STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

PROHOROFF POULTRY FARMS, Employer, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Petitioner.	)	No. 75-RC-37-R 2 ALRB No. 56

On October 24, 1975, an election was held at Prohoroff Poultry Farms, and on the same day a tally of ballots was issued showing 62 votes for no union, 57 votes for the United Farm Workers of America, 2 void ballots, and 25 challenged ballots. On November 14, the regional director issued a report on challenged ballots, recommending that tire Board sustain objections to 18 ballots and overrule objections to 7 others. The employer excepts[1/] to 13 of the regional director's recommendations.[2/]

Neither party excepts to the regional director's recommendation that challenges to the following ballots be overruled, and accordingly we order these ballots to be opened and counted: Nick Samarin, Frank Samarin, Atenodoro H. Carrillo,

[1/] 8 Cal. Admin. Code Section 20365 (f).

[2/] The regional director's initial report, through a confusion of names, made inconsistent recommendations on the ballots of Alex S. Samarin and Bill J. Samarin, and made no recommendation at all on the ballots of Nick Samarin and Frank K. Samarin. The employer pointed out this clerical error in its exceptions. The regional director then issued and served on the parties a correction. Nick and Frank Samarin are eligible; Alex and Bill Samarin are ineligible.

Jose Conchas, Jose A. Jimenez, Antonio Lopez, and Maria Efigenia Perez.

Neither party excepts to the recommendation that the following challenges be sustained: Robert F. Ponder, Greydon Koellman, Victor Kolesnikow, Rosa Maria Contreras, John J. Prohoroff. Accordingly, we sustain these challenges.

SUPERVISORS

The employer's first exception goes to the eligibility of supervisors. The regional director held that eight persons[3/] were supervisors, and therefore not entitled to vote. The employer does not dispute the factual holding that the persons are supervisors; rather, it argues that supervisors are "agricultural employees" under the ALR&, and may not be disenfranchised.

We have already decided the issue by regulation.[4/] The ALRA implicitly excludes supervisors from coverage. Hemet Wholesale, 2 ALRB No. 24, n.6 (1976); Yoder Brothers, Inc., 2 ALRB No. 4, n.8 (1976). Accordingly, challenges to these ballots will be sustained.

OFFICE CLERICAL WORKERS

The employer's other exception goes to the eligibility of five clerical employees who work in the employer's office.[5/]

[3/] Ignacio Aguilar, Rogelio Garcia, Roberto Jimenez, Tomas Padilla, Francisco Perez, Juan M. Perez, Alex S. Samarin, and Bill J. Samarin,

[4/] 8 Cal. Admin. Code Section 20350(b)(l).

[5/] Beverly A. Cummins, Veralee Hakes, Guadalupe Perez, Sherry P. Ponder, Pearl Shubin.

The regional director recommended that we sustain challenges to these employees.

A. The work of office clericals may be "incidental" to an employer's farming operations, and therefore, the clericals may be "agricultural employees" entitled to vote. Dairy Fresh Products Co., 2 ALRB No. 55 (1976). In Dairy Fresh, however, the workers were incidental only to the farming operation, which was apparently the employer's sole business. Here we are faced with a different situation. The employer owns 50 percent of a fertilizer plant, which is a nonagricultural operation, Farmers Reservoir & Irrigation Co., v. McComb, 337 U.S. 755, 762 (1949). The office clericals apparently do work that is incidental both to the agricultural and the nonagricultural operations. Are such office workers "agricultural employees"? This question is presented to us for the first time. We have been unable to find any precedent under the National Labor Relations Act which decides the question directly.

In Olaa Sugar Co., Ltd., 118 NLRB 1442, after remand from 242 F.2d 714, the National Labor Relations Board held:

> We now announce the rule that employees who perform any regular amount of nonagricultural work are covered by the Act with respect to that portion of the work which is nonagricultural. [6/]

[6/] When a worker does two separate jobs, the rule presents no problem: one job can be covered by an NLRB unit and the other by an ALRB unit. The difficulty with Olaa comes when a single job classification or type of work straddles the line between what is covered by the NLRA and what is not. That is the kind of twilight situation we find here.

However, the United States 2nd Circuit Court of Appeals disapproved the Olaa rule in NLRB v. Kelly Bros. Nurseries, 341 F.2d 433 (1965). There the court held, among other things, that when the proportion of nonagricultural labor performed by a worker is small (although more than de miminis), the worker could not be included within an NLRB bargaining unit. Despite Kelly Bros., the NLRB has adhered to the standard of "regularity." Rod McLellan Co., 172 NLRB 1458 (1968). In other words, there is a conflict of precedents, with the NLRB applying a "regularity" standard, and the 2nd Circuit applying a "proportion" standard, at least in one case. We are required, under Labor Code Section 1148, to follow "applicable precedents of the National Labor Relations Act." What that precedent is in this case is not clear.

We also note that the NLRB apparently has not followed Olaa consistently. In Rod McLellan Co., supra, the employer operated a nursery (agricultural), a potting-mix plant (non-agricultural) and a retail store where the products of both operations were sold. The retail clerks were included within the nonagricultural unit without regard to the proportion of nonagricultural goods sold. The fact that they regularly sold such goods was considered dispositive. But the NLRB used a different approach in Truckee-Carson Irrigation District, 164 NLRB 1176. In that case the employer operated an irrigation network (agricultural), an electric generator (nonagricultural), and a shop where mechanics and welders repaired machines from both operations. The fact that the shop employees regularly worked on nonagricultural equipment was not dispositive.

Rather, the amount of such nonagricultural work (20 percent) was considered, and held insufficient to make the employees nonagricultural.

The distinction between the two cases appears to be this: In Rod McLellan (and in other NLRB cases involving processing mills, warehouses, and shipping operations) the disputed work was "separately organized as an independent productive activity," Farmers Reservoir Co., supra at 761, and constituted a distinct, profit-making business. In Truckee-Carson, by contrast, the shop workers were not part of a repair business operated as a "commercial venture." DeGiorgio Fruit Corp., 80 NLRB 853; and see Maneja v. Waialua Agricultural Co., 349 U.S. 254, 263 (1955). Although their work related to agricultural and nonagricultural operations, it was subordinate to both, and was not "independent" or "commercial."

The employer in the present case operates an office in which office clericals handle agricultural and nonagricultural paperwork; but the work of the office clericals is subordinate to both operations, and is not an "independent" or "commercial" entity in itself: the employer does not appear to be in the business of providing bookkeeping or secretarial services to clients. We therefore believe that the Olaa standard of "any regular amount of nonagricultural work" does not apply, and that Truckee-Carson does apply.

Unfortunately, Truckee-Carson did not specify the exact quantity of nonagricultural work that will bring a worker within an NLRB bargaining unit. But a workable standard can be

found in Mann Packing Co., Inc., 2 ALRB No. 15 (1976). In Mann Packing, we dealt with a shop which serviced rolling stock both for the employer's ranch (agricultural) and for the employer's packing shed (nonagricultural). The Board held that since the "bulk" of the rolling stock was for use on the ranch, the shop workers were "agricultural employees."

We therefore hold that the ballots of the five clerical workers will be counted, assuming that none of the workers is confidential, if the bulk of the office's work is incidental to the agricultural unit. Because the issues involved in mixed-work situations are complex, and the applicable law is ambiguous, we are reluctant to announce a general rule. Our holding is therefore limited to this case.

B. This case presents yet another problem. The regional director recommended sustaining challenges to the clerical workers because they were all "confidential" employees. The regional director realized that the NLRB excludes only "those persons acting in a confidential capacity to persons involved in the formation, determination, and effectuation of the employer's labor relations policies." West Chemical Products, 221 NLRB No. 45; B. F. Goodrich Co., 115 NLRB 722. However, the regional director recommended that the term "confidential" be expanded to include all employees whose work "is closely associated with management." He reasoned that in the context of agriculture, all such employees "would likely have a 'community of interests' with management rather than the workers in the field."

Although we have previously rejected the "community of interests" analysis for unit determination, Salinas Greenhouse Co., 2 ALRB No. 21 (1976), we recognize that some employees, such as supervisors and managers, were not intended to be covered by the Act. Their presence in the unit would create a conflict of interest, and blur the line between management and labor. NLRB v. Textron, Inc., 416 U.S. 267 (1974). It may be that in an agricultural setting these policies would require us to formulate new definitions of "managerial" and "confidential" employees; but we do not perceive, on the facts of this case, that the office workers are allied with management. Their interests differ from field workers, certainly; but they also differ from management.

Until we are persuaded there is a need for change, we will continue to follow NLRB guidelines on confidentiality. In the present case, the regional director failed to apply these guidelines.

CONCLUSION

The regional director is ordered to open and count the ballots of Nick Samarin, Frank Samarin, Atenodoro H. Carrillo, Jose Conchas, Jose A. Jimenez, Antonio Lopez, and Maria Efigenia Perez, and to issue a new tally. If the votes of the clerical workers are still determinative, the regional director shall

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conduct such investigation or hearing as is necessary to determine their eligibility under the Mann Packing and B. F. Goodrich standards set forth above.

Dated: November 2, 1976

Gerald A. Brown, Chairman

Richard Johnsen, Jr., Member

Roger M. Mahony, Member

Robert B. Hutchinson, Member

Ronald L. Ruiz, Member