

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

SILVER TERRACE NURSERIES,)	
INC.,)	
Employer,)	Case No. 93-RC-2-SAL
)	
and)	19 ALRB No. 5
)	
UNITED FARM WORKERS OF)	(May 24, 1993)
AMERICA, AFL-CIO,)	
)	
Petitioner.)	

DECISION AFFIRMING DISMISSAL OF ELECTION OBJECTIONS

On March 11, 1993, Petitioner United Farm Workers of America, AFL-CIO (Petitioner or UFW) filed a petition for certification seeking to represent all agricultural employees of Silver Terrace Nurseries, Inc. (Employer). An election was conducted on March 18, 1993. The tally of ballots issued after the closing of the polls on March 18, 1993, showed that all 78 ballots cast had been challenged. The investigation of these challenged ballots is now pending before the Board's Salinas Regional Director.

Section 20365(a)(1) of the Board's Regulations (Cal. Code Regs., tit. 8, sec. 20365 (a) (1)) requires that election objections be filed with the Board's Executive Secretary five days after the close of the polls.¹

¹ All subsequent citations to the Board's regulations herein will appear as "section" followed by the appropriate section number.

On the deadline for filing, March 25, 1993, the Employer's counsel faxed a copy of the Employer's objections to a field examiner in the Salinas regional office, and mailed her a copy by first class mail. Section 20365 requires that objection petitions be filed with the Executive Secretary, who is responsible for their initial disposition, unlike the objections procedures of the National Labor Relations Board (NLRB), which provide that objections shall be filed with the regional offices, which are given the authority to process and investigate them. Section 20365 requires a detailed statement of fact and law relied on or declarations in support of the petition. Section 20365 also requires that objections be served on the region and any parties to the election. Section 20168 allows service by facsimile if the other parties are served simultaneously by the same or another expedited means. Section 20168 also requires that service by fax be followed as soon as possible by filing in the normal manner provided in section 20166.

The Employer failed to comply with the above-cited regulations with its March 25 fax and mailing because it (1) sent them to a field examiner in the Salinas Regional Office, not to the Executive Secretary in Sacramento; (2) did not send the objections by registered or certified mail; (3) served no other party; and (4) attached no declaratory or documentary support or statement of facts and law.

The Employer next filed election objections on

March 30, 1993, employing a facsimile transmission to the Executive Secretary, dated March 23, 1993. On March 31, 1993, the Executive Secretary received by mail an original of the Employer's Objections Petition. No supporting declaration or statement of facts and law was attached. The Objections Petition was dated March 23, but the envelope was postmarked March 30, 1993, five days after the filing deadline.

The Objections Petition the Employer attempted to file with the Executive Secretary by facsimile transmission on March 30 was not transmitted to the other parties. The original Objections Petition mailed on March 30 was not served on the UFW or the Regional Director. Neither were copies provided the Executive Secretary* although Section 20365(c) of the Board's regulations requires six copies.

By order dated April 1, 1993, the Executive Secretary dismissed the Employer's objections as being untimely filed, improperly served and lacking in declaratory support.

On April 8, 1993, the Employer filed its Request for Review of the Executive Secretary's dismissal of its objections. The Employer abandoned three of its objections (1, 4 and 5). The Employer continues to press objection 2, that the Regional Director failed to properly determine the geographical scope of the unit; objection 3, that all of its employees are subject to the jurisdiction of the NLRB; and objection 6, that the Board's election should have been delayed pending the outcome of proceedings pursuant to the petition under Section 9(c)(1)(B) of

the National Labor Relations Act (RM petition) the Employer filed with NLRB Region 20, which it contends could preempt our jurisdiction.

The Request for Review is supported by the declaration of Employer's counsel. Counsel states that the Employer became aware that some of its employees had become unhappy with the OFW, and might request that the UFW disclaim interest in representing the employees. The Employer only became aware on the last day of the objections filing period that the employees were not going to attempt to induce the UFW to disclaim. The declaration states that the temporary secretary assisting Employer's counsel sent the objections to the Regional Office and directed them to the Board agent who had handled the election. The declaration also asserts that Employer's counsel gave the Board agent in charge of the election a copy of the RM petition that the Employer had filed with NLRB.

The Employer contends that its failure to timely file and serve the objections in compliance with the Board's regulations is excusable clerical error. The Employer further contends that its objections, particularly as to its contention that the employees are subject to NLRB jurisdiction, are jurisdictional in nature and therefore not waived by their untimely filing.

The Board's procedure of Executive Secretary screening of objections based on declarations filed with the objections by the objecting party has been specifically approved by the

California Supreme Court. (J.R. Norton v. ALRB (1979) 26 Cal.3d 1 [160 Cal.Rptr. 710].) The legislature recognized that the need to expeditiously process representation cases is greater in the agricultural context than in the commercial context in which the NLRB has operated, because of the transient character of the work in agriculture in the short time frames provided for conducting elections.

No published decision of the ALRB has dealt with the issue of timeliness of filing objections. In view of the importance of the timeliness and other procedural requirements of the Board's election process, we take this opportunity to address this issue in a form that will be generally available to parties appearing before us.

As noted above, section 20365(a) requires that objections be filed within five days of the close of the polls in the election, and prohibits any extension of time for any cause. Under section 20170(a), objections are deemed filed the day they are physically received by the Executive Secretary before expiration of the five day period, or the day they are deposited in registered or certified mail or transmitted by facsimile or other expedited communications medium as provided in section 20168. Section 20170(c) requires that documents filed with the Board must be received by 5 p.m. on the last day of the time period provided, unless mailed by registered or certified mail postmarked by that last day. Section 20170(b) provides that the date of the event triggering the filing period

does not count toward the filing period, and that where the filing period is less than seven days, Saturdays, Sundays and legal holidays do not count.

The NLRB's present regulations governing the filing of objections are similar, requiring that the objections be deposited in the mail before the expiration of a seven day filing period. The NLRB regulation differs from ours in that it requires that the objections be placed in the mail on the day before the expiration of the objection period, and that the postmark show that it was deposited in the mail in compliance with the regulation.

The regulations of both the ALRB and the NLRB define filing as putting the objections in the mail, with the date of the postmark controlling. Physical receipt by the ALRB's Executive Secretary is not required to occur within the five day period unless the objections are personally served.

Under a 1986 revision of the NLRB's regulations, which remained in effect until 1992, the NLRB's objections period had been extended to seven days, but the objections were required to be physically received by the expiration of the seven day period, regardless of the cause or good faith efforts at filing and service.² Under the 1986-1992 rule, the NLRB, in Drum Lithographers (1987) 287 NLRB 22 [127 LRRM 1223], refused

² Unlike the ALRB, where objections must be filed with the Board's Executive Secretary, NLRB objections must be filed in the regional office that conducted the election being objected to.

to accept objections that had been postmarked in the same city in which they were to be filed two days before the end of the objections filing period, because they were not received before the end of the objections period.

In John I. Haas (1991) 301 NLRB 300 [136 LRRM 1121], the NLRB announced its present rule that objections would be accepted if they were deposited in the mail and postmarked the day before the objections period expired. In Haas, the NLRB overruled Drum Lithographers, and announced its intention to revise its regulations to include objections among the documents subject to the postmark rule for timely filing.

We have followed a postmark rule as stated in section 20365 (b). Our rule differs from the NLRB rule under Haas in that the objections may be postmarked on the last day of the objections period, rather than on the next to last day, and in allowing a five day period, plus any intervening Saturdays, Sundays and holidays, rather than seven days as provided in the NLRB's regulations. We have consistently adhered to the postmark rule.

Here, the Employer seeks to be excused for attempting to file its objections five days after the end of the filing period, with a filing that in many other respects also fails to comply with the Board's regulations. The excuses offered are that its counsel was assisted by a temporary secretary who was not familiar with the proper procedures, and that it held up filing because of what turned out to be an illusory hope that

the UFW would disclaim interest in representing the employees.

In our view, the excuses offered cannot justify a failure to comply with our regulations requiring physical receipt or postmarking by the end of the objections period. The Employer cannot contend that it acted in good faith to timely file the objections in compliance with the regulations. The Employer here substantially and repeatedly disregarded the Board's regulations in the same way that led the NLRB to refuse to accept late filed objections in Peoples Natural Gas Company (1971) 191 NLRB 272 [77 LRRM 1463].³

The Employer argues that it made an attempt to file the objections by transmitting them to the Regional Office before the expiration of the objections period. The Regional Office has no authority to deal with objections. Even if the Region had transmitted them to the Executive Secretary, the requirement of service to other parties would have remained unsatisfied.

Furthermore, even if the Regional Office had transmitted the Employer's objections to the Executive Secretary, he

³ Prior to 1986, the NLRB on occasion accepted objections that were received after the filing period where good faith efforts to transmit them before the end of the filing period in a manner allowed by the regulations were shown. (Bechtel Incorporated (1975) 218 NLRB 827 [89 LRRM 1463].) The NLRB's 1986 and 1992 revisions of its objections filing regulations appear to have been for the purpose of substituting the more objective physical receipt or postmark rules for a liberal good faith rule that would invite disputes over last minute filings of objections in the face of time constraints deliberately kept short to promote prompt resolution of representation cases.

would have been unable -to process them, because the Employer provided no declaratory or documentary support as required by section 20365 of the Regulations.

The Employer argues that even if its objections are overruled for procedural reasons, they present jurisdictional issues that can be raised at any stage of the proceedings. Objection 2 contends that the South San Francisco location should not be included in the bargaining unit, apparently at least in part because it is subject to the NLRB's jurisdiction, even if the Pescadero location is not. Objection 3 contends that the Employer is non-agricultural, and subject to the NLRB's jurisdiction. Objection 6 contends that the NLRB's jurisdiction preempts the ALRB's jurisdiction.

Because all ballots were challenged, the inclusion of the South San Francisco location, along with the jurisdictional issues, can be addressed in the challenged ballot investigation and brought before the Board by exceptions to the Regional Director's challenged ballot report, should that be adverse to the Employer. The state-wide unit directed by the Regional Director is presumptively appropriate since section 1156.2 of the ALRA refers to such units as the preferred unit under the ALRA.

The Board will not delay its election procedures to allow the Employer to present evidence that should have been presented during the objections filing period. The legislature consciously designed the Board's election procedures to be more

expedited than those of the NLRB because of conditions of employment in agriculture.

We will, therefore, in agreement with the Executive Secretary's determination, dismiss the Employer's Election Objection Petition in its entirety.

DATED: May 24, 1993

BRUCE J. JANIGIAN, Chairman⁴

IVONNE RAMOS RICHARDSON, Member

LINDA A. FRICK, Member

⁴ The signature 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.

CASE SUMMARY

Silver Terrace Nurseries, Inc.
United Farm Workers)

19 ALRB No. 5
Case No. 93-RC-2-SAL

Background

The Employer operates floral nurseries with locations in Pescadero and South San Francisco, California. On March 11, 1993, the United Farm Workers filed a petition to represent the employees at both locations, and on March 18, 1993, the Board's Salinas Regional Office conducted an election among the employees at both locations. The Board's regulations require that election objections be filed with the Board's Executive Secretary in Sacramento by the fifth day after the election, not counting any intervening Saturdays, Sundays, and holidays, and that service may be accomplished by physical delivery, or by certified or registered by the last day of the objections filing period. If mail is used, compliance with the filing requirement is established by postmark. Objections may be filed by fax, provided that special conditions spelled out in the Board's regulations are complied with. Objections filed by any of these means must be supported by simultaneously filed declarations or documents, all other parties must be served, and specified numbers of copies must be filed with the Executive Secretary.

In this case, objections were due to be filed with the Board's Executive Secretary by March 25, 1993. No objections were received by the Executive Secretary until March 30, when a faxed set of objections and a cover letter were received, followed by a mailed original of these documents with a postmark showing March 30. No declaratory documentary support was filed with the objections, and no other parties were served.

The Employer had also faxed a copy of its objections to the Regional Office on March 25, but without declaratory or documentary support, and without service on the other parties or compliance with the requirements for service by fax.

The Executive Secretary dismissed the objections on April 1, 1993, because they were untimely filed, without declaratory support, and not in compliance with the service and filing requirements of the Board's regulations.

The Employer's request for review contended that the failure to comply with the filing and service requirements was excusable clerical error, and that the issues raised by the objections went primarily to jurisdictional issues, which can be raised at any point in the proceedings.

Board Decision

The Board affirmed the Executive Secretary's dismissal of the objections. The Board applied the postmark rule set forth in its regulations to determine timely filing of the objections, noting that it has consistently followed the postmark rule. The Board noted that the NLRB has recently adopted the postmark rule to determine timeliness of filing of objections. The Board found that the excuses offered by the Employer for non-compliance inadequate, particularly in view of the repeated failure to comply with the regulations in a way that would have prevented the Executive Secretary from processing the objections in a timely way, even if the late filing had been accepted.

The Board noted that the copy of the objections that had been faxed to the Regional Office within the objections filing period failed to comply with the Board's regulation allowing facsimile filing of documents, and that the copy of the objections filed with the Region had no declaratory or documentary support and was not served on any other party. The Board declined to treat this as compliance with the filing requirements for objections, particularly since the regional offices have no authority or responsibility to deal with objections under the Board's regulations.

The Board noted that to the extent that the Employer wished to raise jurisdictional issues, it could still do so in the challenged ballot procedure, since all voters had been challenged, and the investigation was ongoing.

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