STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

E. G. CORDA RANCHES, dba CORDA RANCHES, Employer, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Petitioner.	)	Case No. 75-RC-2-E 4 ALRB No. 35

DECISION AND ORDER SETTING ASIDE ELECTION

On November 13, 1975, an election by secret ballot was held among the agricultural employees of E. G. Corda Ranches in Imperial Valley. The official tally of ballots furnished to the parties at that time indicated that there were 24 votes cast for the UFW, 21 votes for no union, and 2 challenged ballots.

The Employer timely filed objections to the conduct of the election alleging, inter alia, that the Board Agent improperly invoked the three presumptions contained in 8 Cal. Admin. Code Section 20310(e) (1975).[1/] The Employer argues that as a consequence of the Board Agent's application of these presumptions ineligible voters were permitted to cast unchallenged ballots sufficient in number to affect the outcome of the election. Accordingly, the Employer requests that the Board refuse to certify the results of the November 13, 1975 election.

On November 6, 1975, the Employer was served with a

[1/] Reenacted and modified to reflect Board precedent as 8 Cal. Admin. Code Section 20310 (e); see Yoder Brothers, Inc., 2 ALRB No. 4 (1976) at n.2.

petition for certification by the UFW. Pursuant to 8 Cal. Admin. Code Section 20310 (1975),[2/] as it then existed, the Employer submitted a list of its current employees to the supervising Board Agent and to the Union. The list contained the names and addresses of the Employer's steady crew of 50 employees and the names, without addresses, of 58 other employees who were provided to the Employer by an independent labor contractor. The Employer, after being notified by the Board Agent that the list was incomplete due to the absence of addresses for the contractor supplied employees, explained that the contractor did not keep such records and that the requested information was therefore unavailable.

The Board Agent construed the Employer's submission of the incomplete list as a violation of the Board's regulations and, pursuant to 8 Cal. Admin. Code Section 20310 (e) (1975) presumed: (1) that there was an adequate showing of interest to proceed with the election; (2) that peak season requirements had been met; and (3) that all persons who appeared to vote and who provided adequate identification were eligible voters.

In Yoder Brothers, Inc., 2 ALRB No. 4 (1976) we said that "the agricultural Employer is responsible for maintaining and making available to the Board upon request accurate and current payroll lists containing the names and addresses of workers supplied by a labor contractor, as well as those employed directly." Yoder Brothers, Inc., supra at 6, n.3 (emphasis added). Therefore, the Employer by furnishing an eligibility list without the current

---

[2/]Reenacted with modifications as 8 Cal. Admin. Code Section 20310 (a) - (d) [1976].

addresses of more than 50% of its employees, substantially failed to comply with the requirements of 8 Cal. Admin. Code Section 20310 (d) (1975). Consequently, it was within the Regional Director's discretion to invoke the aforementioned presumptions. Application of the first two presumptions prevents the noncomplying Employer from delaying the scheduling of an election by its failure to provide information upon which the Board's initial investigation of the petition is based. The third presumption, in contrast, is relevant to the conduct of the election itself rather than to the preelection investigation and scheduling of the election.

We think "[i]t is important to note that these presumptions are an aid to implementation of the statutory mandate, and not a penalty. Invocation of a particular presumption is appropriate only where the Employer's failure to submit timely and complete information has frustrated the determination of facts which relate to the presumption which is being invoked." Yoder Brothers, Inc., supra , at 6, n.2. Under the circumstances of this case, once the election was directed, no constructive purpose was served by the Board Agent's invocation of the third presumption and by her failure to use the list of eligible employee names to facilitate the voting and challenge procedures. The list was deficient only because of its lack of addresses; it has never been claimed to be anything less than complete with regard to the identification of eligible voters.

On two previous occasions, the Board has ruled that invocation of the third presumption in the instant case did not

///////////////

materially affect the outcome of the election.[3/] After careful consideration of the entire record, we recognize that our former disposition of this case was in error and, we hereby reverse those findings.

Recapitualation of the procedural history of this case will shed light upon the Board's decision to reverse its prior Orders.

In November of 1975, the Board, faced with the dissipation of its operating funds, embarked upon a strategy to expedite resolution of its pending cases. An order was issued directing the conduct of preliminary investigatory hearings before Board Member Joseph Grodin in seven representation cases ("RC") on December 2, 1975; E.G. Corda, 75-RC-2-E, was one of them.

As a result of that hearing Member. Grodin submitted a report dated December 5, 1975 appended to which was a brief report by Herbert Nobriga. This report from Nobriga (hereafter referred to as Nobriga I) was undated but stated that it was a comparison of the Employer's Employment List for the period October 24 to October 30, 1975 (the eligibility list) and the Voter Log (the list prepared by Board Agents during the course of balloting). The report indicated that 3 persons, Jose Fimbres, Maria Ortega, and Thomas Gallegos voted in the election although their names did not appear on the eligibility list. The report further indicates that 49 persons were recorded as voting.

Member Grodin reported that there were factual disputes

[3/] See the Board's Order, dated January 19, 1976 and the Board's Order on Request for Review, dated October 5, 1976.

with respect to the impact of dispensing with the eligibility list, as well as other objections, and ordered that a hearing be held on December 9, 1975. The hearing was limited to the legal issues of whether or not it was proper to invoke the presumption of eligibility and whether such action "affected or could have affected the election in such a manner as to warrant setting the election aside." It was further ordered that the "factual issues to be explored at the hearing include (1) whether and if so, in what manner the lack of an eligibility list deprived the Employer's observers of adequate opportunity to challenge workers not on the list; and (2) whether the three workers identified in Mr. Nobriga's report who voted but were not on the Employer's list were in fact eligible to vote." The issues thus framed for the December 9 hearing were then to be posed to the Board for interim decision.

The presiding officer at the December 9, 1975 hearing was Herbert W. Nobriga. He submitted a report (Nobriga II) to the Board with copies to the parties sometime after December 9. The report itself bears no date.

The report indicates that the hearing focused on the impact of the invocation of presumptions on the election and the eligibility of five voters.[4/] The report, by prior stipulation, makes no recommendations.

[4/] The December 5 order directed inquiry into the eligibility of the three voters identified in Nobriga I, Jose Pimbres, Maria Ortega, and Thomas Gallegos. Nobriga II identifies the five voters who were the subject of examination as Thomas Gallegos, Richard Cordillo, Leo Hignight, John Hignight and Cliff Hamrick. Nowhere in the record or files in this case are the names Jose Fimbres or Maria Ortega mentioned except for the reference in Nobriga I. It can reasonably be inferred that their status as voters was resolved to the satisfaction of the parties; nevertheless the gap in the record remains.

Nobriga II first summarizes the circumstances leading to the Board Agent's invocation of the presumptions, the discussions concerning the challenge procedures to be used, and describes the final tally.[5/] It also briefly discusses the presence of a temporary restraining order which interrupted the election process for a time until the TRO was dissolved by the District Court of Appeal.[6/] With the dissolution of the TRO the election was to proceed as scheduled.

We also consider it relevant that during the pendency of the TRO and after it was lifted, no efforts were made by Board Agents to apprise the workers supplied by the labor contractor of the time and place of the election. These employees, although eligible voters, did not participate in the election; every ballot tallied was cast by members of the Employer's steady crew.

Nobriga II addresses the facts relevant to the determination of the eligibility of five workers.

With respect to Thomas Gallegos, Nobriga II reports at p. 4 that he was "permanently terminated on September 15, 1975,

///////////////

///////////////

5/The report confirms that 49 persons were recorded as voting. One ballot was destroyed at the close of voting and before tally by agreement of the parties. Yet 47, not 48, votes were accounted for by the tally: UFW - 24, No Union - 21, and "void ballots" were actually the UFW challenges to Leo and John Highnight. Nowhere in the records and files of this case is any explanation offered for the reason why one ballot was unaccounted for.

6/The Employer secured the TRO on the basis of its contention that there had not been an adequate showing of interest made by the UFW to proceed with the election. Invocation of the presumptions mooted the Employer's contention and, consequently, the court order was dissolved.

for intoxication on the job, irregular work performance and unpredictable hours," [7/] Gallegos cast an unchallenged ballot, but had the list been utilized, the absence of Gallegos' name therefrom would have triggered an automatic Board challenge.

Ricardo Gordillo was another who voted unchallenged despite his ineligibility to do so. The facts indicate that Gordillo's name had been lined out on the ineligibility list by a Board Agent and Employer representative on November 11 on the ground that he did not work during the applicable payroll period. He did work before and after the critical payroll period but there has been no evidence adduced indicating the applicability of the rule espoused in Rod McLellan Co., 3 ALRB No. 6 (1977) to him.

Nobriga II goes on to point out (to which no party subsequently excepted) that one unidentified voter presented himself to vote immediately after Gordillo but was denied the right to vote on the grounds that he did not work during the applicable period. The report does not state who decided that this person was ineligible nor how that determination was made. The

---

[7/] Our dissenting colleague finds that this statement is but an unsupported contention of the Employer. He overlooks, however, that this account of Gallegos' termination was incorporated in the factual findings contained in Nobriga II. No party has questioned this finding even though all parties were solicited to submit objections to the factual statements in that report.

Our dissenter also relies upon the Board's decision in Rod McLellan, 3 ALRB No. 6(1977) to support his conclusion that Gallegos was an eligible voter. His reliance is misplaced. In McLellan our emphasis was that an employee with a current job should not be denied the right to vote because of a temporary absence due to illness or approved leave, (Emphasis added) Here, even the dissenter notes that Gallegos reported an injury on his last day of work. We are unable to accept the proposition urged by our colleague that one may hold a, current job after completion of his last day of work.

affected voter protested that he had been hired at the same time as Gordillo and if Gordillo was permitted to vote then he should also be allowed to vote.

The report then states that the Employer's observer requested that Gordillo's ballot be removed to which the Board Agent replied with words to the effect that "It's O.K., it's just one vote anyhow."

Three additional voters, referred to as "cowboys," were directly employed by a man named Frank Archer who provided livestock maintenance and fertilizer injection services to area farm operations including Corda Ranches. Two of the cowboys, the brothers John and Leo Hignight each voted challenged ballots while the third, Cliff Hamrick, voted unchallenged.

The Employer contended that all three were eligible voters since Archer's affiliation with the company was in the capacity of a labor contractor. The UFW contended that the "cowboys" were ineligible to vote but that it failed to challenge Hamrick by mistake.

The significance of the "cowboys" votes is most pronounced when examined against the background of the Board's Orders of January 19, and October 5, 1976, which Orders we vacate today.

Following submission of the Nobriga II the parties filed statements of their contentions and the Board issued an Order on January 19, 1976. The Order stated, in pertinent part:

> ...the Board has determined that the election should not be set aside on that ground. Assuming that invocation of the presumption was improper under the circumstances, it appears that this impropriety did not affect the outcome of the election.

On January 28, 1976, the Employer filed a request for review of the January 19, 4976 Order.[8/] There the matter lay as the Board ceased operations a few weeks later due to the lack of operating funds.

After the case was reviewed again in September 1976, pursuant to a summary review procedure, the Board, in an Order dated October 5, 1976, sustained the two challenged ballots and concluded that the resulting three-vote margin of victory for the UFW could not be affected by the two improper votes.[9/] This was an error, for it was overlooked, that if the two challenged "cowboys" were ineligible, then the third "cowboy", Hamrick, was also ineligible. Thus three, and not two, ineligible voters cast unchallenged ballots—Gallegos, Gordillo and Hamrick.

We find an even more fundamental error in the fact that the challenges were resolved at all. First, the procedures promulgated in the Board's regulations for the resolution of challenged ballots were not adhered to. The Regional Director conducted no investigation and the parties presented no evidence relevant to the challenged voter's eligibility. Thus, there

---

8/Throughout the file this document is referred to as a "request for review." However, since all five Board members did indeed sign-the January 19 Order the document is more properly called a "Motion for Reconsideration."

9/As evidence of the Board's reasoning process the official Order, dated October 5, 1976, reads in pertinent part:

> ...the Board affirms its conclusion that the invocation of the presumption...did not affect the outcome of the election, assuming that [such action] was improper. In so concluding, the Board has assumed that the votes of two employees were improper, and sustains the challenges to the votes of Leo and John Hignight on the ground that ...they were not employees of this Employer. The Board treats the ballot that is unaccounted for as a void ballot.

was an inadequate factua.1 record then before the Board based upon which the challenges could have been resolved. Secondly, according to 8 Cal. Admin. Code Section 20363 and Board precedent[10/] challenged ballots will not be resolved absent a showing that they are sufficient in number to affect the outcome of the election. We are now aware that these positions are irreconcilable.

Also illustrative of the confusion and administrative irregularity which permeated the conduct of this election is that the final tally of ballots reveals that one ballot cannot be accounted for. Although not directly attributable to the Board Agent's failure to use the eligibility list, the missing ballot is but another blemish in the integrity of the electoral process.

To complete the procedural history in this case, we note that on October 26, 1976, the Employer filed a "Second Request for Review." By letter dated, January 31, 1977, the Board's Executive Secretary advised Employer's counsel that the Board refused to entertain such request on the ground that the regulations did not provide for more than one request for reconsideration.

CONCLUSION

In Yoder Bros., Inc., supra, we stated, in dictum, that where the presumptions have been invoked, we will refuse to certify the results of the election only where invocation of one or all of the presumptions constituted an abuse of discretion and resulted in prejudice.

The Board Agent in the case at bar abused her discretion

[10/] See e.g., TMY Farms, 2 ALRB No, 58 (1976).

by invoking the third presumption. With this conclusion, even the Board's interim Orders of January and October are in accord. We think it also evident that application of the third presumption prejudically affected the conduct and the outcome of the election. Two ineligible voters voted unchallenged, one ballot remains unaccounted for, the eligibility of three persons (one of whom voted unchallenged, the other two challenged) remains in doubt over two years later, another voter was turned away without being permitted to cast even a challenged ballot and over 50% of the workers eligible to vote were never involved in any phase of the electoral process.

While we regret the procedural history of this case, the Board's ultimate responsibility is to insure that elections are properly conducted and truly representative results are obtained. To achieve this end, we are constrained to set aside the results of this election.

Accordingly, it is hereby ordered that the election be set aside and the petition for certification be dismissed.

DATED: June 2, 1978

GERALD A. BROWN, Chairman

ROBERT B. HUTCHINSON, Member

HERBERT A. PERRY, Member

MEMBER RUIZ, Dissenting:

I dissent. The majority is overturning this election because it feels that the "application of the third presumption prejudicially affected the conduct and the outcome of the election." The third presumption involves, of course, the Board Agent's failure to use the eligibility list. As the majority states: "... once the election was directed, no constructive purpose was served by the Board Agent's invocation of the third presumption and by her failure to use the list of eligible employee names to facilitate the voting and challenge procedures." I conclude then that what the majority is saying is that had the eligibility list been used the conduct and outcome of the election would not have been prejudicially affected.

I concede that had the eligibility list been used, Ricardo Gordillo would not have been permitted to cast an unchallenged vote because his name had been crossed off that list by a Board Agent and a representative of the Employer. But there my

concessions end.

In its conclusion, the majority alludes to "two ineligible voters" who were permitted to vote unchallenged. One of those voters was obviously Ricardo Gordillo, the other was Thomas Gallegos. The majority, quoting from the Nobriga II report, indicates that Gallegos was "permanently terminated on September 15, 1975, for intoxication on the job, irregular work performance and unpredictable hours." That quote is taken out of context. The full quotation says only that the above was the Employer's contention[1]/ It makes no such finding. The facts that Nobriga II does recite are that on October 21, 1975, Gallegos reported an industrial injury that occurred on his last day of work on September 15, 1975, and that the Employer took him to the Workmen's Compensation nsurance Carrier for assistance and that Gallegos has been receiving benefits during the voter eligibility period through the election and through December 9, 1975. It also finds that an Employer observer recognized Gallegos at the election but was not sure if he had been fired; and when asked, Gallegos said he intended to return to work when healthy. Given the facts that Nobriga II sets forth, rather than the contentions, it appears more likely than not that under the standard we set forth in

////////////////

////////////////

---

[1]/The complete sentence reads: "Employer contends that Gallegos was permanently terminated on September 15, 1975, for intoxication on the job, irregular work performance and unpredictable hours." Nobriga II report at pg. 4.

Rod McLellan Co., 3 ALRB No. 6 (1977},[2/] Gallegos held a current job during the relevant payroll period and was in fact an eligible voter. How the failure to use the list affected the eligibility of Gallegos is difficult to see, especially since it appears that the Employer's observer knew that Gallegos had not worked during the eligibility period and did not require him to vote a challenged ballot, relying instead on his word that he would be returning to work. The real question, then, regarding Gallegos is whether or not he was eligible to vote, not whether he was on the list.

What is even more baffling is that the names of the three so-called cowboys appear on the list. Unlike Gordillo, whose name was not on the list, they would have been permitted to vote had the list been used because they were on it. How the failure to use the list with regard to them prejudiced any of the parties, I cannot understand. The issue with regard to the cowboys was whether or not they were, in fact, employees of the Employer. The information the UFW garnered to challenge two of the three could not have been gleaned from the face of the eligibility list; a cursory examination of that list will bear that out. The UFW concedes it erred in not including Hamrick in these challenges. But this is merely a tactical mistake by one of the parties and certainly not one that

---

[2/]In Rod McLellan we said: "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."

can be traced to the invocation of the third presumption.

Next, the majority concludes that "another voter was turned away without being permitted to cast even a challenged ballot." I submit that this argument makes no sense at all. Apparently the majority is here referring to a voter who followed Gordillo and was denied the right to vote and who protested that he had the same qualifications as Gordillo. In one breath, then, the majority is saying that Gordillo should never have been permitted to vote; in the next breath, they say that a man who had the same defects as Gordillo should have been allowed to vote. The logic here escapes me.

The majority gives as its final reason for overturning this election the fact that over 50 percent of the eligible voters did not cast ballots. In Lu-Ette Farms, 2 ALRB No. 49 (1976), we upheld an election where only half of the eligible workers voted. We found that notice to those who were no longer working was made difficult by the Employer's failure to comply with the requirement that it provide the addresses of its employees. The presumptions were invoked in the Lu-Ette election just as they were here. In Lu-Ette we said that the fact that a minority of eligible voters participated in an election is not in itself grounds for setting-aside that election. The question of whether a vote is unrepresentative depends not on numbers alone but rather on a showing that those who did not vote were prevented from voting by conduct of a party or the Board. See also Pacific Farms, 3 ALRB No. 75 (1977), and TMY Farms, 2 ALRB No. 58 (1976). No such showing was made here. In Lu-Ette we also noted that when the party objecting

to the election on the basis of the voter turnout is responsible for the small turnout, he will not be allowed to rely on his own misconduct.

It is my belief that on the facts before us, the failure to use the eligibility list clearly affected but one vote. Given the three vote margin, the two challenged ballots become critical. I agree with the majority that these challenges were improperly decided and therefore I would remand the two challenged ballots to the Regional Director for further investigation even as the Employer himself suggested in his Second Request for Review of October 22, 1976. I would not overturn this election.

Dated: June 2, 1978

RONALD L. RUIZ, Member

CASE SUMMARY

E.G. Corda Ranches

4 ALRB No. 35
Case No. 75-RC-2-E

BOARD DECISION

The issue presented was whether or not the Board Agent's invocation of the three presumptions contained in 8 Cal. Admin. Code Section 20310(e) (1975) was prejudicial to the election. In response to an election petition the Employer submitted its list of employees complete except for the failure to indicate addresses for some 58 employees supplied by a labor contractor. Though an eligibility list was available it was not used at the election by virtue of the invocation of the presumption of eligibility. The Board concluded that the Board Agent abused her discretion in not using the eligibility list and that such failure resulted in at least two ineligible voters being permitted to cast unchallenged ballots. The Board noted other irregularities including one unaccounted for ballot, mishandling of two challenged ballots, a voter being turned away from the polls, and a less than 50% turn-out. In an election in which the margin of victory was three votes the cited errors required that the election be set aside.