STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

ROD McLELLAN CO., Employer, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Petitioner.	)	No. 75-RC-227-M 3 ALRB No. 6

A representation election was held at Rod McLellan Co., on November 5, 1975. The tally of ballots showed 48 votes for the UFW, 42 for no union, 1 void ballot, and 12 challenged ballots. Since the challenges were determinative, the regional director conducted an investigation and issued a report. 8 Cal. Admin. Code Section 20365(e)(1)(regulations of August 28,1975). The employer excepted to the report, submitted detailed declarations controverting the regional director's findings, and made careful and specific legal arguments. The UFW responded with its own declarations and counter-arguments.

The regional director recommended that a challenge to the ballot of Carl Ruch be overruled (Schedule A). No party excepts to the recommendation, and we accept it.

The regional director recommended that a challenge to the ballot of Ralph Valdivia be sustained (Schedule B). No party excepts to the recommendation, and we accept it.

Supervisors. The regional director found that six persons were supervisors (Schedule C) and sustained challenges

to their ballots. He found they were team leaders - working foremen who exercised independent judgment, adjusted grievances, and could effectively recommend discipline or discharge. The employer excepted, submitting declarations from each of the six and from other employees. The declarations set forth the duties of the alleged supervisors/ and specifically denied that any of them exercised independent judgment, adjusted grievances, or could recommend discipline. In essence, these employees were "messengers" who relayed and translated orders and complaints from the true supervisors to the employees and vice versa. Although their rate of pay was slightly higher than other workers', they were not paid a salary, as were the supervisors.

We conclude from these declarations that there is a material factual dispute over the duties and powers of the six voters. Sam Andrews's Sons, 2 ALRB No. 28 (1976). Since both parties have submitted a great deal of evidence already, and since the evidence conflicts, a further investigation would be futile. We therefore order the regional director to hold a hearing under 8 Cal. Admin. Code Section 20363(a) (regulations of October 13, 1976).

Persons Not on the Payroll. The regional director concluded that four persons "did not work and did not receive any form of compensation during the critical payroll period preceding the filing of the instant petition." He recommended that challenges to their ballots be sustained, and the employer excepted. We sustain the challenges to Eric Von Snyder and Brad Denny (Schedule D). We remand the challenges to Margarito Carrera and Millie McFadden for further investigation

(Schedule E).

Section 1157 of the Act states:

> All agricultural employees of the employer whose names appear on the payroll applicable to the payroll period immediately preceding the filing of the petition of such an election shall be eligible to vote.

We interpreted this section in Yoder Bros., Inc., 2 ALRB No. 4 (1976) to mean that "Only those employees who are paid or entitled to be paid for the applicable payroll period are eligible to vote. . . . Employees on paid vacation or paid sick leave during the applicable payroll period, however, would appear to meet the test. . . . " In Yoder Bros., we found ineligible 17 persons on sick leave, leave of absence, and vacation, even though their names appeared on a "master employee list."

On further consideration, we reject the sweeping rule of Yoder. It appears to us inequitable to grant the vote to employees who perhaps worked half a day for an employer, and to deny the vote to long-standing employees who happened to be absent during the single relevant payroll period. We therefore hold that employees who were on unpaid sick leave or unpaid holiday may, under appropriate circumstances, vote.

The payroll limitation of Section 1157 has never been absolute. For instance, if an employee does work in the period, she may vote whether or not her name appears on the payroll, e.g., M. V. Pista & Co., 2 ALRB No. 8 (1976). Likewise, an employee whose name does not appear on the list because she was unlawfully discharged may also vote. 8 Cal. Admin. Code Section 20352(a)(3). In short, the term "payroll" does not describe a

particular piece of paper.

In the present case, Eric Von Snyder and Brad Denny did not work for the employer during the applicable payroll period, nor did they receive any wages. Both were apparently "on call," working for the employer as needed. Their absence from the payroll was not due to sickness or holiday, but because there was no work for them to do. They are indistinguishable from seasonal employees who have not yet been hired for the harvest. They are not eligible.

Margarito Carrera and Millie McFadden present a different picture. The employer claims that they were regular employees who would have done work and been paid, but for sickness (McFadden) or holiday (Carrera). We remand their ballots for further investigation. Their ballots will be counted if it appears that they would have performed work for the employer, but for an absence due to illness or vacation. In deciding their eligibility, the Board will consider such factors as the employees' history of employment, continued payments into insurance funds, contributions to pension or other benefit programs, and any other relevant evidence which bears upon the question of whether or not there was a current job or position actually held by them during the relevant payroll period.

CONCLUSION

The regional director is ordered to undertake such investigations or hearings as may be necessary to determine

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the outcome. In order to preserve the secrecy of the ballot, the regional director is instructed to avoid the opening of a single ballot, if that is possible.

Dated: February 2, 1977

GERALD A. BROWN, Chairman

ROBERT B. HUTCHINSON, Member

RONALD L. RUIZ, Member

SCHEDULE A (OPEN AND COUNT):

1. Carl Ruch

SCHEDULE B (CHALLENGE SUSTAINED):

1. Ralph Valdivia

SCHEDULE C (REMANDED FOR HEARING):

1. Frances Alma. DeFont
2. Beverly Pike
3. Dorothy Hall
4. Olive Smith
5. Angie Aquirre
6. Lorraine Jean Poodry

SCHEDULE D (CHALLENGES SUSTAINED):

1. Eric Von Snyder
2. Brad Denny

SCHEDULE E. (REMANDED FOR INVESTIGATION)

1. Margarito Carrera
2. Millie McFadden

MEMBER JOHNSEN, dissenting:

I dissent. I believe that the specific language of Section 1157 compels us to retain the rule enunciated in Yoder Bros., *2* ALRB No. 4 (1976), that "only those employees who are paid or entitled to be paid for the applicable payroll period are eligible to vote". This standard comports with the definition of the word payroll, that is, an " . . . employer's list of those entitled to receive compensation at a given time and of the amounts due to each". [Webster's 3rd New International Dictionary, Unabridged, p. 1659 (1967)] As we noted in Yoder Bros., "Presumably the Legislature considered that the typical impermanency of agricultural employment, as well as the necessity for speed in the conduct of elections and determination of the results, required ... [this rule defining] the electorate." [2 ALRB No. 4 at 13, n. 10]

It is true that the payroll limitation has never been absolute, in that an employee who performs work during the payroll period but whose name is inadvertently left off the payroll may vote, as well as an employee whose name does not appear on the payroll due to an unlawful discharge. These limited departures from the specific language of Section 1157 are necessary, since in the former case the payroll does not accurately reflect all of those "entitled to be paid" for work performed during the applicable

payroll period, while in the latter case the withholding of voting eligibility would permit an employer to commit an unfair labor practice and profit from his own wrongdoing. But neither consideration is present in this case.

The purpose of Section 1157's payroll limitation is to bring speed and certainty to the election process and avoid elaborate and time-consuming inquiry and speculation regarding the interest of nonworking voters in the outcome of an election. While, this restriction may, to a degree, operate harshly in a case such as this, it is no more harsh than denying the vote to a permanent employee hired the day after the applicable payroll period but prior to the actual balloting or in permitting a person to vote because his name appears on the particular payroll even though he worked only a few hours during the pay period and has left the employer and perhaps even the area.

Despite a resulting conflict with the precise language of Section 1157, the majority will now permit persons claiming to be employees on unpaid sick leave or unpaid vacation to be eligible to vote under "appropriate circumstances", if "there was a current job or position actually held by them during the relevant payroll period". We are thus faced with additional delays in resolving elections because we are left with a vague standard that will produce the time-consuming inquiry and speculation which the Legislature ostensibly sought to avoid in Section 1157 and which the Board likewise sought to avoid in the application of Section 1157 in Yoder Bros.

Dated: February 2, 1977

Richard Johnsen, Jr., Member