

listed at the top of Schedule B be sustained. Accordingly, we accept the recommendation and order that these ballots not be opened_ and counted.

Challenges Sustained

An additional 21 persons listed in Schedule B voted under challenge as alleged economic strikers. The regional director found that none of them appeared on the statutory pre-strike payroll and further, that none of these persons appeared at the post-election investigation to substantiate their economic striker status. The regional director recommended that the challenges be sustained. The UFW excepted, arguing that the presumptions contained in Pacific Tile and Porcelain Co., 137 NLRB 1358, 50 LRRM 1394 (1962) place the burden upon the employer to dispute the eligibility of the voter, and that mere non-appearance in post-election investigations is insufficient to overcome those presumptions.

We have adopted the holding of Pacific Tile and Porcelain Co., supra, in other decisions [George Lucas & Sons, 3 ALRB No. 5 (1977); Lawrence Vineyards Farming Corp., 3 ALRB No. 9 (1977)]. In light of that case the UFW's argument is persuasive as to those persons on the statutory pre-strike payroll. However, we perceive the status of those persons not on the statutory payroll to be of a different sort. We have not yet determined whether such persons may be eligible to vote under certain circumstances. The resolution of this issue will be dependent upon our fullest understanding of the facts of each case. Where, as here, the unavailability of these voters precluded a proper investigation of their claim to

enjoyment of this special statutory provision, we are compelled to sustain the challenges to their ballots. If the election process is to be viable it must be based upon as prompt a fixing of the results as is possible under all of the circumstances. This election, now over one and one-half years old, must not be allowed to languish any longer in a state of incompleteness. The challenges to the votes cast by those twenty-one persons named at the bottom of Schedule B are therefore sustained.

There were eight persons as to whom the regional director made no recommendation because of a lack of information regarding their status. Five of these persons^{1/}claim that they were discharged by the employer prior to the beginning of the strike because of their support of the UFW. Unlike the employees in Schedule G of Lawrence Vineyards Farming Corp., 3 ALRB No. 9 (1977) the record here does not reflect that these persons have instituted legal proceedings challenging their discharges. Each of the incidents alleged as the basis for their respective discharges occurred more than two years before the effective date of the Agricultural Labor Relations Act, and thus these persons are not within the sweep of the protections afforded by Sections 1153 and 1160 of the Act. They cannot therefore claim the benefits which may accrue under the Act to those who, but for an alleged unlawful discharge, would have been on the pre-strike payroll. Since none of these persons does in fact appear on the pre-strike payroll, and by the available evidence left the

^{1/}The voters are: Aurora Barrera, Refugio Renteria, Leonardo Renteria, Carolina G. Soria, and Tomasa Casas.

employer's work force for reasons not related to the economic strike which occurred some two to three weeks later, we do not find them eligible voters. The challenges to their ballots shall therefore be sustained.

Challenges Not Determined

The voters Juana Silva Macias and Maria Teresa Casas both claim to have worked until May 30, 1973, but the employer's records show them as last employed in the week ending May 14, 1973. As both claim economic striker status and there is no evidence explaining the apparent payroll discrepancy, we do not resolve the challenges to these ballots at this time. If these ballots become outcome determinative the regional director shall conduct such further investigation as may be necessary to clarify this conflict.

Our review of the facts regarding voter Delfina Silva convinces us that she should more properly have been included in that group of voters who claim to have been laid off with an expectation of re-employment. As such, the challenge to her ballot will not be resolved at this time in keeping with our resolution of this case and the others in this category.

Challenges Overruled

The regional director recommended that the challenges to the ballots of three voters be overruled.^{2/} As neither party has excepted, we accept the recommendation and order that the ballots of these persons be opened and counted.

^{2/}The voters are: Jose Cervantes, Gamaliel Lopez, Jr., and Miguel Avilar.

The regional director found as to an additional group of eighteen voters^{3/} that they were employees whose names appeared on the pre-strike payroll, that they ceased working at the time of the strike because of the strike, that they participated in strike-related activities, and that they had not engaged in conduct evidencing abandonment of their striker status. On this basis he recommended that the challenges be overruled. We agree, despite the employer's exceptions, and order that the ballots of these eighteen individuals be opened and counted.

In George Lucas & Sons, 3 ALRB No. 5 (1977) we indicated our general reliance upon the rationale and evidentiary presumptions and burdens contained in the NLRB decision Pacific Tile and Porcelain Co., supra, as applied to questions of economic striker voting eligibility under Section 1157, paragraph 2, of our Act. The regional director's report shows recognition of this precedent and comports with it. The employer's exception contends, in essence, that some of these eighteen, as yet unnamed, procured permanent employment elsewhere and therefore abandoned their striker status. But this exception does not present a material factual issue requiring a further hearing. It is an argument about the possible existence of facts other than those found by the regional director, but not a showing that these other facts do exist. Absent such a showing

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| ^{3/} (1) Antonio Acosta Lopez | (10) Maria del Carmen Mendoza |
| (2) Angelita R. Alaniz | (11) Jesus Morales |
| (3) Indalecio Carrillo Silva | (12) Jose Moreno |
| (4) Alfredo Franco Perez | (13) Reyna T. Perez |
| (5) Petra Garza Frausto | (14) Petra R. Ramos |
| (6) Avelino Gonzalez Soria | (15) Maria E. C. Silva |
| (7) Irene Gonzalez | (16) Elias S. Soria |
| (8) Josefa A. Lopez | (17) Maria E. Tapia |
| (9) Valeriano Lopez | (18) Angelica Trevino |

we are entitled to rely upon the regional director's report. Sam Andrews' Sons, 2 ALRB No. 28 (1976). Also, to the extent that the exception claims only that the regional director's investigation was inadequate, it does not, by itself, set forth a ground for exception. Id at 5.

We also note that as a matter of law, the claim that a striker had procured other employment elsewhere, at higher wages, would not, by itself, overcome the striker's presumption of continuing eligibility under the Pacific Tile and Porcelain Co. analysis.

We also dismiss the employer's exception to the regional director's failure to find that the strike had been abandoned prior to the date of the filing of the petition for certification. The essence of the employer's claim is contained in the declaration of its Labor Superintendent Ben Zamudio. The bulk of the evidence consists of uncorroborated hearsay: that picketing ceased at the Reedley District ranches in 1974; that a state agency began referring workers to the employer in 1974; that in April, 1975, four workers seeking reemployment made statements about the status of the strike; that in August, 1975, after the ALRA had been enacted, the UFW sought to organize at the ranches; and that the petition for certification states that at the time of the filing no strike was in progress against the employer.

Unlike our dissenting colleague, we do not view this evidence as creating an issue warranting either further investigation or hearing, or a conclusion that the strike had, in fact, ended before the filing of the petition herein. The second para-

graph of Section 1157 of the Act is a special provision of limited duration, narrowly focused, and designed to confer voting eligibility upon that group of workers engaged in economic strikes pre-dating the legislation. The presence or absence of pickets is not the essential feature of strikes. Rather, it is the withholding of labor from the employer which is decisive. We take administrative notice of the records in many of our cases which reflect that the course of the state-wide strikes which prompted this very portion of the statute shifted away from the individual employer's property to boycotting and informational picketing in major urban areas throughout the country. The withholding of labor did not cease, the tactics changed. The fact of the continued viability of these strikes in the summer of 1975 produced the special voting benefits contained in the second paragraph of Section 1157.

In order to ensure the fullest effect to this special provision we, unlike the dissent, will require clear and compelling evidence of the abandonment of a particular strike before we will deprive the beneficiaries of this provision of their right to vote in elections conducted within the time period established in the statute. The NLRB, operating under a statute which does not confer the special benefits at issue here, has not found abandonment of a strike where the union tendered to the employer a letter announcing the end of the strike and making an unconditional offer to return to work on behalf of the striking employees. See American Metal Products Co., 139 NLRB 601, 51 LRRM 1338 (1962). In that case picketing resumed one month following delivery of the letter, and 14 employees who had returned to work rejoined the strike and again received strike benefits. Against the employer's argument that the

union had terminated the strike by its letter, the Board found that under the overall circumstances of the case it was evident that the union had not abandoned its representational interest in the unit and that the striking employees continued to desire to be so represented. The statements on the petition for certification found by the dissent to be conclusive of the issue of the abandonment of the strike are equivocal when compared to the American Metal Products letter.^{4/} The absence of an offer by the union to return to work and the absence of a notice to the employer of the strike's termination, combined with the fact that the union sought to be certified when the ALRA became law and the appearance of substantial numbers of strikers to vote in an election conducted more than two years after the commencement of the strike all support the soundness of the regional director's determination.

The regional director is hereby ordered to open and count the ballots of those individuals as to which challenges have been overruled, set forth in Schedule A. The ballots of those persons as to which challenges have been sustained, Schedule B, shall not be opened. A revised Tally of Ballots shall thereafter be issued and served upon the parties. If, after a count of these ballots and consideration of the number of challenges which have herein been sustained the outcome of the election cannot be determined, the regional director shall proceed to conduct such further investigation or hearing as may be necessary to resolve the challenges to

^{4/}We also note that a reasonable person could conclude that the information sought in question 11(a) of the petition related solely to whether the 48-hour election provision of Section 1156.3(a)(4) of the Act should be invoked in the specific case and to no other issue.

the ballots of those persons listed in Schedule C. We direct the regional director to consider in this investigation, without limitation, the following factors relative to the voting status of the voters in Schedule C who claim to have been laid off with an expectation of re-employment: the last day each worked for the employer; the reason they ceased work; the employer's established practice, if any, concerning rehiring former employees in the next season; whether each of the voters had performed seasonal or year-round labor and, if seasonal, when during the year they are commonly employed. In addition, for each employee, the regional director shall determine and state in his supplemental report whether any voter has engaged in activities from the date of the strike to the date of the election which constitute abandonment of his or her economic striker status within the parameters of the standards enunciated in Pacific Tile and Porcelain Co., 137 NLRB 1358, 50 LRRM 1394 (1962). See George Lucas & Sons, 3 ALRB No. 5 (1977). As part of the investigation the regional director shall provide the employer with an opportunity to present facts with respect to each of these employees which tend to show abandonment.

Dated: April 25, 1977

GERALD A. BROWN, Chairman

RONALD L. RUIZ, Member

SCHEDULE A

Challenges Overruled

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| (1) Miguel Avilar | (12) Maria del Carmen Mendoza |
| (2) Jose Cervantes | (13) Jesus Morales |
| (3) Gamaliel Lopez, Jr. | (14) Jose Moreno |
| (4) Antonio Acosta Lopez | (15) Reyna T. Perez |
| (5) Indalecio Carrillo Silva | (16) Petra R. Ramos |
| (6) Alfredo Franco Perez | (17) Maria E. C. Silva |
| (7) Petra Garza Frausto | (18) Elias S. Soria |
| (8) Avelino Gonzalez Soria | (19) Maria E. Tapia |
| (9) Irene Gonzalez | (20) Angelica Trevino |
| (10) Josefa A. Lopez | (21) Angelita R. Alaniz |
| (11) Valeriano Lopez | |

SCHEDULE B

Challenges Sustained, No Exceptions

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|--------------------------------|----------------------------|
| (1) Fernando Aguilar | (14) Eluterio Castillo |
| (2) Gilberto Alaniz | (15) Miguel Montoya Macias |
| (3) Antonia Cervantes | (16) John Silva Macias |
| (4) Jesus Delgado | (17) Ramona Munoz |
| (5) Guadalupe Diaz | (18) Tomas Ordaz |
| (6) Roberto Garibay | (19) Esperanza Perales |
| (7) Rafael Ledesma, Jr. | (20) Panfila M. Perez |
| (8) Dolores Lopez | (21) Maximiliano Ramirez |
| (9) Eljio Jose Lopez | (22) Guillermo Rosas |
| (10) Estefana Lopez | (23) Julian Trevino |
| (11) Olivia Quiroz Lopez | (24) Leonor R. Trevino |
| (12) Concepcion Cantu Longoria | (25) Cesar Vargas |
| (13) Maria Cantu Gutierrez | (26) Zeferino Vargas |

Economic Strikers, Challenges Sustained Per

Opinion

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|-----------------------------|--------------------------|
| (1) Leonel Aguilar | (12) Daniel Perez Montez |
| (2) Miguel Calderon | (13) Jose C. Perez |
| (3) Emilia L. Campos | (14) Sylvia Ortiz |
| (4) Raul Comanza | (15) Teresa Ortiz |
| (5) Maria M. Estrada | (16) Aurelia O. Pardo |
| (6) Humberto Fernandez | (17) Daniel Silva |
| (7) Mario Garcia | (18) Margarita M. Soto |
| (8) Emigdio Gonzalez | (19) Magdalena Tapia |
| (9) Adoberto Medina | (20) Sora Perez Sanchez |
| (10) Eusebio Mendoza Campos | (21) Israel B. Puna |
| (11) Leonel T. Mercado | |

SCHEDULE B (Cont'd)

Miscellaneous Challenges Sustained

- (1) Aurora Barrera
- (2) Refugio Renteria
- (3) Leovardo Renteria
- (4) Carolina G. Soria
- (5) Tomasa Casas

SCHEDULE C

Challenges Not Resolved

- (1) Juana Silva Macias
- (2) Maria Teresa Casas
- (3) Cuahtemoc Herrera Salazar
- (4) Anita R. Pardo
- (5) Candido Salazar
- (6) Delfina Silva
- (7) Maria de Jesus Silva**

MEMBER JOHNSEN, Dissenting in Part:

I dissent in part. The majority would overrule the challenges to 21 voters, 18 of whom claimed economic striker status. I would sustain the challenges to those 18 claiming eligibility as economic strikers but would join the majority in overruling the challenges to the three whose ballots were challenged for other reasons. In addition, I would ask the regional director to investigate challenges to four additional voters consistent with the reasoning below.

Under paragraph two of Labor Code Section 1157 the Board has the authority to determine the voting eligibility of economic strikers who participate in strikes which commenced before the effective date of the Act. A fundamental requisite of the applicability of this section is that the workers in question are in fact "economic strikers"; if they are not, their eligibility would presumably be determined under the usual rules relating to the payroll list in the period just preceding the election petition, 8 California Administrative Code Section 20352(a).

The general rule is that abandonment, termination or settlement of the underlying strike prior to the election extinguishes the voting eligibility of economic strikers for whom replacements have been hired.^{1/} Martin Brothers, 127 NLRB 1086 (1960). This rule may have been modified by subsequent NLRB decisions which suggest that economic strikers who make an unconditional application for reinstatement after the termination of the strike maintain their status as economic strikers for purposes of voter eligibility. See dicta in Pioneer Mills, 174 NLRB 1202 (1969)

Following these statutory provisions and decisional precedents, where the Board determines that an economic strike has been terminated by the union prior to the filing of a petition for certification, those permanently replaced economic strikers who did not abandon the strike while it was in progress and who have not yet been reinstated should be eligible to vote if

^{1/}Since Labor Code Section 1156.4 requires that elections be held only during periods of peak employment, it is reasonable to conclude that the employer was operating with a full contingent of employees and, accordingly, that replacements had been hired.

1. (a) The 12-month limitation period of paragraph one or the 26-month period of paragraph two of Labor Code Section 1157 has not expired,^{2/} and,

(b) The workers who were on strike have given the employer an unconditional offer to return to work; or

2. The employer has been adjudged guilty of an unfair labor practice in discriminating against the former strikers in the reinstatement process, 8 California Administrative Code Section 20352 (a) (3).

The question remains as to what standard is applicable in determining whether a strike has been terminated or abandoned. The Pacific Tile case, 137 NLRB 1358 (1962), followed by this Board in George Lucas s Sons, 3 ALRB No. 5 (1977), stands for the proposition that the Board must entertain a strong presumption that workers have maintained an interest in their struck jobs. However, both of these cases involved the question of whether individual employees had abandoned a formal, ongoing union strike

^{2/}As to the permanently replaced economic striker, the 12- and 36-month eligibility periods begin to run from the commencement date of the strike regardless of at what stage of the strike the employee leaves work. The standard form of the NLRB's direction of election reads as follows:

Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election and who retained their status as such during the eligibility period and their replacements ... ineligible to vote are ... employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced.

The unreplaced economic striker, on the other hand, retains voting status until the striker abandons interest or his work is permanently abolished, both of which may occur beyond the 12-month period. Globe Molded Plastics Co., 200 NLRB Mo. 65 (1972); Gulf States Paper, 219 NLRB No. 147 (1975).

and had obtained permanent employment elsewhere. The same presumption against abandonment should not apply to the question of whether the union has called off its strike.

Regulations which controlled the conduct of this election provided that the petition shall specify, in addition to those requirements set forth in the Act, (1) whether a strike is in progress for the unit involved and if so the approximate number of employees participating and the date such strike commenced as well as (2) whether a strike commenced within the 36-month period prior to August 28, 1975, and if so, the date such strike commenced, 8 California Administrative Code Sections 20305 (a) (6) and (7) (1975).

These requirements are reinforced on the face of the certification petition itself in the asking of the following questions:

11. a. Is there now a strike at the employer's establishment(s) involved?
 - b. If so, approximately how many employees are participating?
12. a. Has a strike commenced involving the above unit within the 36-month period prior to August 28, 1975?
 - b. If so, the strike commenced on about what date?
 - c. Approximate number of employees participating in the strike.

The United Farm Workers Union in its petition for an election filed with the Fresno Regional Office on October 6, 1975, signed by Gilbert Padilla as its agent, answered these questions as follows:

- 11. a. No
 - b. [Not answered]
- 12. a. Yes
 - b. July, 1973^{3/}
 - c. 200

In my view this constitutes, in writing, a union position of abandonment of the strike.^{4/} This conclusion is further supported by the filed declaration of the employer that although the "State's Farm Labor Office" [now known as the Employment Services Division of the California Employment Development Department (EDO)] had refused to refer workers to the employer during 1973 and part of 1974, it resumed doing so in early 1975.^{5/}

^{3/}During the investigation of the challenged ballots, the union alleged that the strike had commenced on May 30, 1973, the date selected by the regional director and adopted by the majority to establish the payroll eligibility period applicable to the challenged strikers. However, a collective bargaining agreement between this employer and the UPW expired on April 15, 1973, and, according to the petition, the strike began in July, 1973. It is not clear why the regional director determined that the May strike date should designate the pertinent payroll period since Labor Code Section 1157 permits the Board to adopt rules for economic strikers who, between August 27, 1972 and August 28, 1975, were paid for work performed or for paid vacation during the payroll period immediately preceding the expiration of a collective bargaining agreement or the commencement of a strike.

^{4/}In a separate certification petition which was signed on behalf of the UFW by Marshall Berg and filed in the Salinas Regional Office for a representation election held on September 9, 1975, among D'Arrigo employees in Salinas and Brawley, the union stated that although a strike had commenced on December 10, 1972, it was no longer in force. To question no, 11.a., it responded "No"; and to question no. 11.b., the answer was "Not Applicable".

^{5/}As the employer correctly asserts, EDO may not refer workers to any jobs which are vacant because of a strike, Title 20, Code of Federal Regulations, Section 602.2(b). Referrals may resume only upon a departmental investigation and determination that the strike is no longer in force, EDD Field Office Manual, Section 640.9. See *Di Giorgio Fruit Corp. v. Dept. of Employment*, 56 Cal. 2d 54 (1961).

Of the 80 voters who cast challenged ballots, 67 did so as alleged economic strikers. Of those 18 alleged strikers whose names appeared on the May 30, 1973 payroll list, none satisfied the test set out on page 2 for determining voter eligibility, and I would sustain the challenges. As to the challenges to 13 voters whose names did not appear on the normal eligibility list, I concur with the regional director's recommendation that three of these be overruled and that the ballots of Miguel Avilar, Jose Cervantes, and Gamaliel Lopez, Jr. be opened and tallied.

There is an indication that four additional formerly active economic strikers may have maintained their striker status for purposes of voter eligibility. With regard to Jesus Delgado, Estefana Lopez, John Macias and Julian Trevino, the regional director was of the opinion that all had not only abandoned their interest in the strike but had additionally applied for work or placed their names on lists for future employment. Consistent with my position that the strike was not active at the time of the election, I would remand these challenges to the regional office for investigation limited to the questions of whether they had worked during the pertinent payroll period and had made an unconditional offer to return to work. Upon completion of the investigation of the four challenges, I would issue a revised final tally of ballots.

Dated: April 25, 1977

Richard Johnsen, Jr., Member