

STATE OF CALIFORNIA
AGRICULTURAL LABOR RELATIONS BOARD

GEORGE LUCAS & SONS, Employer,)	No. 75-RC-37-F
and)	3 ALRB No. 5
WESTERN CONFERENCE OF TEAMSTERS, AGRICULTURAL DIVISION, AND ITS AFFILIATED LOCALS,)	
Petitioner,)	
and)	
UNITED FARM WORKERS OF AMERICA, AFL-CIO,)	
Intervenor.)	

Pursuant to our authority under Labor Code Section 1146, the decision in this matter has been delegated to a three member panel of the Board.

On September 12, 1975, an election was held at George Lucas & Sons. The tally showed 170 votes for the Teamsters, 120 for the UFW, 5 for no union, 2 void ballots, and 146 challenged ballots. On November 20, 1975, the regional director issued a Report on Challenged Ballots, to which all three parties excepted. At the Board's request, the regional director issued a supplemental report on February 4, 1976, to which, again, all parties excepted.

The regional director recommended that challenges to the ballots listed in Schedule A be overruled. Since no party has excepted to the recommendation, we overrule the challenges.

The regional director recommended that challenges to the ballots listed in Schedule B be sustained. Since no party has excepted to the recommendation, we sustain the challenges.

Supervisors; In his initial report, the regional director found that Eliseo Chapa Herrera and Julian Lucero were "regular employees with no special duties," and recommended overruling challenges to their ballots. The UFW excepted, and submitted a declaration stating that the two men were "supervisors." The declaration is conclusory. Effectively, it is a flat denial that the regional director was correct in his findings; but the union has given us no means of assessing these findings. In Sam Andrews' Sons, 2 ALRB No. 28 (1976), we held that, in the absence of specific assertions substantiated by evidence, the Board is entitled to rely on the report of the regional director in that the parties have failed to raise a material factual dispute that would warrant a further investigation or hearing. We accept the regional director's recommendation, and order the ballots of Eliseo Chapa Herrera and Julian Lucero to be counted (Schedule C).

The Gardener: The regional director recommended overruling the challenge to Raul Puente, who the UFW alleged was outside the unit. The regional director found that Puente was the employer's gardener, and therefore was an "agricultural employee."^{1/}

^{1/}Section 3 (f) [of the Fair Labor Standards Act] includes . . . secretaries, clerks, bookkeepers, maintenance workers, engineers, and others who are employed by a farmer or on a farm if their work is part of the agricultural activity and is subordinate to the farming operations of such farmer or on such farm." 29 C.F.R. Section 780.158 (Emphasis added.)
Gardeners are maintenance workers

In its exceptions, the UFW submitted a declaration stating that Puente worked only at the employers' personal houses. If Puente is indeed a domestic gardener, he is not an "agricultural employee," even if his name appears on the employer's payroll. The union's declaration therefore alleges an ultimate fact which, if true, would show that the regional director was in error. In other words, the declaration presents a material factual dispute over the voter's status sufficient to warrant a further investigation or hearing into his duties. We therefore will not resolve the challenge now. We order the regional director to investigate further, or hold a hearing, if necessary (Schedule D).

"No Name" Ballots: Through a clerical error of the Board agent conducting the election, three challenged ballots were cast without a notation of the voter's name. Two voters were challenged for lack of identification, and one was challenged as a supervisor. The regional director could not resolve the challenges. We declare these ballots void (Schedule E).

The Economic Strikers: In his initial report, the regional director found there were 64 ballots in the "economic striker" category and indicated that an economic strike commenced against the employer on July 29, 1973. He recommended that the Board overrule objections to 23 of these ballots. He found that the 23 voters:

(1) appeared on the Employer's payroll for the weekly pay period ending July 31, 1973, during which the strike commenced, and (2) stated in declarations given to the Board pursuant to its investigations of challenged ballots that they went on strike against the Employer on or about July 30, 1975, that they have done nothing inconsistent with their claimed status as economic strikers and have participated in strike-related activities since that date.

The employer excepted to this finding on two grounds: First, that by not holding a hearing, the regional director denied the employer the right to "confront" the strikers; secondly, that "by not articulating the standards that were employed to make these factual determinations with regard to the 23 'economic strikers,' the regional director has effectively precluded the Employer from reviewing the findings of fact" The Teamsters also excepted to the findings, stating that a hearing was necessary "since important issues of fact and credibility are raised." The Teamsters also took the "position" that the 23 strikers had "permanently abandoned any interest in future employment." The Board requested the regional director to "set forth the particular facts for each individual" on the issues of participation in, and nonabandonment of, the strike.

The regional director then issued a supplemental report in which he made detailed findings on each of the 23. In essence, he found that all of the 23, except Tomas Alvarez, had not returned to work, or applied for work, at George Lucas & Sons; that all of the 23, except E. Baeza, expressed an unequivocal willingness to return; that none of the 23 had moved from the area or taken a job that made his or her return unlikely; that all 23 were either on the "strike" payroll, or had an expectation of future employment at Lucas,^{2/} except one "voluntary quit"; and that all 23 had joined the picket line or boycott.

^{2/}See first full paragraph on p. 7.

Both the employer and the Teamsters excepted to the supplemental report. The gist of their exceptions was that the regional director had conducted the investigation ex parte, without giving the parties an opportunity for input. Neither the employer nor the Teamsters disputed any particular finding on an individual.^{3/} In short, the parties rest their exceptions on a generalized "due process" argument.

It is the position of the NLRB,^{4/} of this Board,^{5/} of the federal courts,^{6/} and of the California courts,^{7/} that no hearing or trial is necessary if there is no factual dispute.

It is equally well settled that a mere denial that evidence is true is insufficient to raise a factual dispute.^{8/} The regional director found a series of detailed facts on the 23 strikers in question. Neither the employer nor the Teamsters has given us any reason to doubt those findings.

The conduct of investigations is left to the regional director's discretion. If the regional director errs, the parties may raise the error in an exceptions petition. The avenue of

^{3/}For the first time in its supplemental exceptions, the employer claimed that all the strikers had abandoned interest in the strike, and that there had never been a strike at all. Both these claims are unsupported by a scintilla of evidence.

^{4/} NLRB v. O.K. Van Storage, Inc. , 297 F.2d 74, 49 LRRM 2218 (5th Cir. 1961).

^{5/} John V. Borchard Farms, 2 ALRB No. 16 (1976).

^{6/} Fed.R.Civ.Pro. 56.

^{7/} Code of Civ. Pro. Section 437c.

^{8/} Erickson v. United States, 340 F.2d 512 (5th Cir. 1965), cited with approval in NLRB v. Smith Industries, Inc., 403 F.2d 889, 69 LRRM 2660 (5th Cir. 1968).

exceptions allows the parties to dispute findings, to present evidence, and to make legal arguments. If the parties raise a factual dispute, we will remand for a further investigation of hearing. However, an alleged inadequacy in the regional director's investigation is not itself grounds for exception. Sam Andrews' Sons, supra at p. 5.

In the present case, the regional director made findings on the economic strikers which have not been adequately disputed by the employer and the Teamsters. Those findings were sufficient to inform the parties of the issues involved. In no sense were the parties "precluded" from review. Accordingly, we find the exceptions to be without foundation, and we dismiss them.

We turn now to the substance of the regional director's findings on the economic strikers.

Since the strike took place within 36 months of the effective date of the ALRA, the eligibility of the strikers must be determined under Labor Code § 1157, paragraph 2. We hold today that a person whose name appears on the payroll immediately preceding the strike,^{9/} and who went on strike, is presumptively eligible to vote in the election. It is the voter's burden to establish those two facts. If the voter has abandoned interest in the strike, he or she is not eligible. It is the challenger's burden to prove abandonment. The nature of the proof required

^{9/}

The present strike began on July 29 and a payroll period ended July 31. The regional director concluded, and we agree, that the July 31 payroll is the proper one, in this case, for determining eligibility.

will be determined on a case-by-case basis; but we intend generally to follow the standards set forth in Pacific Tile & Porcelain Co., 137 NLRB 1358, 50 LRRM 1394 (1962).

We reserve the question of whether a striker whose name does not appear on the pre-strike payroll may also be eligible.

1. The regional director recommended sustaining challenges to the 18 voters listed in Schedule F because they "failed to make themselves available for the Board's investigation of challenged ballots." The UFW excepted, arguing that mere non-appearance at the investigation is insufficient to disqualify a voter. The argument has merit. Because the regional director made no other findings on these ballots, we are unable to resolve the challenges now. Accordingly, we remand the ballots for such investigation or hearing as may be necessary to determine their eligibility (Schedule F).

2. The regional director found that the voters in Schedule G had worked for the employer in the pre-strike payroll period, went on strike, have not returned to work at Lucas, would like to return to work when the strike is over, and have taken no work that is inconsistent with that desire. We overrule challenges to those ballots.

3. The regional director found that the voters in Schedule H were laid off before the strike began, but had an expectation of re-employment at Lucas. The regional director found that they joined the strike, have not gone back to work with the employer, and have taken no work inconsistent with their

desire to return after the strike. We reserve ruling on these challenges.

4. The regional director found that Armando Lara (Schedule I) had worked for the employer for six weeks in 1973 only, that he was laid off four days before the strike, and that he had an expectation of re-employment. Since Mr. Lara's name appears on the applicable payroll, and since he went on strike, he is presumptively eligible. Mr. Lara has not returned to work at Lucas, would like to return when the strike is over, and has not otherwise abandoned interest. We find him eligible, and overrule the challenge to his ballot.

5. The regional director found that the ten strikers listed in Schedule J "did not appear on the Employer's payroll for the weekly payroll period ending July 31, 1973." In his supplemental report, the regional director found that five names did indeed appear on the payroll, one had appeared on an earlier list in July, and four had not worked at all in 1973. Even with these clarifications, we are unable to make a determination on the eligibility of these workers, since no findings were made on the other elements of eligibility. Accordingly, we remand these ballots for further investigation or hearing. In any case, we reserve ruling on the five whose names did not appear on the payroll.

6. The regional director found that "Mary Lopez," a striker, had worked for the employer in 1974. The UFW excepted, pointing out that "Mary U. Lopez" had not worked in 1974. In his supplemental report, the regional director agreed that

"Mary U. Lopez" had not returned to Lucas. He found she went on strike when the strike began. We find her eligible (Schedule K).

7. The regional director found that Tomas Alvarez, a striker who was otherwise eligible, had worked for the employer for three hours in the more than two years between the strike and the election. The UFW argues that Mr. Alvarez should be eligible to vote, because it is difficult for workers in a labor contractor's crew to control where they work. It is possible, the union argues, that Mr. Alvarez did not even realize where he was working. Since the union offered no evidence to support its position, but relied on speculation, we sustain the challenge (Schedule L).

8. Through an apparent inadvertence, the regional director failed to make further findings, when requested to do so, on the status of economic striker Elodia E. Lara. We remand the ballot (Schedule M).

9. Elisa Baeza was found to meet all the criteria of an eligible economic striker, except she "did not know whether she would like to return to work at Lucas." We will follow the regional director's recommendation and find Ms. Baeza eligible. It is the burden of the challenger to show by affirmative evidence that the striker has abandoned interest in the struck job. While this striker's statement perhaps shows some wavering of interest, we cannot say it proves abandonment of the job and strike. The ballot will be counted (Schedule N).

CONCLUSION

The regional director is ordered to open and count ballots in accordance with this opinion. If the remaining unresolved challenges are still determinative, he is ordered to undertake such investigation and hold such hearings as may be necessary for their resolution.

Dated: February 1, 1977

GERALD A. BROWN, Chairman

ROBERT B. HUTCHINSON, Member

RONALD L. RUIZ, Member

SCHEDULE A (OPEN AND COUNT):

- | | |
|--------------------------------|---------------------------|
| 1. Maria L. Delgado | 20. Camilo Reyes |
| 2. Hermania Rodriguez | 21. Odilia Espinoza |
| 3. Jose Luis Gomez | 22. Elisa Gomes |
| 4. Mario Acdal Gomez | 23. Eleanor Gomez |
| 5. Socorro Arellano | 24. Edna Cabitla Gomez |
| 6. Teofila Acdal Gomez | 25. Gabriel M. Abila |
| 7. Maria Elena Cantu | 26. Raul Duran Macias |
| 8. Dan C. Lowe | 27. Anthony Lucas |
| 9. Pedro Santiago Rivera | 28. Alfredo Elias |
| 10. Consuelo F. Reynozo | 29. Ramona Riviera |
| 11. Maria Soledad A. Hernandez | 30. Hilda Resales |
| 12. Manuel Nalal Burges | 31. Olivia A. Medina |
| 13. Ross Milton Cook | 32. Moses Neva Uriva |
| 14. Ramon Contreras | 33. Jose A. Medina |
| 15. Angel Munoz | 34. Martha Badilla |
| 16. Beatriz R. Gutierrez | 35. Isabel Guterres |
| 17. Angie Gonzalez | 36. Leonard Charles Bowen |
| 18. Ramon Juarez Mireles | 37. Joaguin Delgadillo |
| 19. Vincente Ortiz Rijes | |

SCHEDULE B (CHALLENGES SUSTAINED WITHOUT EXCEPTION):

- | | |
|----------------------------------|----------------------------|
| 1. Mirosearia Gomez | 28. Esperanza Paloma |
| 2. Angie Valdivia | 29. Paul Brizuila |
| 3. Gregoria O. Rodriguez | 30. Jose Pinzon |
| 4. Esmeralda M. Rojas | 31. Gilberto Rodriguez |
| 5. Ramon N. Alcazar | 32. Salvador G. Madrigal |
| 6. Paulo M. Rojas | 33. Eleno V. Abolos |
| 7. Alberto Hernandez Hernandez | 34. Ofelice Silva |
| 8. Andres Rojas Davila | 35. Rogelio S. Morales |
| 9. Ofelia Cantu | 36. Antonia A. Villa |
| 10. Jose C. Cantu | 37. Noemi Rodriguez Madera |
| 11. Luis Villanueva Gomez | 38. Lupe Martinez |
| 12. Maria M. Salinas | 39. Gilberto Rangel |
| 13. Isidro Perez Torres | 40. Jesus Ramirez |
| 14. Hilda Cantu | 41. Christina Linan |
| 15. Ofelia Barrajas | 42. Frank Linan |
| 16. Jose Enrique LaFraga | 43. Esther Rojas de Gomez |
| 17. Maria D. Ramos | 44. Delores Solana Mendoza |
| 18. Serrando Andrade | 45. Macario Regaspi |
| 19. Gracie Gonzalez | 46. Antonio Ramos |
| 20. Guillermo Hernandez Alvarado | 47. Manuel Barboza |
| 21. Amado Andradez | 48. Alberto Reveles |
| 22. Sarah Bravo | 49. Daniel Louis Garcia |
| 23. Guadalupe Hernandez | 50. Sofia Alvarez |
| 24. Esperanza Hernandez | 51. Carlos Baeza |
| 25. Alicia Barbosa | 52. Eliamar Robles |
| 26. Carlos Reveles | 53. Raymundo Baeza |
| 27. Consuelo S. Jimenez | 54. Teresa M. Hernandez |
| | 55. Esperanza Bravo |

SCHEDULE C (OPEN AND COUNT):

1. Eliseo Chapa Herrera
2. Julian Lucero

SCHEDULE D (REMANDED)

1. Raul Puente

SCHEDULE E (VOID):

1. "no name"
2. "no name"
3. "no name"

SCHEDULE F (REMANDED):

- | | |
|-------------------------------|-----------------------------|
| 1. Emilia Quintana | 10. Ismael Solis Palomo |
| 2. Lorenzo Gonzales Saludado | 11. Luis Leyva Lujan |
| 3. Jesus Sisnevov Arona | 12. Dominga Baeza Lujan |
| 4. Antonio S. Garza | 13. Vicente Orona |
| 5. Ernesto Saldivar | 14. Eva Regalado de Trevino |
| 6. Maria Luc Martinez Marquez | 15. Julian Cristan Delgado |
| 7. Salome Rodriguez Trevino | 16. San Juanita Regalado |
| 8. Procerov Leija Martinez | 17. Maria Erlinda Saldivar |
| 9. Maria Martha Lopez Montana | 18. Fidencio Regalado |

SCHEDULE G (OPEN AND COUNT):

- | | |
|-------------------------------|--------------------------|
| 1. Maria Carranza | 8. Andres Carranza |
| 2. Deogracias S. Cisneros | 9. Luisa L. de la Cruz |
| 3. Mitedio de la Cruz | 10. Jose Lopez |
| 4. Amada Herrera | 11. Elisa F. Natera |
| 5. Guadalupe Fernandez Medina | 12. Henry Valdes Uranday |
| 6. Rafael Riveles | 13. Dolores Uranday |
| 7. Lupe Baeza | |

SCHEDULE H (RESOLUTION DEFERRED):

- | | |
|---------------------|--------------------|
| 1. Alejandro Lopez | 4. Frances Uranday |
| 2. Leonard Herrera | 5. Luz Baeza Pena |
| 3. Emma Baeza Orona | |

SCHEDULE I (OPEN AND COUNT):

1. Armando Lara

SCHEDULE J (REMANDED):

- | | |
|-------------------------------|----------------------------|
| 1. Antonio U. Garcia | 6. Flora Aguilar |
| 2. Maria de la Luz Perez | 7. Ambrosio Soto Cadena |
| 3. Manuel Delgado | 8. Procerio Leija Martinez |
| 4. Refugio Soto (Rubacava) | 9. Julian Cristan Delgado |
| 5. Maria Martha Lopez Montana | 10. Fidencio Regalado |

SCHEDULE K (OPEN AND COUNT):

1. Mary U.Lopez

SCHEDULE L (CHALLENGE SUSTAINED): 1.

- Tomas Alvarez

SCHEDULE M (REMANDED)

1. Elodia E. Lara

SCHEDULE N (OPEN AND COUNT):

1. Elisa Baeza