, recommending that all of them be overruled and the ballots be opened and counted. Following review of the Regional Director's findings and recommendations in light of the Employer's timely filed exceptions to the Report, the Board directed the Regional Director to hold one of the ballots in abeyance, to sustain the challenges to seven additional ballots, to open and count 88 of the ballots, and to serve on the parties a revised official Tally of Ballots. (San Joaquin Tomato Growers, Inc./LCL Farms, Inc. (1990) 16 ALRB No. 10.)

Thereafter, on September 19, 1990, in accordance with the Board's Decision at 16 ALRB No. 10, the Regional Director opened and counted the 88 ballots for which the Board had overruled challenges. One of the ballots was a No Union vote while the balance had been cast for the UFW. The revised Tally of Ballots revealed the following results:

UFW	100
No Union.	23
Unresolved Challenged Ballots	<u>90</u>
Total	213

Since unresolved ballots still were outcome determinative, the Regional Director proceeded to investigate additional challenges. In the interest of conserving agency resources, the Board, in its Decision at 16 ALRB No. 10, authorized the Regional Director to exercise his discretion and to investigate as many challenged ballots as were necessary to ascertain whether any of the choices on the ballot had received a majority vote. Accordingly, the Regional Director identified a group of 25 challenged ballots and, following an investigation into those ballots, issued a Supplemental Report in which he found that 15 had been cast by persons not eligible to vote in the election and recommended that the challenges to the other 10 ballots be overruled.

Thereafter, the Employer timely filed exceptions to the Supplemental Report. The Board has reviewed the attached Supplemental Report in light of the exceptions and briefs of the Employer and has decided to affirm the Regional Director's findings and recommendations.

Title 8, California Code of Regulations, section 20363(b) , governs the adequacy of exceptions to Regional Director Reports on Challenged Ballots. In relevant part, that section provides that the exceptions "shall be accompanied by . . . declarations and other documentary evidence in support of the exceptions." Upon the filing of such exceptions in accordance with section 20363(b) , the Board determines whether they are sufficient to overturn the Regional Director's findings or whether they pose a material factual dispute which can be resolved only by means of further investigation or hearing in which event the

Report may be remanded in whole or in part to the Regional Director for new findings and recommendations. (McCoy's Poultry Services, Inc. (1977) 3 ALRB No. 61.)

The first question is whether the Employer has complied with the requirements of the controlling regulation. Consistent with their respective positions throughout these proceedings, San Joaquin Tomato Growers, Inc. and LCL Farms, Inc. have independently challenged the election, filing separate objections to the election and exceptions to the Regional Director's initial and present Report on Challenged Ballots. Both contend, inter alia, that San Joaquin Tomato Growers is not the employer of the agricultural employees in the designated unit while apparently conceding LCL's role in that regard. They also question whether any of the challenged voters who claimed voter eligibility based on their economic striker status were participants in a bona fide strike and believe the Regional Director should have convened a hearing in order to resolve that question. In the alternative, they believe the present inquiry is premature in light of pending election objections which include an allegation of pre-strike violence sufficient to warrant the setting aside of the election. The parties incorporate by reference all of the pre-election arguments and evidence, i. e. , statements allegedly made to the Regional Director under penalty of perjury, in regard to the employer question.^{1/}

^{1/}San Joaquin has attached a declaration executed on August 8, 1989 by San Joaquin general manager Sam Loduca describing San Joaquin's operations, but in which there is no reference to the Regional Director's findings on challenged ballots.

In broad, generalized terms, both San Joaquin and LCL argue that by failing to resolve the employer issue, and absent a hearing as to whether the challenged voters are entitled to claim striker status, the Regional Director's report is predicated only upon what they have characterized as essentially a private hearing in which he has based his findings on "off the record discussions with named and numerous unnamed persons without the slightest evidentiary or procedural safeguards."

The Employer has proffered no evidence in support of its exceptions and thus submits nothing to contradict or detract from the Regional Director's findings. Essentially, the Employer has submitted only a reiteration of prior arguments which the Board addressed and resolved in its initial Decision on Challenged Ballots at 16 ALRB No. 10. Thus, the Board is left with only conclusionary statements which, in the absence of declaratory support, are insufficient either to overturn the Regional Director's recommendations or to warrant further investigation or hearing. (See generally Miranda Mushroom Farms, Inc. (1980) 6 ALRB No. 22; Mayfair Packing Company (1983) 9 ALRB No. 66; Sequoia Orange Co. (1987) 13 ALRB No. 9 .)

As the Regional Director's Supplemental Report on Challenged Ballots is affirmed in its entirety, the 15 challenged ballots of the ineligible voters are deducted from the prior tally, resulting in the final official Tally of Ballots which reads as follows:

UFW	100
No Union	23
Unresolved Challenged Ballots	65
Total	198

Based on the foregoing, the requisite majority showing would be comprised of at least 100 votes for any one of the ballot choices. Since the UFW has achieved that figure, the challenged ballot portion of this proceeding may be closed and the matter proceed to pending objections to the election.

DATED: February 27, 1991

BRUCE J. JANIGIAN, Chairman^{2/}

IVONNE RAMOS RICHARDSON, Member

JOSEPH C. SHELL, Member

^{2/}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. Members Ellis and Nielsen did not participate in this proceeding.

CASE SUMMARY

San Joaquin Tomato Growers,
Inc./LCL Farms, Inc.
(UFW)

17 ALRB No. 3
89-RC-4-VI

On August 11, 1989, the Agricultural Labor Relations Board (ALRB or Board) held a representation election among the agricultural employees of San Joaquin Tomato Growers, Inc./LCL Farms, Inc. at polling sites in French Camp and Crows Landing, California.

The initial Tally of Ballots revealed 13 votes for the Petitioner, the United Farm Workers of America, AFL-CIO (UFW or Union), 22 votes for No Union, and 185 Challenged Ballots. Since the latter were sufficient in number to determine the outcome of the election, the Board's Regional Director immediately investigated a portion of those ballots and issued an initial Report on Challenged Ballots in which he recommended that 96 challenges be overruled and those ballots be opened and counted. After reviewing the Report in light of the Employer's exceptions, the Board issued a Decision in which it directed that one ballot be held in abeyance, that the challenges to 7 ballots be sustained, that the challenges to the remaining 88 ballots be overruled, those ballots be opened and counted, and a revised Tally of Ballots issue. (San Joaquin Tomato Growers, Inc./LCL Farms, Inc. (1990) 16 ALRB No. 10.) The revised Tally revealed that one of the ballots was a No Union vote while the remaining 87 ballots had been cast for the UFW. Since no ballot choice had yet been accorded a majority, the Regional Director investigated another 25 ballots and submitted a Supplemental Report in which he recommended that the challenges to 15 of them be sustained but that 10 ballots be opened and counted.

Upon review of the Supplemental Report in light of Employer exceptions, the Board affirmed the Regional Director's Report in its entirety. From the instant Decision, it is apparent that after the 15 non-valid ballots are deducted from the remaining ballots cast (including the 65 still unresolved challenged ballots), the UFW has achieved a majority vote without the necessity of opening and counting the 10 ballots for which challenges are overruled.

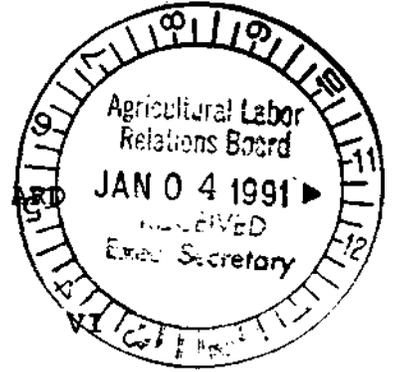
Having thus resolved a sufficient number of challenged ballots to determine the outcome of the election, the Board has directed that the matter proceed to the election objections phase of this representation proceeding for resolution of the Employer's pending objections to the election itself.

* * *

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



SAN JOAQUIN TOMATO GROWERS,)
)
)
 Employer ,)
)
 and)
)
 UNITED FARM OF WORKERS)
 OFAMERICA, AFL-CIO)
)
 Petitioner.)
)

Case No. 89-RC-4-
 REGIONAL DIRECTOR'S
 SUPPLEMENTAL 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 conducted for the agricultural employees of San Joaquin. 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 20363(a)

conducted an investigation of the eligibility of certain challenged voters, and on December 5, 1989, issued a report recommending that the challenges to 96 voters be overruled and that their ballots be counted.

On July 25, 1990, the Board issued its decision in San Joaquin Tomato Growers, Inc./LCL Farms, Inc. (1990) 16 ALRB No. 10, adopting the undersigned's recommendation to the extent of overruling 88 of the challenged ballots. The Board sustained the challenges of (7) challenged voters who had been on strike but returned to work before the election, placed one challenge in abeyance and remanded the case to the undersigned with instructions to open and count the 88 challenged ballots as to which the challenges had been overruled.

The Employer filed a Request for Reconsideration, urging the Board to reverse its decision in 16 ALRB No. 10. On September 11, 1990, the Board, through the Executive Secretary's Office, denied the Request for Reconsideration, and directed that the tally proceed.

On September 19, 1990, in accordance with the Board's direction, the undersigned counted the ballots as to which challenges had been overruled in 16 ALRB No. 10. The revised tally issued following the count of the overruled challenged ballots showed the following results:

UFW.	100
No Union	23
Unresolved Challenges	90
Total Including Unresolved Challenged Ballots	213
Void Ballots.	0

Consistent with the Board's direction to proceed to investigate as many of the remaining challenged ballots as necessary to resolve the election, the undersigned conducted an investigation of the following challenged ballots, and hereby issues this Supplemental Report and Recommendations.

Group I: Voters Whose Names Were Found on the
Eligibility List and Payroll Records
Furnished Following the Remand

Federico Ledesma and Federico Fuentes were both challenged by the Board agents as not being on the eligibility list. Both gave declarations at the time they voted stating that they had worked during the payroll period ending immediately preceding the filing of the petition. Prior to the supplemental investigation pursuant to the Board's instructions in 16 ALRB No. 10, the Employer had provided its records underlying its eligibility list. Inspection of these records showed that Federico Ledesma and Federico Fuentes had worked during the payroll period preceding the filing of the petition. I therefore conclude that Federico Ledesma and Federico Fuentes worked during the eligibility period.

During the supplemental investigation following the Board's Order directing further investigation of the remaining challenged ballots, the Employer provided copies of the basic pay records maintained by Jesse G. Reyes, its labor contractor, for the period of the strike. The records, referred to as punch cards, are cards in which holes are punched through numbers printed on the cards to show the number of buckets turned in by each employee. Each punch card has the name of one employee

whose production record is maintained on that punch card.

Inspection of the punch cards provided for the eligibility period showed the names of the following challenged voters who were not included in the eligibility list: Ubaldo Barriga Reyes, Sergio Canela, Avelino Martinez, Ramon Cano Magallon, Alfredo Ricardo Cortez Hernandez and Manuel Arauyo Perez. Each voted subject to challenge by Board agents because of the absence of their names from the eligibility list. Each was recognized by at least one observer. Each of these voters gave a declaration at the election stating that he had worked during the week of July 23 through 29, 1989, the eligibility period. Because the voting list was a handwritten document delivered to the Board agents at midnight the evening before the election, the omission of several names from the list is not surprising or suspicious.

The declarations of Ubaldo Barrigo Reyes, Sergio Canela, Avelino Martinez, Ramon Cano Magallon, Alfredo Ricardo Cortez Hernandez and Manuel Arauyo Perez are supported and corroborated by the Employer's payroll records. Both show that these employees worked during the eligibility period. I therefore conclude that they were employed during the eligibility period.

Based on the support that the Employer's payroll records gives to the declarations of these employees, I have concluded that they were employed during the payroll period preceding the filing of the petition. I therefore further conclude that they are eligible voters notwithstanding their omission from the eligibility list. I therefore recommend that the challenges

to the ballots of Federico Ledesma, Federico Fuentes, Ubaldo Barrigo Reyes, Sergio Canela, Avelina Martinez, Ramon Cano Magallon, Alfredo Ricardo Cortez Hernandez and Manual Arauyo Perez be overruled and that their ballots be opened and counted.

Group II: Voters Whose Names Were Found on
the Eligibility List Following Further
Examination

The ballots of Yolanda Jimenez Godoy and Cecilia T. Lugueroa were challenged by Board agents because their names could not be found on the eligibility list. Further inspection of the eligibility list shows that they were listed under a slight variation of the name they voted under. Each gave a declaration at the time of voting stating that they worked during the eligibility period.

Yolanda Jimenez Godoy was found on the eligibility list as Yolanda Jimenez. The San Joaquin punch cards for the week of July 23-29 include a Yolanda Jimenez de Godoy whose social security number is the same as that given in the election day declaration.

Based on the foregoing, I conclude that Yolanda Jimenez Godoy is the voter identified as Yolanda Jimenez on the eligibility list.

Cecilia T. Lugueroa did not appear on the eligibility list, but a Cecilia Lua was listed. Inspection of the punch cards underlying the Cecilia Lua entry in the payroll used for

the eligibility shows a punch card for an employee identified as Cecilia Toscana Lua and that the same social security numbers were given by Cecilia Lugueroa at the election as that listed from the eligibility period. Based on the foregoing, the undersigned concludes that Cecilia T. Lugueroa is the same individual named on the eligibility list as Cecilia Lua.

For the reasons stated above I have concluded that Yolanda Jimenez Godoy and Cecilia T. Lugueroa all appeared on the eligibility list under variations of their names. I find that each was eligible to vote in the election, and accordingly, I recommend that the challenges to their ballots be overruled and that their ballots be opened and counted.

Group III: Challenged Voters Not on the
Eligibility List Who State That They Worked During
the Eligibility Period Whose Eligibility
Cannot Otherwise be Established

The Employer, through Jesse G. Reyes, employed Juvenal Alvares, Jose Manuel Andrade, Manuel Cisneros, Luis Garcia, Rafael Andrade Garcia, Manuel Salazar Hernandez, Jesus Obispo Ocampo, Arturo Cerbantez Ramirez, Olegario Silva, Jaime Mora Zamora, Jose Martinez, Miguel Angel Murillo Mora, and Francisco Martinez Lopez. All voted subject to Board agent challenge for not being on the eligibility list. Each gave a delcaration on the day of the election stating they worked at San Joaquin during the eligibility period.

The records provided from labor contractor Jesse G. Reyes establish that each of the individuals discussed in Group III had an established pattern of working under his own name prior to the eligibility period. The payroll sheets furnished

by the Employer for labor contractor Jesse G. Reyes shows that each of these challenged voters worked under his own name in the payroll period ending July 21, 1989, the last payroll period preceding the eligibility period. Examination of the payroll sheets and punch cards for the eligibility period show that none of them worked for San Joaquin, either directly or through Jesse G. Reyes during the July 22 to 29, 1989, payroll period, the period preceding the filing of the petition. Review of the names of those employed during the payroll period shows no use of the same social security number and only one common address between any individual who worked the week prior to and the week of the eligibility period. The common address was given by Jesus Obispo Ocampo who worked the period ending July 21, and those who worked the preceding week and by Pedro Perez who was employed during the eligibility period. The address is one used by other San Joaquin employees working during late July and early August, 1989. While the listing of addresses and social security numbers on the eligibility list by the Employer was not complete, an address or social security number was provided for most employees on the eligibility list. As discussed more fully below, the records and the eligibility list show an almost complete turnover of Reyes' employees at San Joaquin from the week ending July 22 to the week ending July 29.

In view of the strong inference arising from the Employer's records that, contrary to their declarations, these voters did not work during the eligibility period, the Region initiated efforts to contact them.

Board agents visited each address given by the named individuals in this group of challenged voters. Only Sergio Bernabe Martinez and Francisco Martinez Lopez could be located. Each stated that he had worked at San Joaquin preceding the election, but neither could recall what week or weeks they worked, nor were they able to provide any pay stubs or other records to establish when in 1989 they worked for San Joaquin.

Based on careful review of the payroll sheets and the punch cards, the backup raw payroll documentation for labor contractor Jesse G. Reyes, I conclude that the documentary evidence available establishes that none of the individuals named in this group was employed during the eligibility period. Efforts to contact them were unsuccessful, and no corroboration of their claims was available from other sources was disclosed by the investigation.

The Board has endorsed sustaining challenges to ballots solely on the basis of the absence of entries reflecting employment of the disputed voter in employer's payroll records where the Region was unable to locate the challenged voter. Karahadian & Sons, Inc. (1979) 5 ALRB No. 19. The records of San Joaquin and contractor Reyes show more than a mere absence of the challenged voters. The records demonstrate that when employed, these challenged voters worked under their own names, and that their names were not on the payroll during the eligibility period.

In these circumstances, the absence of the 13 challenged voters in this group did not result from accidental

omission from the list but from the reality of a complete turnover of Reyes¹ employees. More significantly, the records show an almost complete turnover in the Reyes crew at San Joaquin from the period ending July 21, 1989, the week before the eligibility period, to the week of the eligibility period, the week ending July 29. Not only these employees but virtually the entire Reyes crew that had worked the week ending July 21 was replaced by a different Reyes crew that worked during the payroll period ending July 29. 157 employees are shown on the Reyes payroll for the period ending July 21, 1989. Only three of the 157 employees who worked for Reyes at San Joaquin in the week ending July 21, worked among the 79 Reyes employees employed during the week ending July 29. I conclude that the 13 challenged voters in this group who had been working under their own names are omitted from the eligibility period payroll because they, like 98 percent of the Reyes crew in the week ending July 21, did not return to work the following week.

In the face of the strong showing made in the records that these challenged votes were not employed at San Joaquin during the eligibility period, and the lack of success of the Region's efforts to contact the voters to obtain some explanation for the statements in their election day declarations that they worked during the payroll period, the undersigned concludes that these ballots should be resolved based on the Employer's records, particularly where, as here, the records persuasively and convincingly show that these employees did not work during the eligibility period.

The undersigned concludes that Juvenal Alvarez, Jose Manuel Andrade, Manuel Cisneros, Luis Garcia, Rafael Andrade Garcia, Manuel Salazar Hernandez, Jesus Obispo Ocampo, Arturo Cerbantez Ramirez, Olegario Silva/ Jaime Mora Zamora, Jose Martinez, Miguel Angel Mora, and Francisco Martinez Lopez were not employed during the eligibility period, nor were they strikers, and are therefore ineligible to vote in the election conducted August 11, 1989. Had they been engaged in a strike as of the date of the election, they could have voted, as long as they had not returned to work. Since each of the 13 named challenged voters was working on the day of the election, it is clear that they would not be eligible to vote in the election if they were relying on striker status during the eligibility payroll period. Strikers who abandoned the strike and return to work are ineligible to vote. San Joaquin Tomato, supra.

I therefore conclude that these 13 voters were ineligible to vote and recommend that the challenges to their ballots be sustained, and that their ballots remain sealed.

Group IV: Voters Who Declared Themselves to Be Strikers but Who Were Not Employed in the Pay Period Preceding the Strike.

Carlos Lopez Rangel and Santiago Naranjo E. Jr. , voted subject to challenge because their names were not on the list in the August 11, 1989 election. Each declared that he was on strike at the time of the election.

Carlos Lopez Rangel stated in the declaration given in the investigation following the Board's order in this case that

he had not gone on strike and had not worked for San Joaquin since June, 1989.

Santiago Naranjo E. Jr. stated the investigation following the Board's order that he had not worked the week prior to the strike. A review of the Employer's payroll records supports his follow up declaration that he stopped working before the strike.

To be eligible to vote as a striker, an employee must have been working up to the start of the strike. The striker's absence from the payroll preceding the filing of the petition for election is then attributable to the strike, and the striker's ballot can be counted. However, where a challenged voter supporting the strike has not worked up to the start of the strike, his absence from the payroll preceding the election is not explained by his participation in the strike, but should be treated like an employee on layoff during the eligibility period and therefore, not an eligible voter. In Ace Tomato, supra, the Board found that individuals who supported the strike in that case but who had not worked in the payroll period preceding the start of the strike were not eligible to vote as strikers, and sustained the challenges to their ballots.

In the undersigned's view, the two challenged voters in this group, under the same analysis, are not eligible to vote. Their absence from the payroll preceding the filing of the petition is not solely attributable to their participation in the strike. They had already left the Employer's payroll for other

reasons prior to the start of the strike. The investigation disclosed no evidence that the reason for absence was for any approved leave of absence or an injured or disabled status or that any place was being held for any of these voters, that would excuse them from being on the payroll preceding the filing of the petition. The undersigned therefore concludes that two challenged voters discussed in this section of this report, Carlos Lopez Rangel and Santiago Naranjo E . , were not eligible to vote as economic strikers, and therefore further recommends that the challenges to their ballots be sustained and that their ballots remain sealed.

Recommendation

It is hereby recommended that the challenges to the ballots of Federico Ledesma, Federico Fuentes, Ubaldo Barrigo Reyes, Sergio Canela, Avelina Martinez, Ramon Cano Magallon, Alfredo Ricardo Cortez Hernandez, Manuel Aroyo Perez, Yolanda Jimenez Godoy, and Cecilia T. Lugueroa, 10 voters in all, be overruled and their ballots counted, and that the challenges to the ballots of Juvenal Alvares, Jose Manuel Andrade, Manuel Cisneros, Luis Garcia, Rafael Andrade Garcia, Manuel Salazar Hernandez, Jesus Obispo Ocampo, Arturo Cerbantez Ramirez, Olegario Silva, Jaime Mora Zamora, Jose Martinez, Miguel Angel Murillo Mora, Francisco Martinez Lopez, Carlos Lopez Rangel and Santiago Naranjo E . , 15 voters in all, be sustained and that their ballots remain sealed. It is further recommended that the remaining challenged ballots be placed in abeyance pending further investigation if they are outcome determinative following

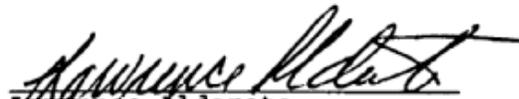
the Board's disposition of the recommendations in this Supplemental Report.

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 certified mail postmarked within five (5) days following service upon the parties of this Regional Director's Supplemental 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: 12/27/90

Respectfully submitted,



Lawrence Alderete
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