

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

NURSERYMEN’S EXCHANGE,)	Case No. 2010-RC-003-SAL
INC.,)	
)	37 ALRB No. 1
Employer,)	
)	(May 25, 2011)
and)	
)	
UNITED FARM WORKERS)	
OF AMERICA,)	
)	
Petitioner.)	

DECISION AND ORDER

On May 17, 2011, the United Farm Workers of America (UFW) filed an "Opposition to Regional Director's Purported Dismissal of Election Petition." This filing has been construed as a request for review, pursuant to Labor Code section 1142, subdivision (b), of the May 16, 2011 dismissal by the Salinas Regional Director of the election petition in the above-captioned case. Nurserymen’s Exchange, Inc. (Employer) filed its response May 23, 2011. We grant the UFW’s request for review and overrule the Regional Director’s dismissal of the election petition as exceeding the authority provided the Regional Director under section 20300(i)(1) of the Agricultural Labor Relations Board’s (Board) regulations.

Section 20300, subdivision (i) (1) of the Board’s regulations provides that a petition for certification shall be dismissed by the Regional Director whenever the contents of the petition or the administrative investigation of the petition discloses the absence of reasonable cause to believe that a bona fide question concerning

representation exists, or the unit petitioned for is not appropriate, or there is not an adequate showing of employee support pursuant to section 20300(j). (Cal. Code Regs., tit. 8, § 20300(i)(1)).¹ Neither this regulation nor any of the Board’s regulations or case law indicates that this authority continues after an election is held. (*Bayou Vista Dairy* (2006) 32 ALRB No. 6 at p. 6.) As we stated in *ConAgra Turkey Company* (1993) 19 ALRB No. 11, a Regional Director's decision to hold an election is final and nonreviewable. Rather, any claims that the Regional Director erred in determining the validity of the election petition must be raised in the election objections process. We find this to be true even, as here, where the Regional Director has come to believe that he erred. As we noted in *Bayou Vista Dairy*, were the Regional Director to have authority to dismiss an election petition after an election has been held, it would be a threat to due process, as the Regional Director would be able to unilaterally implement the most serious of remedies – setting aside an election – without the benefit of an evidentiary hearing. (*Id.*) As an evidentiary hearing is scheduled in this matter, the Regional Director may appear and present evidence on the propriety of his earlier peak employment determination, as he has the right to participate in representation hearings “to the extent necessary to ensure that the evidentiary record is fully developed and that the basis for the Board’s action is fully substantiated.” (Cal. Code Regs., tit. 8, § 20370(c); *GH & G Zysling Dairy* (2006) 32 ALRB No. 2 at p.2, n.2).

¹ All regulatory references are to the Board’s regulations at California Code of Regulations, title 8, section 20100 *et seq.*

Employer argues in its response that there is no time limit under Labor Code section 1156.4 on the Regional Director's authority to investigate an election petition. (*Employer's Response* at p. 7.) Labor Code section 1156.4 provides for immediate investigation of an election petition and, *if reasonable cause to believe that a bona fide question of representation exists*, direction of a representation election by the board. (Cal. Lab. Code § 1156.4) (Emphasis added).² That investigation and the direction of election have already occurred. What the Regional Director and Employer are advocating are a *re*-investigation of the election petition post-election and the resulting invalidation of the election results without due process. We do not construe the Agricultural Labor Relations Act (ALRA), prior Board decisions, or Board regulations as conferring such broad authority on the Regional Director that would override the mandate of Labor Code section 1156.3(c), to wit: "Unless the board determines that there are sufficient grounds to refuse to do so, it shall certify the election." (Lab. Code § 1156.3(c).) Without an evidentiary hearing on the objections raised, we have no sufficient grounds to refuse to certify the election at issue.

We are in receipt of Employer's Notice of Bankruptcy Filing, Employer's Counsel's request for a continuance of the hearing scheduled for May 31, 2011, and the supplemental declaration of Employer's counsel Michael C. Saqui via fax on May 24, 2011. Counsel for Employer states in his declaration that, upon information and belief, Employer has filed for Chapter 11 bankruptcy and Counsel for Employer must first file

² All statutory references are to the California Labor Code unless otherwise stated herein.

an application with the bankruptcy court in order to continue to represent Employer. Further, Counsel states that the application requires a 20-day notice period prior to action by the bankruptcy court. Employer's counsel cites *In re Triangle Chemicals, Inc.* (5th Cir. 1983) 697 F.2d 1280 as support for his belief that prior approval is required for his continued representation of Employer in this matter.

Our review of *In re Triangle Chemicals, Inc.*, as well as 11 United States Code section 327 and related bankruptcy rules, confirms that prior application of the bankruptcy court is necessary in order for counsel to receive compensation from the bankruptcy estate. However, we see nothing in the statute that legally bars Employer's counsel from continuing his representation of Employer. Nevertheless, in the interest of not depriving Employer of its choice of counsel, Employer and Employer's counsel should have the opportunity to determine whether Employer's counsel will be permitted to be compensated for his continued representation of Employer so that Employer and Employer's counsel can determine whether to continue the representation. We therefore grant Employer a twenty-eight (28) day continuance and order that Employer notify the Executive Secretary immediately of any action by the bankruptcy court on the application for employment of counsel or any other pertinent action by the court. In addition, we offer for consideration by all the parties the option of proceeding with a stipulated record.

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ORDER

The order of the Regional Director dismissing the election petition in this matter is overruled and the hearing is hereby continued for twenty-eight (28) days from the date of this Order.

DATED: May 25, 2011

Genevieve A. Shiroma, Member

Cathryn Rivera-Hernandez, Member

Carole Migden, Member

CASE SUMMARY

Nurserymen's Exchange, Inc.
(United Farm Workers of America)

Case No. 2010-RC-003-SAL
37 ALRB No. 1

On May 16, 2011, the Salinas Regional Director dismissed an election petition in this matter after the election occurred and before the commencement of a hearing on election objections on the grounds that the requirement for peak employment had not been met. On May 17, 2011, the United Farm Workers of America (UFW) filed an "Opposition to Regional Director's Purported Dismissal of Election Petition," which the Board construed as a Request for Review pursuant to Labor Code section 1142. The Board granted the UFW's request for review and overruled the Regional Director's dismissal of the election petition as exceeding the authority provided the Regional Director under section 20300(i) (1) of the Board's regulations.

The Board held that neither the regulation nor any of the Board's regulations or case law provides that the authority of the Regional Director to dismiss an election petition continues after an election is held; to permit otherwise would allow the Regional Director to unilaterally set aside an election without the benefit of an evidentiary hearing, threatening due process. Since an evidentiary hearing on election objection was scheduled in this matter, the Regional Director would have the opportunity to appear and present evidence on the prior peak employment determination.

The Board rejected Employer's argument that there was no time limit under Labor Code section 1156.4 on the Regional Director's authority to investigate an election petition. The investigation of the petition and direction of election had already occurred, and what the Regional Director and Employer were advocating were the re-investigation of the election petition and resulting invalidation of the election results without due process. The Board held that conferring such broad authority on the Regional Director would override the mandate of Labor Code section 1156.3 that the Board certify an election unless there were sufficient grounds not to do so.

The Board granted a twenty-eight (28) day continuance in the election objection proceedings because Employer had filed for bankruptcy. Contrary to Employer's counsel's argument that it could not represent Employer without prior appointment by the bankruptcy court under 11 U.S.C. § 327, the Board found nothing in the statute that legally barred Employer's counsel from representing Employer. And instead granted the continuance to allow Employer's counsel to determine whether it could be compensated and whether both would continue the representation.

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