

STATE OF CALIFORNIA
 AGRICULTURAL LABOR RELATIONS BOARD

MARLIN BROTHERS ,)	
)	
Employer)	
and)	No. 75-RC-71-F
)	
UNITED FARM WORKERS OF AMERICA, AFL-CIO)	3 ALRB No. 17
)	
Petitioner)	
and)	
)	
WESTERN CONFERENCE OF TEAMSTERS, AGRICULTURAL DIVISION, IBT)	
)	
Intervenor.)	
)	

This decision has been delegated to a three-member panel.
 Labor Code Section 1146.

On September 29, 1975¹ an election was held at Marlin Brothers. The tally of ballots showed the following results:

Teamsters.	54
UFW.	53
No Union.	1
Challenged Ballots	22

Since the challenged ballots determine the outcome, the Regional Director issued on a report on challenged ballots. on December 8, 1975 All parties filed timely exceptions to the report. At the request of the Executive Secretary, the Regional Director issued a supplemental report on February 8, 1976. The UFW again filed timely exceptions.

CHALLENGED BALLOTS

The twenty-two challenges investigated by the Regional Director fall into one of the following categories:

- (A) Not on eligibility list,
- (B) Supervisor,
- (C) Economic striker.

A. Persons Not On Eligibility List

Eleven persons were challenged as not being on the employer's payroll for the payroll period immediately preceding filing of the representation petition ^{1/}

The Regional Director found that two were/ in fact, on the payroll: Leonar Hernandez Vasquez and Francisco Zamora, although Zamora's name appeared as F. Samora on the employer's records, and recommended that they be found eligible. The Regional Director found that the other nine persons did not appear on the payroll, nor were they employed during the appropriate payroll period. He therefore recommended that the challenges to their ballots be sustained.

No specific exceptions were filed to the Regional Director's finding with respect to Vasquez and Zaraora. The Teamsters generally objected to the recommendations involving all eleven challenged voters on the ground that they were not offered an opportunity, through an investigative hearing, to cross-examine any of the individuals involved

^{1/} The eleven persons are:

Alfredo Balila
Simeon P. Densing
Petra de La Rosa de Garza
Generosa Garza
Vicente A. Olivares
Maria'de Jesus Ramos

Israel Aguilar Ramos
Benjamin Sirnental
Estrela Simental
Leonar Hernandez Vasque:
Francisco Zamora

However, unless a party raises a substantial factual dispute through its exceptions petition an evidentiary hearing will not be ordered. Sam Andrews' Sons, 2 ALRB No. 28 (1976). Accordingly, we adopt the Regional Director's recommendation and direct the ballots of Leonar Hernandez Vasquez and Francisco Zamora to be opened and counted.

The UFW specifically excepted to the Regional Director's recommendation concerning the other nine persons whose names did not appear on the current eligibility list. The sole basis for the UFW exception is that the Regional Director improperly examined only the payroll records of Marlin Brothers. While Marlin Brothers was the only employer listed in the representation petition, the UFW contends that another company, Vernal Farms, was a joint-employer with Marlin Brothers. The representation petition filed herein lists only Marlin Brothers as the employer. The UFW has not submitted any evidence that its original designation of the employer was incorrect.

Since no other factual issues are raised with respect to the eligibility of these nine persons, we deem further, investigation or hearing into the resolution of their eligibility to be unnecessary. We adopt the recommendation of the Regional Director and sustain the challenges to their ballots.

B. Supervisors

Alberto Maupo Torocan and Amanias Cabrila Balajadia were challenged as supervisors. However, the Regional Director's investigation disclosed that neither acted in a supervisory capacity. No party excepted to the findings to the Regional Director for these two

voters. Accordingly, we adopt the Regional Director's recommendation, overrule the challenges to their ballots and direct that the Regional Director open and count their ballots.

C. .Economic Strikers

Nine persons were challenged who claimed eligibility as economic strikers.^{2/} The Regional Director reported that on July 29, 1973, a contract between the employer and the UFW expired. On that date an economic strike commenced against the employer. The payroll period immediately preceding the strike was July 16, 1973 to-July 25, 1973. The strike commenced during the payroll period beginning July 26, 1973 and ending August 1, 1973.

The Regional Director found that two voters, Agapito J. Rivera and Martha Gomez Garcia, appeared on the employer's payroll after the commencement of the strike. The Regional Director reported that Rivera was employed during fourteen consecutive payroll periods from August 5, 1973 through November 30, 1973. He also found that Martha Gomez Garcia was employed during thirteen consecutive periods from May 18, 1973 through September 21, 1973, and again during three consecutive payroll periods from October 7, 1973 through October 19, 1973. Concluding that these two individuals were not in fact economic strikers because they continued to work for the employer after the commencement of the strike, the Regional Director recommended that the

^{2/} The nine persons are:

Socorro Juarez
Peter Juarez
Carlos Rios Alaniz
Eduardo Soto Meraz
Martha Gomez Garcia

Francisco Perez
Agapito J. Rivera
Alejandro Espinoza Alaniz
Giro Hernandez Cuellar

challenges to their ballots be sustained. The UFW excepts to finding, on the grounds that although these two workers continued to work for the employer after the commencement of the strike, they subsequently joined the strike. On the date of the election herein, they signed declarations under penalty of perjury indicating that they were in fact economic strikers. The issue is whether or not they can legally claim status as economic strikers at the time of the election in September 1975, when they were clearly not economic strikers at the time the strike commenced in July 1973. Because of the great difficulty in administering a rule which would permit a person to alternately disclaim and then claim striker status we conclude that economic striker status must be established at the commencement of the strike and retained until the time of the election. See George Lucas & Sons, 3 ALRB No. 5 (1977) , and Pacific Tile and Porcelain Co., 137 NLRB 1358, 50 LRRM 1394 (1962). Since the evidence is uncontradicted that both of these individuals continued to work for the employer for a substantial period of time after the commencement of the strike we adopt the recommendation of the Regional Director and find them ineligible.

In his original report the Regional Director found Alejandr Espinoza Alaniz ineligible on the grounds that he had failed to make himself available for the Board's investigation. The Regional Director further noted that his last day of employment, according to the employer's payroll records, was July 28, 1973. However, in supplemental reports dated February 8, 1976, the Regional Director submitted findings as to this voter's status. Mr. Alaniz claimed that he had worked for the employer until July 29, 1973, when he joined the strike. At the time he was a high school student and had been working for the employer during summer vacations and on a part-time basis during th

school year. -Subsequent to the strike he had worked for two employers in the Delano area doing farm and trucking work. He earned a maximum of \$2.60 an hour at one of his later jobs, while his rate of pay with Marlin Bros, was \$2.05 an hour at the time of the strike. Mr. Alaniz claims to have engaged in strike activities including picketing at the employer's premises and boycotting. As of the date of the Regional Director's supplemental report, Mr. Alaniz had commenced to attend college on a full-time basis although he stated that he would return to Marlin Bros, if the strike were to end. The Regional Director made no recommendation with respect to the voter's eligibility and neither the employer nor the Teamsters filed exceptions to the material contained in the supplemental report. We conclude that the challenge to this worker's ballot must be overruled. Mr. Alaniz was employed during the payroll period immediately preceding the commencement of the strike, and the uncontroverted facts indicate that he ceased his employment because of the strike. Therefore, a presumption of continued interest in the struck job is raised pursuant to Pacific Tile & Porcelain, supra. The fact that Mr. Alaniz engaged in other farm work subsequent to the strike and the fact that he commenced to attend college on a full-time basis are insufficient to justify the conclusion that he has abandoned his interest in the struck job. Since he had previously worked for the employer while he was a student, it is reasonable to conclude that he would again work for this employer on the same basis if the strike were to end. We overrule the challenge to his ballot.

The Regional Director found the remaining five economic strikers to be eligible and recommended that the challenges to their

ballots be overruled. The employer-filed a general exception as to the findings on each of the five voters based upon the lack of an opportunity for the employer to cross-examine each of the alleged economic strikers. The employer argues that Section 1156.3(c) dictates that a hearing is required in cases such as this, -and the Board is without power to rely on the ex parte investigation of the Regional Director. We disagree. In the absence of a factual dispute, no hearing is necessary, Sam Andrews' Sons, supra. We turn now to an examination of the status of each individual voter.

In his initial report, the Regional Director reported that Eduardo Soto Meraz terminated employment with Marlin Bros, during the period ending July 13, 1973. In his declaration submitted to the Board this voter stated that he and other workers were laid off a week before the strike commenced. No other factual findings are presented. However, in his supplemental report the Regional Director states that Meraz's entire crew was laid off on or about July 13, and that a declaration taken from the employer states that Marez applied for work with Marlin Bros, approximately six weeks before the election. This fact was confirmed by a declaration taken from Marez himself. The Regional Director did not, however, alter his previous recommendation that this voter be found eligible. The employer takes specific exception to that finding, on the basis that there are insufficient facts in the record to justify a finding of economic striker status. We agree and conclude that the Regional Director's recommendation must be rejected.

While reapplication for work is not necessarily disqualifying Pacific Tile, supra., it is a circumstance that requires some explanation. Furthermore, we reserve for later decision the question

of whether non-appearance on the pre-strike payroll disqualifies a striker. Assuming that it is not a disqualification, we still do not have sufficient facts to rule on the Meraz ballot. Accordingly, we remand the challenge for hearing to determine the following facts: the date on which Meraz was laid off, his expectation of reemployment at that time, his participation in the strike, and the circumstances surrounding his reapplication for work.

The Regional Director found both Peter and Socorro Juarez eligible on his finding that they ceased their work with the employer during the payroll ending July 27, 1973. No other facts are given as to either voter. In a supplemental report-the Regional Director states that the employer provided evidence, in the form of a time card signed by Juarez, that Peter Juarez stopped working on July 25, 1973. Juarez claims that the reason he stopped working on that day was because he was on the union negotiating committee and was involved for a period of time with negotiating the collective bargaining agreement. The Regional Director further reports that Peter Juarez is presently employed on a full-time basis with Farm Management Co-op and earns \$3.50 per hour. According to Juarez he was earning as much as \$300 per week on a piece rate basis while employed for Marlin Bros.

The only additional evidence submitted concerning Socorro Juarez was that she claims that her last day of work was Saturday, July 28, 1973. She claims that she did not return on July 30 in support of the strike. The employer, however, furnished a time card dated July 25, 1973, in support of its contention that this employee's last day of work was that day as opposed to the 28th. No further evidence is given with respect to the status of Socorro Juarez. The

employer filed no specific exceptions to 'the findings as stated in the supplemental report. Even though there may be a factual dispute **as** to each voter's last day of work, it is apparent that both were paid for work performed during the payroll period immediately preceding the commencement of the strike. Both persons claim to have ceased their employment with the employer in support of the strike. The employer has offered no contrary evidence. Thus, a presumption of continued eligibility is raised as to each, and no evidence of any abandonment of interest in the struck job is offered as to Socorro Juarez. The only evidence that Peter Juarez abandoned any interest in his struck job is that which demonstrates that he subsequently obtained year-round employment with Farm Management Co-op earning \$3.50 per hour. However, evidence of permanent employment elsewhere is, in and of itself, insufficient to overcome the presumption of continued interest in the struck job. Pacific Tile & Porcelain Co. , supra. Since the burden is on the employer to produce objective evidence to overcome the presumption, its failure to do so requires that we resolve the challenge in favor of the employee. Accordingly, the challenges to ballots of Peter and Socorro Juarez are overruled.

The Regional Director found that Francisco Perez appeared on the employer's payroll records under the name of Francisco P. Espinoza. He further found that this employee terminated his employment during the payroll period ending July 27, 1973. No further facts are given with respect to this voter. In his supplemental report the Regional Director was unable to give further information with respect to this voter as he was unavailable for further inquiry. The Regional Director, in his initial report, recommended that Perez's vote be

counted and the employer specifically excepted on the ground that no factual basis was shown for the conclusion that Francisco P. Espinoza and Francisco Perez were one of the same. No other evidence was offered by the employer. Although the Regional Director's report does not specifically state that Perez terminated his employment because of the strike, it is reasonable to infer that that was the case because of the date he terminated his employment. Moreover, we are bound to accept the recommendations of the Regional Director if no party excepts to his findings. Since the employer's only exception was the claim that the Regional Director had insufficient factual basis to conclude that Francisco Perez was the same person as Francisco P. Espinoza, and since the employer offered no evidence that the two persons were not in fact the same, we are bound to accept the Regional Director's recommendation.

The Regional Director recommended that the challenge to the ballot of Giro Hernandez Cuellar be overruled and reported that this employee terminated his employment on July 28, 1973. The employer took no specific exception to the recommendation of eligibility. Therefore, we adopt the recommendation of the Regional Director and find Giro Hernandez Cuellar to be an eligible voter.

The Regional Director found that Carlos Rios Alaniz had reapplied for work with the employer after the initiation of the strike and had been working as a foreman at the time the strike commenced. He recommended that the challenge to his ballot be sustained and no party has excepted thereto. We adopt the recommendation pro forma and sustain the challenge to his ballot.

Therefore, we direct the Regional Director to open and count the ballots of the following persons:

1. Leonar Hernandez Vasquez
2. Francisco Zamora
3. Alberto Maupo Torocan
4. Amanias Cabrila Balajadia
5. Alejandro Espinoza Alaniz
6. Peter Juarez
7. Socorro Juarez
8. Francisco Perez
9. Giro Hernandez Cuellar

following challenges are sustained:

1. Alfredo Balila
2. Simeon P. Densing
3. Petra de La Rosa de Garza
4. Generosa Garza
5. Vicente A. Olivares
6. Maria de Jesus Ramos
7. Israel Aguilar Ramos
8. Benjamin Simental
9. Estela Simental
10. Agapito J. Rivera
11. Martha Gomez Garcia
12. Carlos Rios Alaniz

If the ballot of Eduardo Soto Meraz determines the outcome, the Executive Secretary is ordered to set the challenge for hearing with the objections hearing we previously ordered in this case.

Dated: February 16, 1977

GERALD A. BROWN, Chairman

ROBERT B. HUTCHINSON, Member

RICHARD JOHNSON, JR., Member