STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

ROD McLELLAN COMPANY, Employer, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Petitioner.	)	Case No. 75-RC-227-M 4 ALRB No. 22

DECISION ON CHALLENGED BALLOTS

Pursuant to the provisions of Labor Code Section 1146, the Agricultural Labor Relations Board has delegated its authority in this matter to a three-member panel.

Following a petition for certification filed by the United Farm Workers of America, AFL-CIO (UFW), an election was conducted on November 5, 1975, among the agricultural employees of the Employer, Rod McLellan Company. The tally of ballots showed the following results:

UFW	48
No Union	42
Void Ballots	1
Challenged Ballots . . .	12

As the challenged ballots were sufficient in number to determine the outcome of the election, the Regional Director conducted an investigation and issued a report, including recommendations as to the resolution of the challenges. The Employer filed exceptions to the report, along with supporting declarations and arguments,

to which the UPW responded with declarations and arguments in support of its position. Subsequently the Board issued an opinion, Rod McLellan Co., 3 ALRB No. 6 (1977).

Eight challenges were based on alleged supervisory status. Because no exceptions were taken to the Regional Director's recommendations, the Board sustained one of the challenges and overruled another in its original opinion. As to the other six alleged supervisors, the Board concluded that the Employer's exceptions raised a material factual dispute regarding their duties and authority, and ordered the Regional Director to hold a hearing to further investigate their status. On June 20, 1977 Investigative Hearing Examiner (IHE) Jeffrey Fine issued a report, in which he recommended that four of these challenges be overruled and the other two sustained. Both of the parties filed exceptions.

The Board has considered the challenges, the record, and the IHE's Decision in light of the exceptions of the parties and hereby affirms the rulings, findings, and conclusions of the IHE and adopts his recommendations.[1/]

Supervisors

The IHE found Olive Smith and Lorraine Poodry not to be

[1/] We decline to adopt in full the IHE's discussion of the burden of proof in hearings on challenged ballots. As these hearings are investigatory in nature, 'the concept of burden of proof does not, strictly speaking, apply. Nevertheless, it is true that in all such hearings there is an underlying status quo as to each voter which one of the parties seeks to upset; that party initially has the burden of producing evidence regarding that voter. In the instant case, for example, the names of the six alleged supervisors appeared on the eligibility list. They were therefore presumptively eligible voters. Absent any other evidence, that presumption would remain and determine the disposition of these ballots.

supervisors within the meaning of Labor Code Section 1140.4C j) at the time of the election. As no party excepted to these findings, the challenges are hereby overruled and the ballots will be opened and counted.

The other four voters challenged as supervisors were Angie Aguirre, Prances De Font, Dorothy Hall, and Beverly Pike. These four were considered by the Employer as being in a "team-leader" or a "foreman-grower" job classification. The Employer's contention is that these terms are equivalent to that of "lead-man" and that, due to their seniority or expertise, these individuals were utilized as conduits for orders to the other workers.

The IHE found that Angie Aguirre and Frances DeFont were not supervisors and that Dorothy Hall and Beverly Pike were supervisors. Testimony indicated these similarities among the job duties and functions of these persons at the time of the election: all four instructed and corrected other employees; all were paid an hourly wage; other employees regarded them as supervisors. This is not the sum of the facts however.

The record shows that Beverly Pike and Dorothy Hall exercised supervisorial authority. For example, testimony showed that Dorothy Hall moved among the greenhouses seeking out plants for orders, checked on the work performed by employees, exercised independent judgment in making work assignments, and could effectively recommend hiring and discharge. As to Beverly Pike, the record reflects that she exercised independent judgment in directing truck drivers and that on one occasion she effected the discharge of an employee.

In contrast, there was no persuasive evidence that either Angie Aguirre or Frances DeFont exercised independent judgment or possessed other statutory supervisory authority. As to Frances DeFont, the evidence indicates no more than that at the time of the election she was a long-time, trusted employee. We agree with the IHE that with respect to Angie Aguirre there was insufficient evidence to warrant a finding that she was a supervisor within the meaning of the Act.[2/]

Persons Not on the Payroll

Four of those originally challenged were found not to be on the Employer's payroll for the period immediately preceding the filing of the representation petition. The Regional Director initially recommended sustaining all four challenges. The Board sustained two of the challenges and remanded two for further investigation. Thereafter, the Regional Director made an investigation and issued a report, and the Petitioner filed exceptions thereto.[3/] As the exceptions and supporting declarations raised a material factual dispute, the Regional Director, pursuant to a

[2/] The finding with respect to Angie Aguirre is consistent with our finding in a previous unfair labor practice case, Rod McLellan Co., 3 ALRB No. 71 (1977). In that case the supervisorial status of Angie Aguirre was put in issue by the pleadings, the same parties were involved, and the issue was fully litigated. We note that absent evidence of a material change in circumstances, the finding in the previous unfair labor practice case is a sufficient basis for our holding in this case that Angie Aguirre was not a supervisor at the time of the election. NLRB v. Lee-Rowan Company, 316 F.2d 209 (CA 8) 53 LRRM 2021 (1963), enforcing Lee-Rowan Company, 137 NLRB 187, 50 LRRM 1107 (1962).

[3/] In connection with this report, the Board has received numerous submissions and motions from the parties which are not authorized by either the Act or the Regulations. We have not considered sub-missions or motions filed subsequent to the expiration of the time allowed for the filing of exceptions.

Board Order, conducted a further investigation and issued a supplementary report.

With respect to these two voters we previously held that: "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 employee's 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." Rod McLellan Co., 3 ALRB No. 6, at p. 4, (1977). -The intent of that ruling was to prevent the disenfranchisement of employees who were fortuitously on unpaid sick leave or unpaid holiday during the relevant payroll period. The record before us, when measured against that goal, requires that the challenges to the ballots of these two employees - Margarito Carrera and Millie McFadden be overruled, and their ballots counted.

Margarito Carrera

The Regional Director's reports reveal that Carrera was hired by the Employer as a permanent, full-time employee on April 7, 1970. In 1975, in addition to his two weeks paid vacation, from September 7, 1975 to September 22, 1975, Carrera requested and received permission for an additional four weeks of unpaid leave from September 22, 1975 to November 7, 1975. However, he did not take the full four weeks, but returned to work on October 29, 1975. Originally, Carrera intended to vacation in Mexico as he

had done in the past, but instead he traveled to Alaska to visit an uncle of his wife. While in Alaska, he worked for about two weeks in a cannery at an hourly wage with overtime for any time over eight hours a day. Apparently he received no fringe benefits other than the overtime pay.

The Employer provides several insurance and benefit plans, participation in which is conditioned on either employee status or employee-dependent status. The California State Florists Association Plan (CSFA) provides hospital/medical benefits as well as a comprehensive medical plan. The program was instituted by the Employer on September 15, 1975. From September 15 to November 30, 1975, Mr. Carrera was covered as a dependent of his wife under the CSFA Plan, because he was on vacation when the company instituted the plan. He was enrolled in his own right on December 1, 1975.

Effective September 1, 1972, the Employer provided a life insurance plan for its employees through Guardian Life Insurance Company. Carrera was continuously enrolled in this plan from its inception. Carrera was also covered by the Employer's profit-sharing plan. He accrued benefits under the plan, during his regular vacation period - September 7 to September 22 - because he was paid while on vacation. Carrera did not receive any salary from September 22, 1975 to October 30, 1975, and therefore did not accrue benefits under the program during this period. However, Carrera's trust account continued during, this period, and his share for 1975 was computed thereafter. Had he been terminated, he would not have had a continuing account.

In the years following the election, Carrera has taken

leaves of absence during the same period of each year. Each time he returned to work for the Employer. Carrera is presently employed by the Rod McLellan Company.

The above facts lead to the conclusion that Margarito Carrera would have performed work for the Employer during the critical payroll period but for his absence due to unpaid vacation leave. His ballot shall therefore be counted.

Millie McFadden

Ms. McFadden had been hired on April 25, 1968, as a permanent full-time employee. She was on approved sick leave from July, 1975, to February 3, 1976. During this time she was under doctor's orders not to work. In July of 1975, McFadden filed a state disability claim. On January 29, 1976, her doctor gave her a release to return to work. While she was on sick leave, the Employer hired temporary help but did not replace her permanently; the Employer usually hires extra, temporary employees during peak periods. Pursuant to an agreement with the Employer, when Ms. McFadden's doctor released her she returned to the same department where she had previously worked, at the same rate of pay. Thus, the facts indicate that Ms. McFadden's job was held open for her by the Employer during the pertinent payroll period.

The Regional Director's investigation discloses that Ms. McFadden's receipt of sickness benefits was predicated upon her continuing employment with the Employer. Records submitted by the insurance company show that Ms. McFadden was covered by Blue Cross/Blue Shield from June, 1975, to March, 1976, thus covering the period of the absence in question - July, 1975 to February 3,

1976. Indeed, Ms. McFadden stated that while she was on sick leave, Blue Cross covered part of the expenses of her medical bills and she paid the rest.

Ms. McFadden was enrolled in the Guardian Life Insurance Plan from its inception, September 1, 1972, until an audit in September, 1976.

Ms. McFadden was not paid during her sick leave, so no money was added to her share of the profit-sharing trust. She was not immediately benefiting from the plan during her illness. However, upon termination from the Employer an employee is entitled to the entire sum in his or her account. In August of 1977 she received a total of approximately $800,00 from the profit-sharing program. This was after she was terminated on April 12, 1977, due to permanent disability. On July 17, 1976, she had commenced another medical leave of absence.

The above facts lead to the conclusion that Millie McFadden would have performed work for the Employer during the critical payroll but for her absence due to illness.

Conclusion

This case has thus far had a unique procedural history. In order to clarify the current status of the outstanding challenged ballots herein, we shall summarize the disposition of all of the challenges, including those dealt with in our prior opinion.

The Regional Director is hereby ordered to open and count the ballots of those persons listed in Schedules A and B attached hereto. The challenges to the ballots of those persons listed in Schedules C and D having been sustained, the ballots

shall not be counted. The Regional Director shall thereafter prepare and serve upon the parties an amended tally of ballots.

DATED: April 21, 1978

GERALD A. BROWN, Chairman

HERBERT A. PERRY, Member

Schedule A, Challenges Overruled - No Exceptions

Carl Ruch

Olive Smith

Lorraine Poodry

Schedule B, Challenges Overruled Per Board Opinion

Angie Aguirre

Prances DePont

Margarito Carrera

Millie McFadden

Schedule C, Challenges Sustained - No Exceptions

Ralph Valdlvia

Schedule D, Challenges Sustained Per Board Opinion

Eric Von Snyder

Brad Denny

Dorothy Hall

Beverly Pike

Member HUTCHINSON, dissenting:

I disagree with the majority's finding that Dorothy Hall and Severly Pike were statutory supervisors.

Since the six voters in question are on the eligibility list they are presumed eligible absent sufficient evidence to establish their supervisory status.

The question of supervisorial status of persons in the category of the six people at issue here is often a close call. The record evidence, in my view, is insufficient to establish that Hall and Pike are supervisors within the meaning of Labor Code Section 1140.4(j) , and, in any event, does not justify treating Hall and Pike differently than the other four "teamleaders."

Since the evidence does not support the conclusion that any of the "teamleaders" had actual authority to "hire, transfer, suspend," etc., the question turns on whether, in the occasional act of directing fellow employees, assigning work,

or recommending that certain action be taken, the teamleaders were exercising "independent judgment" or carrying out routine reporting, messenger, or monitoring functions.

There is no evidence that Dorothy Hall hired, fired, or effectively recommended such action. The IHE relied on the fact that she moved from greenhouse to greenhouse in search of plants, occasionally gave directions, arranged for the reassignment of one employee, and instructed another as to the proper methods of work. In each incident her exercise of judgment was more of a routine or clerical nature consistent with her function as a conduit between the actual supervisors and the employees.

The evidence with respect to Beverly Pike's supervisorial powers is equally weak. The IHE found that she spent 97 percent of her time at routine physical labor yet found supervisorial status on the fact that she could hold up truck drivers until the truck was properly loaded and that she "played a key role" in one discharge,

But, directing the truck drivers involved nothing more than determining whether or not an order was properly filled. Such judgments do not amount to more than routine clerical or mechanical decisions.

The testimony regarding Pike's alleged firing of an employee, identified as "Shirley," does not establish that Pike exercised independent judgment with respect to this action, Two employees essentially testified that Pike initiated Shirley's firing which resulted in the IHE's conclusion that Pike played a "key role" in the firing. But, an employee might initiate a

discharge or even play a key role in a discharge without having the authority to effectively recommend such action. Pike testified that she simply reported the "frequent absences" and "inadequate performance" of Shirley. All of the testimony is consistent with the Employer's contention that Pike, like the other teamleaders, acted as a messenger or conduit and falls short of what is necessary to establish supervisorial status.

DATED: April 21, 1978

ROBERT B. HUTCHINSON, Member

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of:

ROD McLELLAN COMPANY,

Employer,

Case No. 75-RC-227-M

and

UNITED FARM WORKERS OF AMERICA, AFL-CIO,

Petitioner.

Robert J. Stuirtpf, Bronson, Bronson and McKinnon for the Employer.

Linton Joaquln, for the United Farm Workers of America, AFL-CIO.

DECISION

JEFFREY FINE, Investigative Hearing Examiner: This case was heard before me in Watsonville, California on March 14, 15, and 16, 1977. On February 2, 1977 the Agricultural Labor Relations Board (Board) issued its decision in Rod McLellan Co., 3 ALRB No. 6 (1977) on twelve challenged ballots cast in an election conducted among Rod McLellan employees on November 5, 1975. The Board found that the regional director's challenged ballot report of December 29, 1975 was not dispositive as to the challenges made by the United Farm Workers to the eligibility of Frances Alma DeFont, Beverly Pike, Dorothy Hall, Olive Smith, Angie Aguirre and Lorraine Poodry. For these employees, the Board ordered that a hearing be held to determine whether they are supervisors within the meaning of Labor Code

Section 1140.4(j) . [1/]

All parties were given full opportunity to participate in the hearing. Upon the entire record, including my observation of the demeanor of the witnesses, and after consideration of all available evidence, I make the following findings of fact, conclusions, and recommendations.

Statement of Facts

Rod McLellan Company operates a nursery in Watsonville, California and South San Francisco, California. The election took place on November 5, 1975. The bargaining unit comprised all agricultural employees of Rod McLellan who were employed in the Watsonville nursery. The Watsonville operation, among other things, grows plants and flowers which are shipped to retail customers from either Watsonville or South San Francisco.

All of the employees who were challenged on the ground that they were supervisors worked either in the propagation department which was supervised by Craig Winter, or in the packing shed which was supervised by David Jacobs.

In the propagation department, new plants are started

1/This section of the Act defines supervisors as:

> " . . . any individual having the authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or the responsibility to direct them, or to adjust their grievances, or effectively to recommend such action, if, in connection with the foregoing, the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment."

Interpreting identical language in the NLRA the courts have read the enumerated powers in the disjunctive—-that is, any of the enumerated powers is sufficient to render an employee a supervisor. Kaiser Engineers v. NLRB (1976 9 Cir.) 538 F.2d 1379, 92 LRRM 3153.

from cuttings, plants are grown to maturity and then are sent to customers.

The packing shed is divided into three sub-units: roses, gardenias, and orchids. Customers' orders are generally relayed by Jacobs to the various sub-units and teamleaders in the sub-units see that the orders get filled.

At the time of the election, the six challenged employees were paid an hourly wage and punched a time clock. The six were classified either as nurseryman, teamleader or foreman-grower. The boundaries between these job classifications are somewhat vague and with the exception of pay rates there does not appear to be much differentiation. Foreman-grower was at the top of the hourly pay scale followed in descending order by teamleader, and nurseryman. All wera paid more than general employees.

Burden of Proof

The Agricultural Labor Relations Act (Act) is designed to give agricultural employees the right to organize in order to bargain collectively with an employer. The bargaining unit of any agricultural employer is composed of all the eligible agricultural employees of that employer. (Labor Code Section 1156.2). In addition, "(a) 11 agricultural employees of the employer whose names appear on the payroll applicable to the payroll period immediately preceding the filing of the petition . . . shall be eligible to vote." (Labor Code Section 1156). When the eligibility of a particular employee is put in question that employee votes a challenged ballot. The regulations specify that any party making a challenge must have good cause. 8 Cal. Admin. Code Section 20350(1975) as amended 8 Cal, Admin. Code Section 20355(1976). Only if the number of challenges is determinative of the election will the regional director investi-

gate and recommend sustaining or overturning the challenges. Parties may then take exceptions to the regional director's recommendation. If there are no exceptions to the regional director's recommendations, the Board adopts such recommendation. A party excepting to a regional director's recommendation must submit evidence which raises a material factual dispute. Sam Andrews & Sons, 2 ALRB No. 28 (1976). The Board then will resolve the issue.

In the case before me, the regional director, on the basis of an ex parte investigation, recommended sustaining the challenges made by the UFW with regard to the six named employees. The employer excepted and the Board concluded that further investigation by the regional director would be futile and ordered a hearing pursuant to 8 Cal. Admin. Code Section 20363(a)(1976). 3 ALRB No. 6 (1977).

8 Cal. Admin. Code Section 20363(a)(1976) states "where, after" investigation the regional director deems it appropriate, he or she may issue a notice of hearing on those challenged ballots which cannot be resolved by investigation . . . " It is apparent therefore that the regional director's recommendations with regard to the six challenges here are not dispositive. The Board did not rely on the regional director's recommendation nor am I constrained to rely on them. The procedural posture of these challenged ballots is simply that the Board has ordered a material factual dispute to be resolved by hearing. This being so, the party which puts eligibility into issue has the burden of producing evidence to sustain these challenges. The UFW has the burden of coming forth with evidence which if believed would sustain their challenges.

OLIVE SMITH

Olive Smith began working for the Rod McLellan Company in 1974. She was hired by Craig Winter and started in the propagation

department. Soon after she was hired, Winter transferred her to full time work in the brorailiad section because bromiliad demand and production had expanded to the point where, in Winter's judgment, a full time employee was necessary.

Smith testified that for four or five months she worked alone in bromiliads but by the time of the election there were two other employees in addition to her working in bromiliads. Smith was the most experienced and senior employee in bromiliads. At the time of the election she was classified as nurseryman and thus was paid a higher hourly wage than other employees.

Testimony indicated that the work in bromiliads was routine. It consisted of repotting, separating, watering, pollinating plants and putting them on trucks for delivery. Smith participated in all these tasks. In addition she performed routine clerical functions such as keeping records of all plants shipped.

Verna Miller testified that she worked in the bromiliad section six to twelve times in a two year period and that Olive Smith instructed her in the work to be done. Miller stated that she regarded Smith as the person who was in charge. The fact that Smith instructed employees who were temporarily assigned to the bromiliad section does not elevate her to the status of a supervisor. As the most experienced person in bromiliads, she is the person other employees would logically turn to for help. This does not in and of itself make her a supervisor. Skaggs Transfer, Inc., 185 NLRB No. 91, 75 LRRM 1174 (1970), enforced in part 440 F.2d 994, (6th Cir. 1971) 77 LRRM 2256.

That Verna Miller viewed Smith as "in charge" does not make Smith a supervisor within the meaning of the Act. The Board

in Salinas Greenhouse Co., 2 ALRB No. 21 (1976) has stated that occupying "a special position in the company in the eyes of the employees is not a sufficient basis from which to conclude (one) i a supervisor . . . " At 3.

Whether Smith was actually "in charge" is rebutted by the testimony of Joe Ramirez. Ramirez, unlike Verna Miller, regularly worked in bromiliads and consequently his testimony is more credible. He testified that Olive Smith gave him instructions but he also testified that Smith received instructions from Craig Winter and that she relayed such information to Ramirez.

On cross-examination the UFW elicited testimony from Joe Ramirez that Olive Smith gave Margarita Escarenza, the third regular employee working in bromiliads, permission to come in early so that *she-* could leave early. The testimony did not indicate that this happened regularly. Considering that no evidence was introduced to indicate that Smith hired, fired, disciplined or assigned employees or effectively recommended such action, this instance of what could possibly be considered an exercise of independent judgment standing alone does not warrant finding Olive Smith a supervisor, and I therefore find that Olive Smith is not a supervisor within the meaning of Labor Code Section 1140.4(j) .

LORRAINE POODRY

Lorraine Poodry was hired by Craig Winter in October 1975 approximately one month before the election. She was told that a new department was being set up to ship plants directly from the nursery in Watsonville. The employer therefore needed someone to check the quality of plants, to see that orders were sent out, and to wait on wholesale customers. At the time of the election she was classified as a "foreman-grower" and as such was paid signif-

icantly more than the lowest hourly permanent full time employee. (See employer's exhibit 4). There is no dispute that on February 16, 1976 she was promoted to a supervisor.

Winter testified that Poodry's job was defined in large part by him and that he took an active part in the operation when it began. Winter's testimony which was not effectively rebutted was that he spent approximately 80 percent of his time in the new department when it first began operation. This supports an inference that in the first weeks of operation Poodry did not exercise independent judgment. (Arkay Packaging Corp., 221 NLRB No. 10, 90 LREM 1728 (1975).)

Winter also testified that Poodry was hired because she previously managed a plant store and was very particular about plants She would be able to select the best and most suitable plants for customer's. Poodry was also a college graduate. While Poodry may have had special expertise or ability which made her particularly valuable to the employer, this alone does not necessitate a finding that she is a supervisor. Rheem Mfg. Corp., 188 NLRB No. 67, 76 LRRM 1311 (1971).[2/]

Both Poodry and Winter testified that Poodry was told when she was hired that if expansion was successful she would be promoted to supervisor. Ultimately she was promoted. The fact that

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2/ In Rheem, supra, the NLRB held that quality control technicians were supervisors since they responsibly assigned and directed work of other employees and possessed authority to recommend disciplinary action. The Board did not look to the special expertise that such employees had, but rather that quality control technicians had several inspectors working directly under their supervision. Poodry' skills do not seem to be of a type that would necessitate regarding her as a professional employee, and the mere fact that she had some "expert" knowledge of plants is not enough to conclude that she is a supervisor.

she was hired with the understanding that she would be promoted should the department prove successful is not dispositive of supervisory status. The NLRB looks not to ultimate responsibility but to what attributes an employee presently possesses in order to determine if that employee is a supervisor. Cumberland Shoe Corp., 144 NLRB No. 124, 54 LRRM 1233 (1963).

The tasks performed by Poodry were generally mechanical and routine. She waited on customers, took orders that were phoned in or brought in by salespeople, selected plants and loaded them for delivery. Poodry testified that she engaged in physical labor such as loading the trucks to the same extent as other employees. The bulk of other testimony contradicted this and revealed that she only loaded on occasion and spent most of her time waiting on customers. However, the evidence does not show that Poodry engaged in moxe than routine tasks.

The UFW attempted to show that Poodry's job differed significantly from other employees in the shipping unit. For example, Poodry had a table and later a desk where she answered the phone and filled the orders. However, when Poodry was absent Verna Miller substituted for her and used the same desk. Also she did not take the same breaks as other employees but this was because she often waited on customers and sometimes was not free to go on break.

The testimony with regard to Poodry's ability to effectively recommend is weak. Verna Miller testified that Poodry told her, "I've put you in for a raise" or words to that effect. Miller stopped working at the end of February 1976, roughly a week or two after Poodry was officially promoted to supervisor. The UFW was unable to pin down the time when Poodry made this statement and it could very well have been made after Poodry was promoted.

Verna Miller and Patricia De La Garza testified that Poodry several times gave them permission to leave work early. De La Garza indicates that she began working with Poodry in February. It is unclear whether permission was given before the election. In any case, such conduct does not warrant finding Poodry a supervisor.

Verna Miller also testified that when the department first opened, the company newspaper noted the fact and indicated that Poodry, Miller and Oddam would be working in the new department. Miller was in the office when Poodry told Dorothy Hall that she was upset because the notice simply lumped her together with Miller and Oddam. Hall allegedly said that it was put in the paper because of the election and Poodry supposedly said that she understood. The most obvious inference to draw is not that Poodry was a supervisor, which is what the OFW claims is .the significance of this incident, but that she had a different status and position than other employees. The employer admits that Poodry is a "foreman-grower."

Patricia De La Garza testified that she noticed no difference between Poodry's duties and powers before she was promoted than afterwards. De La Garza testified that she began working with Poodry in February shortly before Poodry was promoted. A supervisor possesses the authority to hire, fire, assign, etc. and does not have to exercise that, authority. Considering the size and nature of Poodry's operation, it is likely that Poodry has little occasion to exercise her supervisorial powers so that it may appear that her job is unchanged. .

In sum, I find Lorraine Poodry not a supervisor within the meaning of Labor Code Section 1140.4(j) at the time the election occurred.

DOROTHY HALL

At the time of the election Dorothy Hall was classified as a foreman-grower in the propagation department. As such she was, paid on an hourly basis. Her direct supervisor was Craig Winter. Generally she worked with six or seven other employees.

Hall who is no longer employed at Rod McLellan, but is seeking to be rehired, testified that her duties were to take cuttings water plants, treat sick plants, weed, mist plants and apply pesticides when necessary. During the Christmas season, Hall also was involved in seeing that orders for wreaths of needlepoint ivy were filled. As many as 15 people worked in needlepoint ivy. [3/] In addition to these duties Hall kept records of how many cuttings were taken and potted of a particular plant. When Winter was unavailable she wrote invoices for wholesale orders.

Although Hall testified that she spent 95 percent of her time doing the same work as other employees, Patricia De La Garza and Verna Miller testified that she spent considerable time moving from greenhouse to greenhouse looking for different kinds of plants so that orders could be filled and seeing that cuttings were potted. In general, Hall told employees what work they should be doing and corrected them when they did work incorrectly. Other workers testified that Hall visited many of the greenhouses to check on work. I find that Hall spent a significant amount of time going from greenhouse to greenhouse in contrast to other employees. On several occasions it seems she exercised judgment in allowing employees to leave early. There was some testimony that Dorothy Hall on

3/ The ratio of rank and file employees to supervisors is a factor the NLRB has considered in determining whether employees are or are not supervisors. Hills Department Store, 155 NLRB No. 109, 60 LRRM 1477 (1955).

occasion handed out paychecks.

Several events testified to give rise to the conclusion that Hall was a supervisor. First, it is apparent from the geography of the propagation unit of Rod McLellan that Hall was in and out of greenhouses checking on work and spent a significant proportion of her time doing this.

Second, Francis Figeroa testified that Dorothy Hall told her that she was unsatisfied with the work of Susan Webb and was going to complain to Craig Winter about it. She did not tell Winter, but she did arrange for Webb to work with other employees to see if she would do better work. There is an inference that Hall's job was to report on employee performance and could effectively recommend firi or transfer. Additionally, Refugio Valdevia testified that Hall told employees which greenhouse to work in. This suggests that Hall had considerable discretion to determine how orders were filled and considering the often large number of employees suggests Hall had some discretion in making assignments.

Third, Enrique Barra testified that another teamleader, Arturo Torres, told him how to do a particular job and that Hall came by and told him how to do it a different way. From this one could conclude that Hall was in charge and she directed other teamleaders. Taking all these factors into consideration, the number of employees in the department, the physical size of the department which made it necessary for Hall to move from greenhouse to greenhouse, and Hall's ability to assign, I find that Dorothy Hall is a supervisor within the meaning of Labor Code Section 1104.4(j) .

ANGIE AGUIRRE

Angie Aguirre has been employed in the orchid department of the Rod McLellan Company for the past ten years. Her immediate

supervisor at the time of the election was David Jacobs.

David Jacobs, as supervisor, appears to have delegated more responsibility to teamleaders than Winter. For example, he had his teamleaders and forepeople initial the personnel status change forms. (PSC forms). These forms recorded any change in status of a particular employee. If an employee got a raise, the PSC-form would indicate this. According to the testimony, team-leaders' initials on a PSC form meant only that the teamleader saw the document. It did not mean that the signature or initials were necessary to effectuate any change. This testimony was essentially unrebutted. Although these documents were subpoenaed by the UFW, none were offered or admitted into evidence.

Jacobs also had meetings with all the employees that he directly supervised. Some witnesses testified that at these meetings Jacobs said that his teamleaders had the power to fire, and discipline. Further, he allegedly said that employees should take their small problems to teamleaders before discussing them with him. This suggests that teamleaders had the power to adjust grievances.

Finally, before the election, Jacobs was a trainee supervisor.[4/] There is no dispute that he was a full supervisor by the time of the election. While Jacobs was a trainee, teamleaders passed out paychecks, attended teamleader meetings and appear to have exercised more authority than usual. Even if teamleaders were supervisors during the period when Jacobs was a trainee supervisor they were temporary supervisors at best. The NLRB has frequently rec-

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4/ Jacobs was unable to remember when he was a trainee supervisor. The best estimate is that he was a trainee supervisor from December 1973 until May 1974.

ognized that employees serving in temporary supervisory capacities are not as a rule ineligible to vote. GAF Corp. v. NLRB (1975 5th Cir.) 90 LRRM 3295, 3296.

At the time of the election Aguirre was classified as a teamleader. She was paid more than general employees and was paid on an hourly basis. Sometimes she acted as an interpreter. Generally the orchid department employed three or four persons.

Aguirre testified that she spent approximately 90 percent of her time engaged in routine physical tasks. However, testimony from other witnesses disclosed that her job differed somewhat from those of other employees in the orchid department.

In general, other employees sorted, graded and packed orchids. Aguirre sorted, mostly packed, instructed other employees how to grade, took down orders that were relayed to her. She was responsible for seeing that orders were filled and sent out. Aguirre insists that she exercised no independent judgment but merely relayed orders and direction given to her by Jacobs. If Jacobs was absent she took orders directly as they came in, but large orders had to be approved by Jacobs.

The UFW sought to prove Aguirre's supervisory status through evidence of her ability to hire or fire, to discipline, to assign work, to manage production, to adjust grievances and to effectively recommend.

Hiring

The evidence is insufficient to conclude that Angie Aguirre hired. Some witnesses testified that Angie Aguirre was the one who told them they could start work. Such witnesses also testified that they did not know who in fact really made the decision

to hire them. At best therefore, Aguirre appeared to some employees to have hired them. However, the NLRB has held that "ostensible supervisory status...is not probative as to the issue before us. Our task is to determine whether a certain employee is actually a supervisor." Frank Foundries Corp., 213 NLRB No. 65, 87 LRRM 1188 (1974).

The only testimony with regard to a specific incident of hiring was effectively rebutted. Angel Sandoval testified that unsolicited by him, Aguirre asked him whether he would allow his wife to work. If so she would be hired. Cross-examination revealed that Ron Frazier, administrative manager, was reluctant to hire Mrs. Sandoval until, she received clearance from a doctor regarding a past illness. Mr. Sandoval maintained that the decision to nine had been made by Angie Aguirre and Frazier's input was limited. Sandoval's position is that Aguirre sought him out with regard for a job for his wife and that Frazier really had no say in the decision. To me, Sandoval's version of events is unlikely. He maintains on one hand that the decision to hire was Aguirre's and oh the other hand that Frazier objected, conditioned hiring, but really had no say in the ultimate decision.

Gloria Vasquez testified that she was present during a conversation between Aguirre and Angel Sandoval and that Sandoval asked Aguirre for a job for his wife. Mr. Sandoval asked other teamleaders and supervisors also.

Even if the testimony of Gloria Vasguez is not credited, and one looks only to Sandoval's testimony, it is apparent that Ron Frazier was involved in the decision to hire Mrs. Sandoval. However, I do credit the testimony of Gloria Vasquez because I find Sandoval's

explanation improbable and find that Angie Aguirre did not hire Mrs. Sandoval.

Assignments

The evidence disclosed that within the orchid department Aguirre decided what work had to be done in order to fill the orders. Many, witnesses testified that in effect Angie Aguirre told them what to do. On occasions she told employees when to take breaks and when to clean up the work area preparatory to leaving at the end of the day. It is also apparent that much of the work in the orchid department is routine. It does not appear that Aguirre exercised more than routine discretion which is not indicative of supervisory status.[5/] The evidence is not persuasive that Aguirre had the power to transfer workers to other departments. To make such transfers, unrebutted testimony of Craig Winter indicates and I so find, that Aguirre would have to determine not only that there was not enough work in orchids but that another department needed or could use additional workers. Nothing indicates that Aguirre had the authority to do this.

Adjustment of Grievances

The UFW contends that Aguirre, Pike and DeFont had the power to adjust grievances. The crucial piece of support for this contention is the testimony of Elizabeth Figeroa, Sophia Arroyo and Verna Miller that David Jacobs told employees at a series of meetings that teamleaders had the authority to fire and that all employees must bring problems to the attention of their teamleaders before they were brought to him. Jacobs admitted this but insisted that

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5/ See McClery Industries, Inc., 205 NLRB No. 85, 83 LRRM 1702 (1973). Employees that instruct, train and assign work to other packers found not to be supervisors.

teamleaders nevertheless did not have the authority to adjust grievances.

The authority to adjust grievances is clearly an indicia of supervisory status. However, it is unclear what grievances team-leaders actually adjusted, and whether the minor problems referred to by Jacobs were in fact grievances. [6/] The UFW has not met its burden of proof with regard to grievances. I find that Angie Aguirre did not have the authority to resolve grievances and on the basis of Jacob's statements alone I do not find she was a supervisor at the time of the election. [7/]

Discharges, Layoffs, Discipline

Elizabeth Figeroa, Sophia Arroyo and Verna Miller testified that David Jacobs stated on several different occasions at employee meetings before the election that Aguirre, Pike and DeFont had the authority to fire. When Figeroa testified at the hearing with respect to this, the translator had difficulty translating her exact meaning, although Figeroa ultimately stated that Jacobs told the assembled employees that the teamleaders had this authority.

Arroyo testified that Jacobs was assisted by a translator, Elizabeth Figeroa, at least on one occasion when he made this statement. This raises the possibility of mis-translation although

6/ Beverly Pike testified that permission to leave early was the type of minor problem that Jacobs meant to be brought to teamleaders first.

7/ In Frank Foundries the hearing officer found that employees brought their complaints to a leadman but there was no evidence that the leadman had any authority to act in the employer's behalf. The Board concluded that the leadman was thus not a supervisor. Frank Foundries, 213 NLRB No. 65, 87 LRRM 1188 (1974).

neither party raised this point. Thus even if Jacobs did not say that the teamleaders had the authority to fire, employees may have been left with the distinct impression that they did have that authority. Apparent authority is not determinative. (Frank Foundries Corp., supra.)

Arroyo testified to two employee meetings, one in June or July 1975, and another in November where Jacobs said teamleaders had authority to fire. Her testimony is somewhat ambiguous. She testified that Jacobs told the employees that "we have to do our work correctly and if one day they let us go, we should talk with h i m." Again, by way of explanation she said "the employees were told that if they were fired or let go by a teamleader or foreperson they should not go home but first go to h i m."

Verna Miller testified without ambiguity that Jacobs on more than one occasion at employee meetings said that teamleaders and forepersons had the authority to fire.

Jacobs denies he ever made such a statement. He does admit however that at these employee meetings he explained the chain of command.

Julia Ruch testified that she attended such employee meetings and Jacobs never said teamleaders or forepersons had the authority to fire. Linda Roman testified similarly.

While some employees believed Jacobs said teamleaders had the authority to fire, I am not convinced on the basis of available testimony that he said this. Therefore, based on the evidence that Jacobs made such statements, I do not find that Pike, Aguirre and DeFont are supervisors.

The UFW did elicit testimony that Aguirre as well as other

teamleaders commented on and criticized the performance of employees. For example, they would tell workers to stop talking and hurry up.

Aguirre also admitted that Jacobs sometimes discussed raise with her. It is not clear that Jacobs followed her recommendations, although he may have considered them. It is also apparent that Aguirre is a trusted long time employee with the responsibility to see that her department carried out its assigned tasks.

It appears that whatever orders Aguirre gave were minor and within the confines of the general pattern of output determined by the number of orders which had to be filled. "The leadman or straw boss may give orders or directives or supervise the work of others, but he is not necessarily a part of management, and a 'supervisor' within the act ...". NLRB v. Doctors Hospital, (1973, 9th Cir.) 48S P.2.d *772,* 776., 85 LREM 2228. Consequently, I do not find Angie Aguirre was a supervisor within the meaning of Labor Code Section 1140.4(j) but rather a senior employee.

FRANCIS DeFONT

Francis DeFont has been employed in the gardenia department of the Rod McLellan Company for the past eleven years. Her immediate supervisor at the time of the election was David Jacobs. DeFont was classified as a teamleader, was paid hourly and punched a time clock. Usually she worked with four other employees.

Jacobs testified that DeFont essentially relayed information and exercised no independent authority. DeFont's testimony was similar. Like Aguirre, DeFont instructed workers, corrected their work and told them what to do. Although DeFont spent sons time writing invoices and speaking with customers over the phone, she also worked with other employees in the gardenia department

doing essentially the same tasks.

Besides the statement attributed to Jacobs regarding the authority of teamleaders to fire there is little else upon which to find that DeFont was a supervisor. Like Aguirre and Pike, DeFont was a long time trusted and respected employee.

The UFW was unable to elicit convincing testimony or even much testimony with regard to DeFont. For example, Verna Miller thought some teamleaders had special, privileges but not DeFont. Patricia De La Garza testified that she never saw DeFont hire or fire.

Elizabeth Figeroa testified that she took over DeFont's job when DeFont was absent, and that Jacobs told her to tell the other employees what to do. It is reasonable to conclude that DeFont herself was under such orders and that when she corrected employees or told them what to do she was thereby carrying out orders that were given, to her. Evidence does not show that the instruction DeFont gave other employees amounted to anything more than routine instruction.

Elizabeth Figeroa also testified that she overheard a conversation between Jacobs and DeFont. DeFont apparently complained about the performance of an employee and Jacobs responded by saying "you hired h e r ." Figeroa testified that it was her understanding that DeFont hired.

Other than the hearsay statement described above there is very little evidence that DeFont acted as a supervisor as opposed

to a senior employee or lead person. Because such hearsay is uncorroborated it cannot be the basis for a finding of fact. (8 Cal. Admin. Code Section 20370(c)). Additionally, a great deal of testimony was elicited regarding the Rod McLellan Company's policy of hiring relatives and friends of employees. Jacobs' statement to DeFont in this context is less than what it appears. Therefore, I conclude that Francis DeFont was not a supervisor within the meaning of Labor Code Section 1140.4(j).

BEVERLY PIKE

At the time of the election Beverly Pike was a teamleader in the rose grading department. Her supervisor was David Jacobs. Pike testified that her duties were essentially the same as those of Aguirre and DeFont. There is no dispute that Pike was promoted to supervisor in January 1977. (See employer's 11(b)).

As a teamleader Pike was paid an hourly wage and like other non-managerial employees punched a time clock. Pike described her role as a coordinator under Jacobs' instructions.

Pike testified that her duties were the same as other employees in the rose grading department. She graded roses,

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8/ It could be argued that this hearsay statement is an admission and hence a hearsay exception. Under this view Jacobs would be admitting on behalf of the employer DeFont's ability to hire, a clear indicia of supervisory status. However, no evidence was adduced by the UFW that Jacobs was authorized to make such statements for Rod McLellan Company and therefore I don't believe this statement is a hearsay exception. Evidence Code Section 1222.

Additionally, it might be argued that Jacobs' statement is non-hearsay i.e., is not offered to prove the truth of any assertion. The mere fact that Jacobs made such a statement is relevant to help prove that DeFont hired. It does appear that this statement is offered in a hearsay manner to prove whether in fact DeFont hired and hence is hearsay. Am-Cal Investment Co. v. Sharlyn Estates, I (1967) 255 C.A.2d 526, 539-542.

bunched them, trimmed them and put them in buckets and placed them in the cooler. She testified that she spent approximately 97 percent of her time engaged in such routine tasks.

In addition to those enumerated, Pike had other duties. She told employees what to do, corrected them, told them which colors to bunch, assigned particular employees to particular colors, told employees when to clean up, totaled hours on employee time cards, and initialed or signed personnel status change forms when directed to do so by Jacobs. These tasks do not appear to require more than routine discretion, although Pike testified that at peak times approximately 12 persons would be working in roses.

Pike also testified that on occasion she held up trucks and told drivers not to leave because there were still orders to fill. Pike insisted that it wasn't because of her authority that the drivers couldn't leave.

It can be argued that holding up truck drivers is not an indicia of supervisorial status since it is part of the responsibility for getting Out orders and this responsibility in the context of the Rod McLellan organizational scheme does not make one a supervisor. However, considering that testimony indicated that the trucks went to different areas to pick up various plants, the holding up of a truck could affect other aspects of the McLellan operation. Viewed in this manner, I believe that Pike exercised independent judgment in directing truck drivers.

Additionally, there is evidence from Verna Miller and Elizabeth Figeroa that Beverly Pike fired an employee identified as Shirley. Miller testified that firing Shirley was Pike's idea, that Pike said that she didn't want Shirley and that Pike was the one who called up Shirley and told her that she was discharged.

Figeroa testified that Pike told her that she didn't need Shirley, that Shirley was frequently absent, that Shirley was not sick, but lazy, and didn't want to work and that she fired Shirley.

On rebuttal Pike testified that she did not fire Shirley but merely reported her frequent absences and inadequate performance to Ron Frazier who did fire her. It is interesting to note that Pike reported to Frazier not Jacobs.

It appears from the evidence that Pike played a key role in the decision to terminate Shirley.

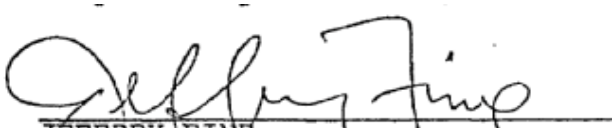
I find that Beverly Pike exercised independent judgment when directing employees and was instrumental in the decision to fire one employee. Therefore, I find that Beverly Pike is a supervisor within the meaning of Labor Code Section 1140.4 (j).

CONCLUSION AND RECOMMENDATION

I find Dorothy Hall and Beverly Pike to be supervisors and recommend the challenge to their ballots be sustained. I find Angie Aguirre, Francis DeFont, Olive Smith and Lorraine Poodry not to be supervisors and recommend the challenge to their ballots be overruled.

DATED: June 20, 1977

Respectfully submitted,



JEFFREY FINE
Investigative Hearing Examiner