STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

COCOPAH NURSERIES, INC.,	)	Case No. 01-RC-1-EC(R)
	)	
Employer,	)	27 ALRB No. 3
	)	(June 22, 2001)
and	)	
	)	
UNITED FARM WORKERS OF AMERICA, AFL-CIO,	)	
	)	
Petitioner.	)	

DECISION AND ORDER ON CHALLENGED BALLOTS

On March 20, 2001,[1] the United Farm Workers of America, AFL-CIO (UFW) filed a petition for certification seeking to represent a bargaining unit of all of the agricultural employees of Cocopah Nurseries, Inc. (Employer) in the State of California. An election was conducted on March 27, with the initial tally of ballots showing 42 votes for the UFW, 47 votes for No Union, and 13 Unresolved Challenged Ballots. On May 22, the El Centro Regional Director (RD) issued the attached Report on Challenged Ballots, in which he recommended that three of the challenges be sustained, nine of the challenges be overruled and the ballots counted, and one challenge be held in abeyance pending the resolution of a related unfair labor practice charge. The UFW timely filed exceptions to the RD's report, taking issue with the resolution of seven of the challenges.

[1] All dates refer to calendar year 2001, unless otherwise indicated.

The Agricultural Labor Relations Board (ALRB or Board) has reviewed the Report on Challenged Ballots in light of the exceptions filed by the UFW and affirms in part and reverses in part the RD's recommendations, as discussed below.[2]

Jose L. Navarro

Mr. Navarro was challenged by a Board agent because his name was not on the eligibility list. He signed a challenged ballot declaration indicating that he is disabled and that he last worked for the Employer on March 8, which was prior to the March 11-17 eligibility period. Based on evidence received from both the Employer and Mr. Navarro, the RD confirmed that Mr. Navarro had not worked for the Employer since March 8. The RD therefore concluded that Mr. Navarro was not eligible to vote and sustained the challenge.

The UFW asserts that the sustaining of this challenge discriminates against Mr. Navarro due to his disability and that his ballot should be held in abeyance until the lawfulness of his discharge is resolved, as the RD recommended with regard to Juan Berumen.[3] The UFW's argument misses the point, as there is no indication that Mr. Navarro was discharged and, if so, any indication that there is any pending legal challenge to the discharge. Nevertheless, for the reasons discussed below, we find that there is insufficient information in the RD's report to allow us to rule on this challenge.

An individual is eligible to vote if he or she would have worked during the eligibility period but for an absence due to illness. (*Rod McLellan Co.* (1977) 3 ALRB No. 6;

[2] The conclusions and recommendations not excepted to by the UFW are adopted pro forma.
[3] Mr. Berumen alleges in a pending unfair labor charge that he was unlawfully discharged.

Valdora Produce Co. (1977) 3 ALRB No. 8.) In addition, there must be a reasonable expectation of returning to work. (*Ibid.*) In deciding eligibility, the Board must consider such factors as the employee's history of employment, continued payments into insurance funds, contributions to pension or other benefit programs, and any other relevant evidence which bears upon the question of whether or not there was a current job or position actually held by the employee during the eligibility period. (*Ibid.*)

Here, the RD's report is silent as to whether Mr. Navarro would have been working during the eligibility period but for his disability. Consequently, it is not possible to rule on this challenge without further investigation in accordance with the principles set forth in *Rod McLellan Co.* and *Valdora Produce Co.* If material facts remain in dispute after such investigation, resolution of the challenge then would require an evidentiary hearing. Accordingly, the RD's decision to sustain the challenge as to Mr. Navarro will be reversed and remanded for further investigation, as specified in the order below.

Ruben Angulo M.

Mr. Angulo's vote was challenged by the Employer's observer because he failed to present identification at the time of voting, as required by Regulation 20355, subdivision (c).[4] This requirement also was communicated to prospective voters via distribution of the Notice and Direction of Election prior to the election. After the election, the RD sent Mr. Angulo a letter and left a phone message in an attempt to discuss his challenged ballot, but never received a reply. The Employer provided a W-4 form with the

[4] The Board's regulations are codified at Title 8, California Code of Regulations, section 20100, et seq.

name Ruben M. Angulo which included a social security number that matched the number next to the same name on an employee list provided by the Employer. The RD concluded that the signature on the W-4 is "very similar" to the signature on the challenged ballot declaration signed by Ruben Angulo M. During the investigation, the Employer stated that Mr. Angulo's ballot should be counted if the two signatures matched. Nevertheless, the RD concluded that there was insufficient evidence to show that the person who, at the election, claimed to be Ruben Angulo M. is in fact the same person listed as Ruben M. Angulo on the eligibility list. In large part, the RD contrasted this evidence with that gathered with regard to others who failed to provide identification at the time of the election but later provided additional evidence during the investigation (such as declarations from co-workers and bank cards and pay stubs).

The UFW claims that, in accordance with a stipulated agreement among the parties, the similar signatures and matching social security numbers are enough to establish identity. The RD's report mentions no such stipulation. However, in light of the similarity in the signatures and the Employer's stated position that such evidence should be sufficient to allow this ballot to be counted, we find it appropriate to count the ballot. The RD properly sought corroborating evidence such as that provided by the others who failed to present identification at the time of the election; however, we believe that in this instance it is determinative that the party making the challenge assented to reliance on matching signatures in deciding whether to count the ballot. Therefore, we shall order that the ballot of Mr. Angulo be opened and counted.

Murray E. Burnaman, Karen Maust, William McCallum, Elva G. Munoz, Jose Rodriguez, Jr.

These five employees were challenged by the UFW's observer on the grounds that they are confidential employees. The RD states that the declarations submitted by the five individuals reflect that they do not actively participate in the resolution of employee complaints and grievances along with any management person, and that their work does not involve labor relations matters. Therefore, the RD concluded that they do not perform any duties that would make them confidential employees. The UFW does not dispute the content of the declarations nor provide any conflicting information concerning the duties performed by these employees. Rather, the UFW claims that the RD applied the wrong legal standard. The UFW asserts that it is not necessary that employees work "directly" on confidential matters; rather, it is sufficient if such employees have regular access to confidential files in the course of their work. The UFW also suggests that autonomy in dealing with employee payroll questions, safety, complaints, work injury claims, etc. is itself good evidence of confidential status.

The National Labor Relations Board (NLRB) has long held that confidential employees are only those who assist and act in a confidential capacity to persons who formulate, determine, and effectuate management policies in the field of labor relations. (See, e.g., *B.F. Goodrich Company* (1956) 115 NLRB 722.) This test was upheld by the United States Supreme Court in *NLRB* v. *Hendricks County Rural Electric Membership Corporation* (1981) 454 U.S. 170. The ALRB has adopted this same test. (See *Koyama Farms* (1984) 10 ALRB No. 4; *Hemet Wholesale* (1976) 2 ALRB No. 24.) The RD's stated conclusions

regarding the five employees, while not utilizing the exact wording of this long-accepted test, are consistent with the test.[5] Specifically, he concludes that they do not participate with any management person in the resolution of employee grievances or complaints and do not perform work that involves labor relations matters. In contrast, the UFW's assertion that regular access to confidential files is sufficient for confidential status consistently has been rejected. (See, e.g., *Bakersfield Californian* (1995) 316 NLRB 1211; *Associated Day Care Services* (1984) 269 NLRB 178.)[6] Therefore, we believe that the RD applied the correct legal standard.

In addition, the UFW exceptions as to these five employees must be rejected for failure to provide material facts that contradict the RD's findings. (*Sequoia Orange Co.* (1987) 13 ALRB No. 9; *Miranda Mushroom Farm, Inc.* (1980) 6 ALRB No. 22.) The Board is entitled to rely on the report of a Regional Director where the parties fail to raise a material factual dispute that would warrant further investigation or hearing. (*Sam Andrews' Sons* (1976) 2 ALRB No. 28.) Here, the UFW has provided no facts concerning the duties of the five employees and, thus, has failed to provide any information that would contradict the findings of the RD. Accordingly, we will affirm the RD's decision to overrule these five challenges and order that the ballots be opened and counted.

---

[5] In stating his conclusions, the RD cited various Board cases that applied this standard.

[6] However, an employee who has regular access to documents regarding management's positions in collective bargaining and labor relations matters before they are revealed to the union or affected employees may be considered confidential. (*E & L Transport Company* (1998) 327 NLRB 408; *Associated Day Care Services*, *supra*.) The UFW does not allege such facts in the present case.

ORDER

In accordance with the discussion above, the Board hereby affirms the RD's overruling of the challenges to Murray E. Burnaman, Karen Maust, William McCallum, Elva G. Munoz, and Jose Rodriguez, Jr. and ORDERS that their ballots be counted. The RD's decision to sustain the challenge as to Ruben Angulo M. is hereby reversed and it is ORDERED that his ballot be counted. While it is ORDERED that the challenge to the vote of Jose L. Navarro be remanded for further investigation and, if warranted, a hearing, this is contingent upon the ballot being outcome determinative after other ballots are counted pursuant to this ORDER and a revised tally of ballots is issued. Therefore, the RD shall open and count the ten ballots to which the challenges have been overruled pursuant to this Decision, and thereafter shall issue a revised tally of ballots. If necessary, after the revised tally of ballots issues, determinations with regard to the eligibility of Mr. Navarro and Mr. Berumen may then proceed in accordance with this Decision.

DATED: June 22, 2001

GENEVIEVE A. SHIROMA, Chairwoman

IVONNE RAMOS RICHARDSON, Member

GLORIA A. BARRIOS, Member

HERBERT O. MASON, Member