

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

E. S J. GALLO WINERY,)	
)	
Employer,)	Case No. 75-RC-6-F
)	
and)	
)	5 ALRB No. 57
WESTERN CONFERENCE)	
OF TEAMSTERS,)	
)	
Petitioner,)	
)	
and)	
)	
UNITED FARM WORKERS)	
OF AMERICA, AFL-CIO,)	
)	
Intervenor.)	
)	

DECISION ON CHALLENGED BALLOTS

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

Following a Petition for Certification filed by Western Conference of Teamsters (WCT) and a Petition for Intervention filed by United Farm Workers of America, AFL-CIO (UFW), an election by secret ballot was conducted on September 10, 1975, among the agricultural employees of E. & J. Gallo Winery (Employer or Gallo).

The Tally of Ballots furnished to the parties at that time showed the following results:

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WCT	223
UFW	131
No Union	0
Challenged Ballots	<u>195</u>
Total	549
Void Ballots	2

As the challenged ballots were sufficient in number to determine the outcome of the election, the Regional Director conducted an investigation and issued his Report on Challenged Ballots on November 17, 1975. The Board severed the issue of the eligibility of economic strikers and ordered a hearing on that issue which was conducted between October 6 and December 3, 1975, before Hearing Officer Gerald A. Brown. The Hearing Officer issued the attached Report on Challenged Ballots of Economic Strikers on February 11, 1976.

All parties excepted to portions of both the report of the Regional Director and the report of the Hearing Officer and have submitted briefs on the issues raised by the challenged ballots. The Board has considered the record^{1/} herein, the reports of the Regional Director and Hearing Officer, and the exceptions and briefs of the parties, and has decided to affirm their rulings, findings and conclusions and to adopt their recommendations, as modified herein.

^{1/} Although there appears to be some confusion, the Hearing Officer's Report makes clear that the record includes, inter alia, Gallo Exhibits 1-92, WCT Exhibits 1-57, UFW Exhibits 1-21 (with the exception of UFW Exhibit 10 which was never submitted) and Board Exhibits 1-14.

Economic Strikers

E. & J. Gallo Winery is a wine producer located near Modesto and Livingston in the heart of the San Joaquin Valley. Between 1967 and 1973, Gallo's agricultural employees worked under contracts negotiated between the Employer and the UFW. Following the expiration of their most recent collective bargaining agreement on April 18, 1973, the parties were unable to agree on a new contract. About that time, the WCT began an intensive organizing drive among Gallo workers and, in June, 1973, Gallo notified its employees that it was withdrawing recognition from the UFW and would thenceforth recognize the WCT as its employees' collective bargaining representative. The UFW thereafter called a strike, which commenced on June 27, 1973, and organized a consumer boycott against Gallo in support of the strike.

One hundred thirty-nine persons claiming economic striker status voted challenged ballots in the election. The hearing on economic-striker eligibility was conducted during the first months of this Board's existence. Since that time, we have issued decisions in many challenged-ballot-cases. In those decisions, we have constructed a comprehensive framework to resolve issues such as those now before us. In the interests of clarity, we set out below the general principles which form the basis of our decision herein.

The Gallo strike commenced prior to the effective date of the Agricultural Labor Relations Act (ALRA). We therefore conclusively presume it to be an economic strike and will decide individual issues of economic-striker eligibility according to

the requirements of the second paragraph of Labor Code Section 1157.^{2/}
Julius Goldman's Egg City, 3 ALRB No. 76 (1977).

Under that paragraph, a voter claiming economic-striker status has the burden of showing that (s)he joined the strike and either: (1) was on the payroll for the payroll period immediately preceding the commencement of the strike,^{3/} George Lucas & Sons, 3 ALRB No. 5 (1977); or (2) was on the payroll period immediately preceding the expiration of the pre-Act collective bargaining agreement^{4/} but quit prior to the payroll period immediately preceding the commencement of the strike for reasons related to the strike, Franzia Bros. Winery, 4 ALRB No. 100 (1978); or (3) was a seasonal employee who, upon returning to the Employer to obtain work according to his or her established

^{2/} The second paragraph of Labor Code Section 1157 reads:

In the case of elections conducted within 18 months of the effective date of this part which involve labor disputes which commenced prior to such effective date, the board shall have the jurisdiction to adopt fair, equitable, and appropriate eligibility rules, which shall effectuate the policies of this part, with respect to the eligibility of economic strikers who were paid for work performed or for paid vacation during the payroll period immediately preceding the expiration of a collective-bargaining agreement or the commencement of a strike; provided, however, that in no event shall the board afford eligibility to any such striker who has not performed any services for the employer during the 36-month period immediately preceding the effective date of this part.

^{3/} Because the strike commenced in late June, we will refer to this payroll period as the June payroll.

^{4/} Because the contract expired in mid-April, we will refer to this payroll period as the April payroll.

employment pattern, elected to join the strike, Franzia Bros. Winery, supra; or (4) was not included on one of the applicable payrolls because of sick leave or vacation, Rod McLellan Co., 3 ALRB No. 6 (1977).^{5/}

We must now decide whether, assuming they join the strike, employees on the payroll for the period immediately preceding the expiration of the contract are economic strikers if the employer discharges them- prior to the payroll period immediately preceding the commencement of the strike. In deciding this question, we will apply the same rule to discharges occurring during this period that we apply to quits occurring during this period. If the discharge was unrelated to union considerations, we will not deem such an individual to be an economic striker notwithstanding his or her participation in strike-related activities. In such instances, the employment relationship has been totally severed prior to, and for reasons unrelated to, the strike. Where, however, union considerations played a role in the discharge, we will not disenfranchise an otherwise eligible voter because, in such cases, the discharge itself is part and parcel of the strike.

Once it has been established that a challenged voter is an economic striker, we will apply the principles enunciated by the National Labor Relations Board in Pacific Tile and

^{5/} Our decision in Rod McLellan did not address the eligibility of economic strikers. However, Section 1157 requires us to adopt "fair, equitable, and appropriate eligibility rules" for pre-Act economic strikers. The Rod McLellan rule concerning sick leave and vacation meets these criteria and we therefore apply it here.

... we will presume that an economic striker continues in such status and, hence, is eligible to vote To rebut the presumption,^[7/] the party challenging his vote must affirmatively show by objective evidence that he has abandoned his interest in his struck job. The nature of the evidence which may rebut the presumption will be determined on a case-by-case basis. However, acceptance of other employment, even without informing the new employer that only temporary employment is sought, will not of itself be evidence of abandonment of the struck job so as to render the economic striker ineligible to vote. [137 NLRB at 1359-60]

Challenges As to Which No Specific Exceptions Were Filed

We adopt, pro forma, the Hearing Officer's recommendations concerning challenged voters as to whom no exceptions were filed, Roberts Farms, Inc., 5 ALRB No. 22 (1979), and his recommendations concerning challenged voters as to whom exceptions were filed only with respect to the absence of their names from the June payroll. Franzia Bros. Winery, supra. Accordingly, the following voters are found ineligible:

1. Angelo Picanco
2. Jose Valencia (Lopez);

and the following voters are found eligible:

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| 1. Robert F. Abbott | 4. Augustin Avalos, Jr. |
| 2. Guadalupe Abrego | 5. Augustin Avalos, Sr. |
| 3. Paula de Avalos | 6. Cruz (Cardona) Briones |

^{6/} We adopted the principles of Pacific Tile and Porcelain Company in George Lucas & Sons, supra.

^{7/} Hereinafter referred to as the Pacific Tile presumption.

7. Antonio Caetano
8. Jaime Caetano
9. Julio R. Caetano
10. Andres Cardona
11. Alfredo Castillo
12. Leonardo Cavazos
13. Gabriel Chavez
14. Luis M. Coelho
15. Ana Maria Culebro
16. Carmen DeLeon
17. Regino DeLeon
18. Rosalinda DeLeon
19. Vicente DeLeon, Jr.
20. Bernardina Del Gado
21. Jose De Souza
22. Moise De Souza
23. Andronico Duran (Garcia)
24. Bertha Duran
25. Concepcion Duran
26. Amaro Fernandez
27. Maria Fernandez
28. Felipe Miramontes Gonzalez
29. Ramon Gonzalez
30. Rosalio Gonzalez
31. Rodolfo Gonzales
32. Jose Gutierrez
33. Barbara Antonia Guzman
34. Cesario Hernandez
35. Manuel Hernandez, Jr.
36. Manuel Hernandez, Sr.
37. Francisco A. Inacio
38. Jose M. Inacio
39. Manuel Inacio
40. Joao Lindo, Jr.
41. Joao Lopes
42. Trinidad Madrigal (Garibay)
43. Raul Maldonado (Pech)
44. Ramundo Martinez
45. Salvador (Chavez) Mejia
46. Antonio Meza
47. Marcelino Montoya
48. Francisco Nava
49. Esperanza Nunez
50. Jose Pacheco
51. Pedro Pacheco
52. Lozaro Perera
53. Manuel Perez
54. Frank Perry
55. Magdalena Del Real
56. Roberto Rio s
57. Guadalupe Rivas
58. Juana de Rivas
59. Manuela Sanchez
60. Florentino Sandoval

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|--------------------------|------------------------|
| 61. Maria Sandoval | 68. Rosario Del Toro |
| 62. Antonio Silva | 69. Refugio Trujillo |
| 63. Manuel Souza | 70. Mario Vargas |
| 64. Manuel D. Terra | 71. Norberto Vargas |
| 65. Manuel F, Terra, Sr. | 72. Rogelio Villanueva |
| 66. Guadalupe Del Toro | 73. Jesus Zuniga |
| 67. Juan Del Toro | 74. Rosa Zuniga |

Employees Whose Names Appeared on
Neither of the Applicable Payrolls

Camilo Avalos
Lucinda Coelho
Jose Macias (Mejia)

The Hearing Officer recommended overruling the challenges to the ballots of these three employees. The Employer excepts, arguing that they were not economic strikers because they had all voluntarily quit their employment. This argument is based upon the failure of Macias and Avalos to respond to recall notices and the failure of Coelho to continue working after December, 1972.

Macias and Avalos were both seasonal harvest employees who worked for Gallo only in late summer and early fall. It is unclear whether their recall notices requested them to work in the 1973 grape harvest or at some earlier point in time, but in either event, we find them eligible. An economic striker, by definition, cannot honor a recall notice asking him or her to work during the strike without losing his or her status as an economic striker. Therefore, if the Employer's recall notices requested Macias and Avalos to work during the strike, the

notices have no relevance to the question of whether they were economic strikers. On the other hand, if the notices requested them to work during a portion of the year outside their usual employment patterns, it is relevant but has very little weight. Under the doctrine we enunciated in Franzia Bros. Winery, supra, we are concerned with whether a seasonal worker joined a strike or, instead, worked for the Employer according to his or her normal employment pattern notwithstanding the strike. An employee's failure to respond to a notice requesting him or her to work outside the normal seasonal pattern does not significantly affect these key considerations.

When they returned for the 1973 harvest at Gallo, Macias and Avalos joined the strike instead of going to work for Gallo. As they have met their burden of proof, we find them to be economic strikers. No evidence was presented in rebuttal to the Pacific Tile presumption; we therefore adopt the recommendations of the Hearing Officer and overrule the challenges to their ballots.

Although Coelho was a seasonal employee who generally worked during both the planting and harvest seasons at Gallo, she failed to work during the planting season in early 1973 because of a lengthy bout with the flu. She did not return for the harvest because she joined the strike. An illness which prevents an employee from following her precise annual employment pattern is not sufficient to justify disenfranchisement. Coelho did not work in the harvest because she joined the strike and is indistinguishable from other seasonal harvest workers who joined

the strike. We find that she was an economic striker and, as no evidence was presented to rebut the Pacific Tile presumption, we adopt the Hearing Officer's recommendation and overrule the challenge to her ballot.

Serafin Correia

Serafin Correia was discharged prior to the April payroll period; as a result, he did not work during either of the applicable payroll periods. The Hearing Officer nonetheless concluded that Correia was an eligible voter because the Employer informed him that he would be rehired during the coming harvest. At harvest time, Correia did not work but, instead, joined the strike.

The Employer excepts, arguing that the discharge which occurred prior to either of the applicable payroll periods prevents Correia from attaining economic striker status. We affirm the Hearing Officer's conclusion. By promising Correia employment during the harvest, the Employer instituted a disciplinary measure short of discharge, i.e., a lengthy suspension. A suspended employee maintains at least the same connection to the Employer as does a returning harvest worker. Correia worked for the Employer since 1966 or 1967, intended to return for the harvest, and would have returned had he not joined the strike. We therefore overrule the challenge to his ballot.

Working Foremen

Gustavo Flores Cruz
Jose "Culebro"

Four economic strikers were challenged because of their status as "working foremen". The Hearing Officer concluded that

two of them, Gustavo Floras Cruz and Jose Culebro, were eligible to vote.^{8/} The Employer excepts, pointing out that the Regional Director found other "working foremen" ineligible because they were supervisors (see p. 36), and argues that our conclusions concerning all "working foremen" must be uniform.

We decide eligibility issues on a case-by-case basis (Pacific Tile and Porcelain Company, supra). It is not clear that all working foremen had the same job responsibilities. The Hearing Officer properly disposed of the eligibility issues relating to Cruz and Culebro on the basis of the evidence presented concerning their job responsibilities and not on the basis of the job responsibilities of others. As the Employer presented no exceptions to the merits of the Hearing Officer's, determination, we overrule the challenges to their ballots.

Employees on the April Payroll Who Were
Discharged Prior to the June Payroll

Ricardo Barros

The Hearing Officer recommended that we overrule the challenge to Ricardo Barros' ballot. Gallo excepts, arguing that Barros was not an economic striker because he quit work by failing to return on time from a leave of absence.^{9/}

In mid-June 1973, Barros was granted a five-week leave

^{8/} The remaining two, Jose Maria Arroyo and Umberto Hernandez, were found to be ineligible on other grounds. See discussion p. 19 and p. 32, infra.

^{9/} Although Barros was listed as a voluntary quit, he was actually discharged by the Employer for overstaying an approved leave of absence.

of absence so that he could go to Portugal; he was due to return on July 25, 1973. While in Portugal, he fell ill and did not return until August. When, he failed to return on July 25, Gallo listed him as a voluntary quit. The strike commenced while Barros was in Portugal. Upon returning, he joined the strike instead of returning to work and, therefore, never presented to the Employer the medical excuse he had procured.

We conclude that Barros was an economic striker. Due to the timing of the events, it is virtually impossible to accurately determine whether his discharge was wholly unrelated to the strike. Barros joined the strike at the first opportunity and apparently was not even aware that Gallo had discharged him. In close cases such as this, we feel the purposes of the Act, including maximum participation of agricultural employees in the election process, are better served by finding the challenged voter to be eligible.

Because we find that Barros was an economic striker and none of the parties excepted to the Hearing Officer's finding that he did not abandon his interest in his struck job, we adopt the Hearing Officer's recommendation and overrule the challenge to his ballot.

Basilio Chavez

The UFW excepts to the Hearing Officer's recommendation that we sustain the challenge to Basilio Chavez' ballot. Gallo discharged Chavez between the April and June payrolls. The UFW argues that this discharge was closely related both to Chavez' union activities and to the strike. We find merit in this

exception.

Prior to the discharge, Chavez had been employed by Gallo for five years. He was President of the UFW Ranch Committee. One week prior to the commencement of the strike, he was discharged^{10/} ostensibly for bringing a pistol onto company property; the "pistol" was a plastic toy. In view of the timing of the discharge, Chavez' long employment history with Gallo, his position with the UFW and the fact that he did not bring a pistol onto the property, we find that the discharge was related to his union activities and was part and parcel of the strike. As he subsequently participated in strike activities, we conclude that he was an economic striker. Furthermore, Chavez did not abandon his interest in his struck job. Accordingly, we decline to adopt the recommendation of the Hearing Officer and, instead, we overrule the challenge to Chavez' ballot.

Roberto de la Cruz

The Hearing Officer recommended that we overrule the challenge to Roberto de la Cruz' ballot notwithstanding the fact that he was discharged in April 1973. Gallo excepts, arguing that it is beyond the power of this Board to examine the merits of discharges occurring before the effective date of the ALRA.

As we have previously stated, when an employee who

^{10/} We apply the rules concerning employees discharged between the April payroll period and the June payroll period notwithstanding the fact that Chavez was not on the April payroll. Chavez would have worked during that time but for an illness. Employees are not, ineligible to vote merely because they are on sick leave during the applicable payroll period. Rod McLellan Co., supra.

claims economic striker status is discharged between the payroll period preceding the expiration of a collective bargaining agreement and the payroll period preceding the commencement of a strike, we will examine the discharge to determine if it was related to the employee's union activities. If it was so related, and the employee participated in strike activities, we will find the employee to be an economic striker.

We conclude that De la Cruz has not carried his burden of proof; he has not demonstrated that his discharge was related to union considerations. After working for Gallo for about three months, De la Cruz reported that he was ill and would therefore be absent from work. During a nine-day absence, he drove to Coachella where he was arrested for trespassing in conjunction with UFW strike activity in that area. Upon his return, he presented a medical excuse from a UFW clinic. Gallo found the excuse to be inadequate because it was not signed by a physician and after investigating the merits of Cruz' medical condition, discharged him for failure to present an adequate excuse for his absence. Although a detailed medical report was subsequently prepared and sent to Gallo, Gallo denied ever having received it.

These facts, occurring two months before the strike commenced, do not convince us that the discharge was related to the strike or to De la Cruz' union activities. Accordingly, we decline to accept the recommendation of the Hearing Officer and, instead, we sustain the challenge to De la Cruz' ballot.

Estelvina Inacio

The Hearing Officer concluded that Estelvina Inacio was

not an economic striker because she quit work or was terminated prior to the commencement of the strike.^{11/} The UFW excepts, arguing that she should be eligible because she was on the April payroll. As no evidence was presented linking the quit or discharge with the strike, we adopt the recommendation of the Hearing Officer and sustain the challenge to her ballot because she was not an economic striker.

Cecilia Mendoza

The Hearing Officer concluded that Cecilia Mendoza was not an economic striker because she was discharged prior to the commencement of the strike. The UFW excepts, arguing that the discharge was connected to her union activities. We disagree.

Mendoza, a union steward, was discharged in mid-June 1973, for failing to perform her job properly. She admitted on cross-examination that her supervisor criticized her work prior to the discharge and that she responded by requesting other work. We do not believe that she has carried her burden of proving that her discharge was connected to her union activities. Accordingly, we adopt the recommendation of the Hearing Officer and sustain the challenge to her ballot.

Employees Whose Names Appeared on the April Payroll
But Who Quit Prior to the June Payroll

Maria Amaral

Maria Amaral quit during the period between the April

^{11/} Like Ricardo Barros, Inacio was listed as a voluntary quit when she failed to return from an approved absence from work on time. A "voluntary quit" under these circumstances is, in fact, a discharge.

and June payrolls because she considered her work assignment to be inappropriate. No contention is made that she quit for reasons related to the strike. We therefore sustain the challenge to her ballot.

Eusebio Moreno (Ybanez)
Pedro Torres

The Hearing Officer recommended that we sustain the challenges to the ballots of Moreno and Torres because they were not economic strikers, having quit work prior to the commencement of the strike. The UFW excepts, arguing that they should be considered eligible solely because they were on the April payroll. Moreno and Torres both quit work over disputes with supervisors which were unrelated to the strike. Therefore, we adopt the recommendations of the Hearing Officer and sustain the challenges to their ballots.

E. Walter Regnier

E. Walter Regnier also quit during the period between the April and June payrolls. Although he testified that he quit because he predicted Gallo's recognition of the Teamsters and did not wish to work under a Teamsters contract, the Hearing Officer did not credit this testimony. We find that Regnier did not prove that he quit for reasons related to the strike and we therefore sustain the challenge to his ballot.

Employees Who Moved From the Area_ and Obtained Other Work Jose Amaya

The Hearing Officer concluded that Jose Amaya was an eligible voter notwithstanding his procurement of employment at a

cannery where he received better wages and fringe benefits than he received at Gallo. The Hearing Officer based his decision, in part, upon Amaya's testimony that he wished to return to Gallo because his rheumatism was aggravated by the wet working conditions at the cannery. The Employer and the WCT except, arguing that Amaya's move from the Livingston area and acceptance of the new job constitute objective evidence of abandonment sufficient to rebut the Pacific Tile presumption. They also argue that the Hearing Officer improperly relied upon Amaya's subjective testimony concerning his health.

We do not consider Amaya's move sufficient to rebut the Pacific Tile presumption. Pacific Tile and Porcelain Company, supra, requires us to consider economic-striker eligibility on a case-by-case basis. In applying this approach, we must be cognizant of the characteristics of the agricultural labor force, including its migratory nature. See Agricultural Labor Relations Bd. v. Superior Court, 16 Cal. 3d 392, 414, 128 Cal. Rptr. 183, 546 P. 2d 687 (1976). Because of the migration which commonly occurs, a striker's relocation in a new area is not so persuasive evidence of abandonment in the agricultural context as it would be in the industrial context.

An economic striker does not abandon his or her interest in the struck job merely because (s)he obtains other work. Pacific Tile and Porcelain Company, supra. Furthermore, Amaya satisfactorily explained why he had not abandoned his interest in his job at Gallo despite the superior wages and benefits at the cannery: he considered cannery work unhealthy and uncomfortable. We reject

the Employer's contention that it is improper to rely upon testimony such as Amaya's statement concerning his health. Although a party wishing to rebut the Pacific Tile presumption must come forward with objective evidence, testimony concerning a striker's continuing personal interest in the struck job is entirely proper and may be used, as here, to support the presumption. See, e.g., Akron Engraving Company, Inc., 170 NLRB 232, 67 LRRM 1515 (1968). Accordingly, we adopt the Hearing Officer's recommendation and overrule the challenge to Amaya's ballot.

Jose Amaral

The Hearing Officer concluded that Jose Amaral was an eligible voter notwithstanding his procurement of employment in Rhode Island subsequent to the commencement of the strike. Both Gallo and the WCT except, arguing that Amaral's course of conduct evidences abandonment of his interest in his struck job.

When the strike began, Jose Amaral was living in company housing at Gallo with his wife, Maria. Because Amaral joined the strike and was thus unwilling to work, Gallo required the Amarals to vacate their living quarters. They moved to Rhode Island where they lived with family members; through familial connections, they obtained work at Converse Rubber Company. They returned to California a few months before the election.

The Hearing Officer concluded that this conduct was not objective evidence of abandonment sufficient to rebut the Pacific Tile presumption. We agree. Because Gallo suddenly evicted the Amarals from their living quarters, their moving across the country and reliance upon family members for housing do not

establish abandonment of Jose Amaral's interest in his struck job. His procurement of work at Converse is also insufficient to rebut the Pacific Tile presumption, particularly in light of Maria. Amaral's testimony that she always intended to return to California, that she wanted to pick grapes and that she returned in 1975 specifically because she heard the Gallo strike would be settled and that there would be an election.^{12/} We therefore overrule the challenges to Amaral's ballot.

Jose Maria Arroyo

The Hearing Officer concluded that Jose Arroyo was not an eligible voter because he embarked upon a successful career as a restaurant entrepreneur. The UFW excepts, arguing that Arroyo's continued performance of part-time farm work demonstrates that he has maintained his interest in his struck job.

An economic striker remains eligible only if (s)he maintains an interest in the specific struck job; it is not sufficient for the striker to maintain an interest in any form of work with the struck employer. When at Gallo, Arroyo was a year-round employee. Since entering the restaurant business, he has performed farm work only on a part-time basis. His primary economic commitment clearly lies with his restaurant. Regardless of whether Arroyo is willing to do some farm work, it is clear that he has abandoned his interest in his struck job where he was a year-round field employee. Accordingly, we adopt the

^{12/} Although Jose Amaral's testimony was unclear, a problem apparently due, in part, to difficulties in translation, Maria Amaral's testimony was direct, clear and convincing.

recommendation of the Hearing Officer and sustain the challenge to his ballot.

Luis Avila
Refugio Avila

The Hearing Officer concluded that Luis and Refugio Avila were ineligible to vote because, subsequent to the commencement of the strike, they moved to Salinas and raised strawberries under a sharecropping agreement. We find merit in the UFW's exception to this conclusion, as we find that their conduct does not evidence abandonment of their interest in their struck jobs.

The Avilas, father and son, work under sharecropping agreements with T. T. Miyasaka, Inc. Timothy Miyasaka, apparently the President of T. T. Miyasaka, Inc., testified that sharecroppers provide labor and some crate costs; land, plants, fertilizer, and insecticides are all provided by Miyasaka, Inc. Miyasaka testified that sharecroppers earn a little more than other farm workers but he emphasized that he considered the primary benefit to the sharecropper the control over his hours and intensity of work. He pointed out that although sharecroppers may earn more than other farm workers when there is a good market, they also incur the risk of a poor market. Although Miyasaka was intensively questioned about the compensation paid to the Avilas, no mention was made of the fringe benefits which ordinarily accompany a union contract.

Sharecropping is not significantly different from other

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farm work. The benefits are similar^{13/} and the actual work is almost identical. We do not consider that acceptance of interim employment as a sharecropper constitutes evidence sufficient to rebut the Pacific Tile presumption. We therefore reject the recommendation of the Hearing Officer and overrule the challenges to the Avilas' ballots.

Pedro Bautista
Rebeca Bautista

The Hearing Officer concluded that Pedro and Rebeca Bautista were not eligible voters because they moved to Arvin, California, and went to work in a nursery. The Bautistas testified that they were very satisfied with both their work and their benefits program and that they did not intend to leave. The UFW excepts, arguing that their move is not sufficient to rebut the Pacific Tile presumption in light of their annual return to the Livingston area to work in the grape harvest.

Like Jose Arroyo, these voters have not maintained an interest in the positions they held at Gallo prior to the strike. Although, as the Hearing Officer notes, the testimony is somewhat unclear, the Bautistas worked at Gallo not only in the harvest but at other times of the year as well. Because, since moving to Arvin, they are interested in working at Gallo only during the

^{13/} Although the Employer presented evidence that the Avilas made substantially more money sharecropping than they had earned at Gallo, Luis Avila whereas the income at Gallo was apparently paid to him as an individual. Furthermore, Miyasaka testified that there was not a substantial difference between the compensation received by a sharecropper and by an ordinary field laborer.

harvest, they are no longer interested in their struck jobs which involved a greater time commitment. Accordingly, we adopt the Hearing Officer's recommendations and sustain the challenges to their ballots.

Florentine Haro Campos

The Hearing Officer concluded that Florentine Haro Campos was an eligible voter. On the last day of the hearing, the Employer introduced into evidence a leave-of-absence form for Campos dated June 27, 1973, the first day of the strike. The form stated that Campos was granted a leave of absence to visit an ill relative in Mexico. The Employer invites us to infer from this document that Campos did not withhold labor from the Employer in support of the strike but, instead, (1) did not work because he wanted to visit a sick relative, or (2) did not work because he was afraid to cross the picket line.

We give little weight to the leave-of-absence form. No one from Gallo testified as to the circumstances under which it was prepared. It was, at best, almost entirely uncorroborated hearsay, not- admissible in a civil action^{14/} and presented without any testimony which would indicate that it was reliable evidence. We find that Campos was an economic striker notwithstanding the leave-of-absence form.

We also find that he did not abandon his interest in his

^{14/} Hearsay which is not admissible under the California Evidence Code may be admitted in a representation proceeding before the ALRB but may not, in and of itself, form the basis of a factual finding. 8 Cal. Admin. Code § 20370 (c). This section is the successor to 8 Cal. Admin. Code Section 20390 (a), in effect at the time of the hearing.

struck job. He obtained farm work in Visalia, California, at wages similar to those he earned at Gallo. The nature of the work is identical. The procurement of other employment is not objective evidence sufficient to rebut the Pacific Tile presumption. Accordingly, we adopt the recommendation of the Hearing Officer and overrule the challenge to Campos' ballot.

Manuel Cunha

The Hearing Officer concluded that Manuel Cunha was an eligible voter notwithstanding his present employment with Valley Vineyard Services, a land-management company directing farm work at Montecello Vineyards. He is currently a crew pusher during part of the year and a regular field employee during the remainder of the year. His wages are similar to those paid by Gallo at the time of the hearing. Testimony of members of Valley Vineyard's supervisory staff indicates that a crew pusher is not a regular supervisor but a field employee who has minimal supervisory responsibilities for certain periods. As Cunha's work and wages are not significantly different from his work and wages at Gallo, the Pacific Tile presumption has not been rebutted. We adopt the recommendation of the Hearing Officer and overrule and challenge to Cunha's ballot.

Manuel Lopez (Cabrera)
Hipolito Ybarra

The Hearing Officer concluded that these two voters were eligible notwithstanding their procurement of interim employment as field workers at L S D Properties. Although they are year-round employees at L & D and are provided benefits somewhat superior to those they earned at Gallo, these factors are

insufficient to rebut the Pacific Tile presumption particularly in light of their testimony concerning their reasons for continuing interest in their struck jobs. Lopez wished to return to Gallo because the workplace was closer to his home and Ybarra wished to return because of dissatisfaction with L & D's supervisory personnel. Accordingly, we adopt the recommendations of the Hearing Officer and overrule the challenges to their ballots.

Jose Orosco

The Hearing Officer concluded that the challenge to Jose Orosco's ballot should be sustained because he was not an economic striker. The UFW excepts, solely on the grounds that his procurement of interim employment with the Merced Cemetery District is not sufficient to rebut the Pacific Tile presumption.

Prior to the strike, Orosco had already obtained employment with the Merced Cemetery District. He first made arrangements to work for the county in February 1973, when he was told that he would be hired at the first opportunity. He began work for the county in May 1973. This conduct demonstrates that Orosco did not withhold his labor from the Employer in support of the strike and, therefore, never joined the strike.

The Pacific Tile presumption is relevant only after the challenged voter has carried the burden of proving that (s)he is an economic striker. Orosco failed to carry this burden and is thus ineligible without regard to the Pacific Tile presumption. Q-T Tool Co., 199 NLRB 500, 81 LRRM 1520 (1972). We therefore adopt the recommendation of the Hearing Officer and sustain the challenge to Orosco's ballot.

Joao Souza

The Hearing Officer concluded, that Joao Souza was an eligible voter notwithstanding his procurement of employment at both a lumber yard and a poultry company subsequent to the commencement of the strike. The Employer argues that this conduct is objective evidence sufficient to rebut the Pacific Tile presumption.

Once again, we apply the rule that acceptance of other employment is not, in and of itself, sufficient to rebut the Pacific Tile presumption. Souza explained that his work at the lumber yard was temporary; the lumber yard was located in Fresno and his wife owned a house in Modesto where he wished to live. Soon after beginning work at the lumber yard, he quit and moved to Modesto.

Souza's subsequent work in the poultry company is not so different from nor so superior to farm labor that we can infer that Souza abandoned his interest in his struck job by obtaining work there. The benefit program is similar to benefit programs common in farm labor and there is a high rate of turnover, just as in farm labor.

The Employer's reliance on the NLRB's treatment of striker Donald Gratzler's ballot in Q-T Tool Co., supra, is misplaced. In that case, the NLRB concluded that Gratzler was not an economic striker because he had obtained permanent employment elsewhere prior to the commencement of the strike. The resolution of Gratzler's ballot did not, therefore, involve an application of the Pacific Tile presumption. Accordingly, we adopt the

recommendation of the Hearing Officer and overrule the challenge to Souza's ballot.

Feliciano Urrutia, Jr.

The Hearing Officer recommended sustaining the challenge to the ballot of Feliciano Urrutia, Jr. because he abandoned his interest in his struck job by obtaining employment as a janitor with the State of California in early 1975, prior to the election. The UFW argues that this conduct is not sufficient to rebut the Pacific Tile presumption. We do not agree. In 1974, Urrutia tried unsuccessfully to obtain a similar janitorial position. That conduct evidences a continuing desire to leave farm work. The benefits at his new job are substantially superior to those at Gallo and he offered no explanation for his purported desire to relinquish those benefits and return to Gallo. We therefore adopt the Hearing Officer's recommendation and sustain the challenge to Urrutia's ballot.

Candelario Guerrero (Velasquez)

The Hearing Officer recommended that the challenge to Candelario Guerrero's ballot be overruled notwithstanding his procurement of employment with Joe Gallo subsequent to the commencement of the strike. (Joe Gallo is a separate employer; there is no evidence of any connection between Joe Gallo and E, & J. Gallo Winery.) The Employer excepts, arguing that Guerrero agreed with Joe Gallo that his employment there would be permanent.

The acceptance of a new position is not sufficient to rebut the Pacific Tile presumption even if the employee tells the

new employer that (s)he will not return to the struck job should the strike be settled. Q-T Tool Co., supra. Few strikers would be able to obtain interim employment if they announced an intention to leave once the strike was settled at the original employer's business. Therefore, statements made by a striker in order to obtain employment are not, standing alone, reliable evidence of abandonment of the striker's, interest in a struck job. We therefore overrule the challenge to Guerrero's ballot.

Hermino G. Vierra
Rosa Vierra

The Hearing Officer recommended sustaining the challenges to the ballots of Hermino and Rosa Vierra. The Vierras are currently living in housing provided by Hermino Vierra's new employer. It is substantially superior to their previous housing at Gallo. Their testimony revealed that they would return to Gallo only if they were provided housing of the same quality as that which they currently occupy.

Because Gallo would have to substantially improve the housing provided to its employees before the Vierras would return, we consider it highly unlikely that the Vierras will again seek work at Gallo should the strike be settled. The Vierras have conditioned their return to the struck employer upon the receipt of benefits which will, in all probability, not be forthcoming. They have, therefore, in effect abandoned their interests in their struck jobs, Nate Ben's Reliable, Inc., 219 NLRB 818, 90 LRRM 1051 (1975). We adopt the Hearing Officer's recommendation and sustain the challenges to the Vierras' ballots.

Mark E. Whalen

The Hearing Officer concluded that Mark Whalen was not an economic striker and therefore was not eligible to vote. Following a layoff at Gallo which occurred between the expiration of the contract and the commencement of the strike, Whalen went to work for his brother, who owned a construction business. However, Whalen's procurement of construction work does not preclude him from attaining economic striker status. He began the construction work only after being laid off. He testified that he would have returned for the harvest had there not been a strike. He explained that he previously had worked for his brother but, because the work was sporadic and the jarring caused by the heavy machinery aggravated an earlier back injury, he had quit and begun to work as a farm laborer. When working for his brothers he earns \$5.00/hour which is not a great deal more than wages earned by a farm worker in the grape harvest. He had supported the strike and engaged in strike and boycott-related activities. We find that he was an economic striker. No evidence of abandonment, beyond his work with his brother, was presented at the hearing. We thus conclude that Mark Whalen is an eligible voter and overrule the challenge to his ballot.

Reapplication for Work at Gallo

Maria C. Alfaro

Vicente Alfaro

Daniel Magdaleno (Verdusco)

Jesus Magdaleno

Jose Magdaleno

Ramona Magdaleno

The Hearing Officer recommended overruling the challenges

to these voters' ballots notwithstanding the Employer's contention that they abandoned their interests in the strike by reapplying for work at Gallo subsequent to the commencement of the strike.^{15/} Reapplication for work is not, in and of itself, sufficient to rebut the Pacific Tile presumption because an economic striker may have reasons apart from abandoning the strike that explain his or her action. For example, the voter may be protecting his or her ability to obtain unemployment compensation. D'Arrigo Bros. of California, 3 ALRB No. 37 (1977); Pacific Tile and Porcelain Company, supra. In the absence of sufficient information concerning the circumstances surrounding the reapplication, we find that the Pacific Tile presumption is not rebutted. We adopt the Hearing Officer's recommendations and overrule the challenges to these voters' ballots.

Receiving Social Security Benefits

Salvador Hernandez (Solis)
Francisco Rosa
Augustin Del Toro
Feliciano Urrutia, Sr.

The Hearing Officer concluded that these challenged voters abandoned their interests in their struck jobs by withdrawing from the labor market and supporting themselves through the receipt of social security benefits. The UFW, relying upon Holiday Inns of America, Inc., 176 NLRB 939, 71 LRRM 1333 (1969),

^{15/} The Employer also argued that these voters were not economic strikers because they voluntarily quit their employment by failing to respond to recall notices. We reject this contention for the reasons set forth in the discussion of voters Avalos and Macias (see p. 8, supra).

argues that employees are not rendered ineligible to vote in representation elections merely because they limit their earnings to protect their eligibility for social security.

Holiday Inns addressed an entirely different issue. In that case, an employee took an extended leave of absence each year to protect his eligibility for social security benefits. When a representation election was held during his annual leave of absence, he was allowed to vote because he was still an employee notwithstanding his extended leave. No question of economic striker eligibility under Pacific Tile and Porcelain Company, supra, was presented.

We agree with the Hearing Officer's conclusion that these voters abandoned their interests in their struck jobs. Although one or more of them might be willing to do a minimum of farm work, none is willing to return to the position he held prior to the strike because to do so would require him to sacrifice his social security benefits.^{16/} Accordingly, we adopt the Hearing Officer's recommendation and sustain the challenges to these voters' ballots.

Illness

Tomas DeLeon
Vicente DeLeon, Sr.
Felipe Haro

The Hearing Officer concluded that these voters were not eligible because, subsequent to the commencement of the

^{16/} Augustin Del Toro testified that he would return to Gallo even if his return required him to forfeit his social security benefits. The Hearing Officer did not credit this testimony as Del Toro had not worked since he began receiving benefits.

strike, they suffered incapacitating illnesses or injuries which would prevent them from returning to Gallo should the strike be settled. The UFW excepts, arguing that the medical prognoses are unclear since no physician testified at the hearing.

None of these men has performed farm work since his illness or injury. None testified that he was ready to return to work and all have suffered from their disability for substantial periods of time. Although a temporary disability, such as a broken arm or the flu, will not render an economic striker ineligible, we agree with the Hearing Officer that the physical handicaps suffered by these voters is of a more permanent and serious nature. Accordingly, we adopt the Hearing Officer's recommendations^{17/} and sustain the challenges to their ballots.

Joao S. Lindo, Sr.

The challenged ballot of Joao S. Lindo, Sr. presents a different issue. The Hearing Officer concluded that Lindo was not eligible because he suffered from a mental illness which had been treated by prolixyn injections. We do not agree, however, that Lindo was thereby rendered ineligible to vote. Although Lindo has not worked since the commencement of the strike, his illness predates the strike. He has been under psychiatric treatment for a number of years and in 1972, he was able to work very little during the harvest. The medical records demonstrate

^{17/} We place no reliance upon the "blackout" suffered by Vicente DeLeon, Sr. subsequent to the election; we examine eligibility as of the time of the election without regard to later occurrences. D'Arrigo Bros. of California, Reedley District No. 3, 3 ALRB No. 34 (1977).

that he will be able to work at least as much as he did prior to the commencement of the strike. He stated that he would have worked since the strike began but for his difficulty in finding a job. He has thus maintained his interest in his struck job because his struck job required no more than sporadic work limited by the illness. We therefore reject the Hearing Officer's recommendation and overrule the challenge to Lindo's ballot.

Disabled

Manual Cabral
Julio Parra

The Hearing Officer concluded that these employees were not eligible voters because, at the time of the election, they were permanently disabled and unable to work. The UFW excepts, arguing that had the election been held when the strike began in 1973, they would have been eligible. We reject that contention. We determine eligibility as of the date of the election and will not consider hypothetical eligibility two years before the effective date of the Act. We adopt the Hearing Officer's recommendations and sustain the challenges to these voters' ballots.

Education

Umberto Hernandez

The Hearing Officer recommended sustaining the challenge to Umberto Hernandez' ballot because he is currently in school preparing for a career in drafting and land surveying. The UFW excepts, arguing that Hernandez has maintained his interest in his struck job because Gallo could utilize those skills he is

acquiring.

Hernandez' struck job was that of field laborer. He testified that he does not intend to return to that position and his conduct clearly demonstrates that he no longer intends to be a farm worker. An economic striker must maintain his interest in the struck job and not some other position with the same employer. We adopt the Hearing Officer's recommendation and sustain the challenge to Hernandez' ballot.

Employees Who Did Not Testify

Luis Coelho, Jr.
Tomas Faria

We sustain the challenges to the ballots of Coelho and Faria, noting the parties' agreement that they were ineligible. Coelho had not worked for Gallo during the 36-month period preceding the effective date of the Agricultural Labor Relations Act and Faria returned to work for Gallo in 1974.

Catalina Serrano (Garcia)

We sustain the challenge to this voter's ballot noting the parties' agreement that there is no challenged ballot envelope bearing her name.

Pedro Vega Garcia

There is no evidence in the record that Pedro Vega Garcia ever attained economic-striker status. Although his declaration states he worked for Gallo in late 1974, Gallo's Vice-President for Industrial Relations testified that the Employer has no record of his ever having worked for Gallo. We sustain the challenge to his ballot.

Francisco Vega Garcia
Ricardo Gonzalez

The record indicates that these employees returned to work for Gallo subsequent to the commencement of the strike. As they thereby abandoned the strike, we sustain the challenges to their ballots.

Jose Duran (Garcia)
Socorro A. Duran
Enrique Quesada
Eva Quesada
Abdon Salazar
Avelino E. Da Silva
Melvin Nightengale

The record is not sufficiently clear for us to determine whether these employees attained economic-striker status and/or whether they abandoned their interests in their struck jobs. Although we would ordinarily hold these ballots for further investigation should they become outcome-determinative, it is highly unlikely that an investigation at this late date, some six years after the commencement of the strike, would uncover new data. D. M. Steele, dba Valley Vineyards, 5 ALRB No. 11 (1979). We therefore sustain the challenges to these seven ballots.

Challenges Considered in the Regional Director's Report

The eligibility of the following voters is discussed in the section of this Decision dealing with economic strikers:

1. Basilio A. Chavez (see p. 12)
2. Gustavo Flores Cruz (see p. 10)
3. Concepcion F. Duran (see p. 7)
4. Jose Duran (Garcia) (see p. 34)
5. Umberto Hernandez (see p. 32)

6. Guadalupe Del Toro (see p. 8)
7. Rosario Del Toro (see p. 8)
8. Jose Valencia (Lopez) (see p. 6)
9. Pedro Vega Garcia (see p. 33)

No Exceptions Filed

We adopt, pro forma, the Regional Director's recommendations as to all voters concerning whom no exceptions were filed. Roberts Farms, Inc., 5 ALRB No. 22 (1979).

Accordingly, we hereby sustain the challenges to the following ballots:

- | | |
|--------------------------|----------------------|
| 1. Ranjet Bassi | 5. Natividad Serna |
| 2. Pilar Betancourt | 6. San Juanita Serna |
| 3. Catalina Ortega Perez | 7. Regina Souza; |
| 4. Andre Serna | |

and we hereby overrule the challenges to the following ballots:

- | | |
|----------------------|-------------------|
| 1. Josefina Arrequin | 6. Yolanda Lugo |
| 2. James G. Barham | 7. Darol McKinley |
| 3. Steve Cain | 8. Maria Tinoco |
| 4. Elvira Cisneros | 9. Irene Zavala |
| 5. Donald Hatchett | |

Names Absent From Eligibility List

Manual B. de Camaro
Pablo S. Montes
Maria Hernandez

The Regional Director recommended that we sustain the challenges to these voters' ballots because their names did not appear on the eligibility list. The WCT excepts, arguing that all three were either on vacation or sick leave during the

eligibility period and are thus eligible to vote. See Rod McLellan Co., 3 ALRB No. 6 (1977). As the WCT presented no evidence in support of its contention, we adopt the recommendation of the Regional Director and sustain the challenges to the ballots of de Camaro, Montes, and Hernandez.

Supervisors

Salvador Salado
Kalwant Sandhu
Jesse Sandoval
Antonio Zavala

The Regional Director recommended that we sustain the challenges to these voters' ballots because they were supervisors as defined in Labor Code Section 1140.4(j).^{18/} The Employer and the WCT except, arguing that the record provides no basis for resolving the challenges. We agree. Declarations provided to the Regional Director were in unresolvable conflict on the key issue of the job responsibilities discharged by these individuals. Without more information, we are unable to determine which set of declarations more accurately reflects their duties. We therefore defer resolution of the challenges to these ballots for

^{18/} section 1140.4 (j) reads:

The term 'supervisor' means 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.

further investigation should they become outcome-determinative.

Failure to Produce Identification

William Hull
Ruben Lopez

The ballots of Hull and Lopez were challenged because they failed to produce identification when they appeared to vote. The Regional Director recommended that we sustain the challenge to Hull's ballot because no one at the polling place recognized him, and that we overrule the challenge to Lopez' ballot because both the Employer's and the WCT's observers identified him at the polling site.

As to Hull's ballot, we reject the Regional Director's recommendation. The Employer submitted an affidavit in which company observer Jerlad Russell stated that he identified Hull to Board Agents at the election. The Employer also submitted an affidavit in which handwriting expert Sherwood Morrill stated that he compared the signature on the challenged ballot declaration with Hull's employment application, employment information card, union application, and tax forms and concluded that the forms were all signed by the same person. In light of these affidavits, we overrule the challenge to Hull's ballot.

We adopt the Regional Director's recommendation as to Lopez' ballot. The UFW excepted to the recommendation solely on the basis that collusion between the WCT and the Employer rendered the identification at the polling place unreliable. As no evidence of unreliability was presented, and as such a bare assertion is not a basis for preventing an otherwise eligible

voter from participating in the election, we overrule the challenge to Lopez' ballot.

Security Guards

The Regional Director recommended that we sustain the challenges to 30 voters who were security guards.^{19/} The Employer and the WCT except, arguing that Labor Code Sections. 1140.4(a) and (b) and 1156.2^{20/} prevent us from holding that the

^{19/} The Employer and the WCT argue that one of the 30 voters challenged as security guards, Scott DeSalvo, was actually a "bug man", responsible for providing information about insects on the farm. As no evidence was presented in support of this contention, we shall treat the challenge to DeSalvo's ballot along with those of the other security guards. The Regional Director made no recommendation as to one ballot, the envelope of which was marked "field security"; we shall treat that challenged ballot also along with those of other security guards.

^{20/} Section 1140.4(a) and (b) reads:

(a) The term 'agriculture' includes farming in all its branches, and, among other things, includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities (including commodities defined as agricultural commodities in Section 1141j(g) of Title 12 of the United States Code), the raising of livestock, bees, furbearing animals, or poultry, and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market and delivery to storage or to market or to carriers for transportation to market.

(b) The term 'agricultural employee' or 'employee' shall mean one engaged in agriculture, as such term is defined in subdivision (a). However, nothing in this subdivision shall be construed to include any person other than those employees excluded from the coverage of the National Labor Relations Act, as amended, as agricultural employees, pursuant to Section 2(3)

[fn. 20 cont. on p. 39]

security guards are ineligible. The Employer and the WCT argue that:
(1) security guards are agricultural employees within the meaning of Section 1140.4(a) and (b); and (2) they must be included in the same unit as all other agricultural employees of E. & J. Gallo Winery under Section 1156.2.

We have consistently stated that security guards are excluded from coverage under the Agricultural Labor Relations Act. Hemet Wholesale, 2 ALRB No. 24 (1976), fn. 6; Yoder Brothers, Inc., 2 ALRB No. 4 (1976), fn. 9; 8 Cal. Admin. Code § 20352(b)(2); 8 Cal. Admin. Code § 20355(a)(5). The Employer's and the WCT's argument stems from a misinterpretation of Labor Code Section 1140.4(a) and (b). That section sets the outer limits of our jurisdiction; we may not assert jurisdiction over any person who is (1) not engaged in agriculture and (2) not excluded from coverage under Section 2(3) of the National Labor Relations Act as amended (29 U.S.C. Section 152(3)). It does not follow, however, that we are required to assert jurisdiction over every class of employee who is so excluded from coverage under the NLRA.

[fn. 20 cont.]

of the Labor Management Relations Act (Section 152(3), Title 29, United States Code), and Section 3(f) of the Fair Labor Standards Act (Section 203(f), Title 29, United States Code).

Section 1156,2 reads:

The bargaining unit shall be all the agricultural employees of an employer. If the agricultural employees of the employer are employed in two or more noncontiguous geographical areas, the board shall determine the appropriate unit or units of agricultural employees in which a secret ballot election shall be conducted.

Such an interpretation would lead to results entirely inconsistent with the overall purpose of the Act which is to "ensure peace in the agricultural fields by guaranteeing justice for all agricultural workers and stability in labor relations". (Preamble to Agricultural Labor Relations Act)

All agricultural employees of an employer must be included in the same bargaining unit (with the exception of employees employed in noncontiguous geographical areas). Labor Code §1156.2. Therefore, were we to assert jurisdiction over security guards, we would not be able to create a separate unit for guards but would, as the Employer argues, be required to place them in the same unit with field laborers. Section 9(b)(3) of the National Labor Relations Act reads in pertinent part:

... the Board shall not ... (3) decide that any unit is appropriate for such purposes if it includes, together with other employees, any individual employed as a guard to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises;

The key concern behind the passage of this section was the possibility that security guards would have their loyalties divided between the employer and the union. McDonnell Aircraft Corp., 109 NLRB 967, 34 LRRM 1489 (1954); German, Labor Law (West Publishing Co., 1976). We cannot expect security guards to loyally enforce an employer's security rules against fellow union members particularly in times of economic confrontation or when a union is exercising its access rights. Such divided loyalties would be a significant source of instability and a

potential cause of increased violence and are, therefore, inimical to the purposes and policies of the Act.

We do not believe the Legislature intended to create such an unfair and unstable condition, particularly in light of its overall purpose in enacting the Agricultural Labor Relations Act. Accordingly, we sustain the challenges to the ballots of the following-named individuals because they are excluded from coverage under the Act:

- | | |
|-------------------------|--------------------------|
| 1. Robert H. Anderson | 17. Stephen W. Jones |
| 2. Arthur L. Atkinson | 18. Norman W. Liles |
| 3. Mark B. Blake | 19. Charles W. Logan |
| 4. Robert D. Bowman | 20. Thomas J. Lynch III |
| 5. Dale W. Clapp | 21. Richard A. Murphy |
| 6. Richard N. Cody, Jr. | 22. Randall C. Roberts |
| 7. Joseph Corbin | 23. Las E. Scoggins |
| 8. Jim R. D'Anna | 24. Charles E. Schumway |
| 9. George R. DeSalles | 25. Clarence J. Sullivan |
| 10. John H. DeVasure | 26. Paul R. Taupin |
| 11. Scott DeSalvo | 27. David L. Vierra |
| 12. Garfield Dunean | 28. Lloyd J. Vierra |
| 13. Charles H. Grant | 29. Noel E. White |
| 14. Anthony Hazelwood | 30. Robert W. Winter |
| 15. Ronald S. Hand | 31. Ballot marked |
| 16. Ronald W. Johnson | "field security" |

Conclusion

We hereby direct the Regional Director to open and count*the ballots of the employees listed in Schedule A (attached)

and to prepare and issue a revised Tally of Ballots to the parties. If the ballots of the employees listed in Schedule C (attached) then prove to be outcome-determinative, we direct the Regional Director to investigate the eligibility of those voters and to prepare a supplemental report on challenged ballots. We hereby direct that the ballots of the persons listed in Schedule B (attached) are not to be opened and counted because those persons have been found ineligible.

Dated: September 19, 1979

RONALD L. RUIZ, Member

HERBERT A. PERRY, Member

MEMBER McCARTHY, Dissenting in Part:

The majority has extended voting eligibility to a substantial number of economic strikers for whom I believe eligibility is precluded by the terms of Section 1157 of the Act. That section, in pertinent part, provides:

... the board shall have the jurisdiction to adopt fair, equitable, and appropriate eligibility rules, which shall effectuate the policies of this part, with respect to the eligibility of economic strikers who were paid for work performed or for paid vacation during the payroll period immediately preceding the expiration of a collective-bargaining agreement or the commencement of a strike; provided, however, that in no event shall the board afford eligibility to any such striker who has not performed any services for the employer during the 36-month period immediately preceding the effective date of this part.
[Emphasis added.]

The threshold requirement for voting eligibility under Section 1157 is that the economic striker appear on at least one of the specified payrolls and have performed services for the employer within three years of the date of the Act. Only then

can the economic striker be given further consideration for eligibility under rules which the Board is empowered to adopt. The validity of this straightforward interpretation of Section 1157 is amply demonstrated in the dissenting opinion of former Board Member Hutchinson in Franzia Bros. Winery, 4 ALRB No. 100 (1978). I therefore cannot endorse the majority's grant of eligibility to 20 economic strikers who were on neither the payroll immediately preceding the expiration of the collective bargaining agreement nor the payroll immediately preceding the commencement of the strike.^{1/}

Dated: September 19, 1979

JOHN P. McCARTHY, Member

^{1/} These economic strikers are enumerated at pages 64 and 65 of the Administrative Law Officer's Decision.

1. Robert F. Abbott
2. Guadalupe Abrego.
3. Maria C. Alfaro
4. Vicente Alfaro
5. Jose Amaya
6. Jose Amaral
7. Josefina Arrequin
8. Camilo Avalos
9. Paula de Avalos
10. Augustin Avalos, Jr.
11. Augustin Avalos, Sr.
12. Luis Avila
13. Refugio Avila
14. James G. Barham
15. Ricardo Barros
16. Cruz (Cardona) Briones
17. Antonio Caetano
18. Jaime Caetano
19. Julio R. Caetano
20. Steve Cain
21. Florentine Haro Campos
22. Andres Cardona
23. Alfredo Castillo
24. Leonardo Cavazos
25. Basilio A. Chavez
26. Gabriel Chavez
27. Elvira Cisneros
28. Lucinda Coelho
29. Luis M. Coelho
30. Serafin Correia
31. Ana Maria Culebro
32. Jose Culebro
33. Manuel Cunha
34. Gustavo Flores Cruz
35. Carmen DeLeon
36. Regino DeLeon
37. Rosalinda DeLeon
38. Vicente DeLeon, Jr,
39. Bernardina Del Gado
40. Magdalena Del Heal
41. Guadalupe Del Toro
42. Juan Del Toro
43. Rosario Del Toro
44. Jose De Souza
45. Moise De Souza
46. Andronico Duran (Garcia)
47. Bertha Duran
48. Concepcion F. Duran
49. Amaro Fernandez
50. Maria Fernandez
51. Rodolfo Gonzales
52. Felipe Miramontes Gonzalez
53. Ramon Gonzalez
54. Rosalio Gonzalez
55. Candelario Guerrero (Velasquez)
56. Jose Gutierrez
57. Barbara Antonia Guzman
58. Donald Hatchett
59. Cesario Hernandez
60. Manuel Hernandez, Jr.
61. Manuel Hernandez, Sr.
62. William Hull
63. Francisco A. Inacio
64. Jose M. Inacio
65. Manuel Inacio
66. Joao Lindo, Jr.
67. Joao S. Lindo, Sr.
68. Joao Lopez
69. Manuel Lopez (Cabrera)
70. Ruben Lopez
71. Yolanda Lugo
72. Jose Macias (Mejia)
73. Trinidad Madrigal (Garibay)
74. Daniel Magdaleno (Verdusco)
75. Jesus Magdaleno
76. Jose Magdaleno
77. Ramona Magdaleno –
78. Raul Maldonado (Pech)
79. Ramundo Martinez
80. Darol McKinley
81. Salvador (Chavez) Mejia
82. Antonio Meza
83. Marcelino Montoya
84. Francisco Nava
85. Esperanza Nunez
86. Jose Pacheco
87. Pedro Pacheco
88. Lozaro Perera
89. Manuel Perez
90. Frank Perry
91. Roberto Rios
92. Guadalupe Rivas
93. Juana de Rivas
94. Manuela Sanchez
95. Florentine Sandoval
96. Maria Sandoval
97. Antonio Silva
98. Joao Souza
99. Manuel Souza
100. Manuel D. Terra
101. Manuel F. Terra, Sr.
102. Maria Tinoco
103. Refugio Trujillo
104. Mario Vargas
105. Norberto Vargas
106. Rogelio Villanueva
107. Mark S, Whalen
108. Hipolito Ybarra
109. Irene Zavala
110. Jesus Zuniga
111. Rosa Zuniga

SCHEDULE B – CHALLENGES SUSTAINED – BALLOTS NOT TO BE OPENED

1. Maria Amaral
2. Robert H. Anderson
3. Jose Maria Arroyo
4. Arthur L. Atkinson
5. Ranjet Bassi
6. Pedro Bautista
7. Rebeca Bautista
8. Pilar Betancourt
9. Mark B. Blake
10. Robert D. Bowman
11. Manual Cabral
12. Manual B. de Camaro
13. Dale W. Clapp
14. Richard N. Cody, Jr.
15. Luis Coelho, Jr.
16. Joseph Corbin
17. Roberto de la Cruz
18. Jim R. D'Anna
19. Avelino E. Da Silva
20. Tomas DeLeon
21. Vicente DeLeon, Sr.
22. Augustin Del Toro
23. George R. DeSalles
24. Scott DeSalvo
25. John H. DeVasure
26. Jose Duran (Garcia)
27. Socorro A. Duran
28. Garfield Duncan
29. Tomas Faria
30. Francisco Vega Garcia
31. Pedro Vega Garcia
32. Ricardo Gonzalez
33. Charles H. Grant
34. Ronald S. Hand
35. Felipe Haro
36. Anthony Hazelwood
37. Maria Hernandez
38. Salvador Hernandez (Solis)
39. Umberto Hernandez
40. Estelvina Inacio
41. Ronald W. Johnson
42. Stephen W. Jones
43. Norman W. Liles
44. Charles W. Logan
45. Thomas J, Lynch III
46. Cecilia Mendoza
47. Pablo S. Montes
48. Eusebio Moreno (Ybanez)
49. Richard A. Murphy
50. Melvin Nightengale
51. Jose Orosco
52. Julio Parra
53. Catalina Ortega Perez
54. Angelo Picanco
55. Enrique Quesada
56. Eva Quesada
57. E. Walter Regnier
58. Randall C. Roberts
59. Francisco Rosa
60. Abdon Salazar
61. Charles E. Schumway
62. Les E. Scoggins
63. Andre Serna
64. Natividad Serna
65. San Juanita Serna
66. Catalina Serrano (Garcia)
67. Regina Souza
68. Clarence J. Sullivan
69. Paul R. Taupin
70. Pedro Torres
71. Feliciano Urrutia, Jr.
72. Feliciano Urrutia, Sr.
73. Jose Valencia (Lopez)
74. David L. Vierra
75. Hermino G. Vierra
76. Lloyd J. Vierra
77. Rosa Vierra
78. Noel E. White
79. Robert W. Winter
80. Ballot marked "field security"

SCHEDULE C – REMAND IF OUTCOME DETERMINATIVE

1. Salvador Salado
2. Kalwant Sandhu
3. Jesse Sandoval
4. Antonio Zavala

CASE SUMMARY

E. & J. Gallo Winery (WCT) (UFW)

5 ALRB No. 57

Case No. 75-RC-6-F

HEARING OFFICER'S and REGIONAL DIRECTORY'S REPORTS

Following the filing of a Petition for Certification by the Western Conference of Teamsters, an election was held among-the agricultural employees of E. & J. Gallo Winery. One hundred thirty-nine voters were challenged as economic strikers.

Following an investigation, the Regional Director issued a Report on Challenged Ballots. The Regional Director recommended that the Board overrule the challenges to 12 of the challenged ballots, sustain the challenges to 52 others, and defer ruling on one challenged ballot. After a hearing on the voting eligibility of the economic strikers, the Hearing Officer issued a report in which he recommended that the Board overrule the challenges to 96 of the ballots, sustain the challenges to 30 of the ballots and defer ruling on the remaining challenged ballots for further investigation should they become outcome-determinative.

BOARD DECISION

On the issues involving economic strikers, the Board adopted the recommendations of the Hearing Officer as to all voters concerning whom no exceptions were filed or concerning whom the only exception was the absence of their names from the payroll list for the payroll period immediately preceding the strike. See Franzia Bros. Winery, 4 ALRB No. 100 (1978).

The Board treated challenged voters who were discharged prior to the strike as eligible voters only if their discharges were related to union activities and the strike itself. For all those voters who allegedly abandoned their interests in their struck jobs, the Board applied the principles set forth in Pacific Tile and Porcelain Company, 137 NLRB 1358.

Because of the difficulty created by the passage of time, the Board decided to sustain the challenges to the ballots of those alleged economic strikers which would require further investigation.

The Board overruled the challenge to one voter's ballot despite the fact that he failed to provide proper identification at the polling booth because a comparison of signatures by a handwriting expert identified him as an eligible voter. Another voter was found eligible despite the failure to provide proper identification because he was identified by observers at the election.

The Board concluded that security guards are excluded from coverage under the Agricultural Labor Relations Act because they cannot be placed in the same unit as other employees covered by the Act.

The Board deferred ruling, for further investigation if necessary, on the ballots of four voters challenged as supervisors, as the Regional Director's Report did not sufficiently resolve conflicts between affidavit; concerning these individuals' job responsibilities.

The Board overruled the challenges to 111 ballots, sustained the challenges to 80 ballots and deferred ruling on 4 ballots.

* * *

This Case Summary is furnished for information only and is not an official statement of the case or of the ALRB.

STATE OF CALIFORNIA
 AGRICULTURAL LABOR RELATIONS BOARD



E & J GALLO WINERY,)	
)	
Employer)	
)	
and)	
)	
WESTERN CONFERENCE OF TEAMSTERS,)	Case No. 75-RC-6-F
)	
Petitioner)	
)	
and)	
)	
UNITED FARM WORKERS OF AMERICA, AFL-CIO)	
)	
Intervenor)	
)	
)	

REPORT ON CHALLENGED BALLOTS OF ECONOMIC STRIKERS

After an election conducted in the above matter on September 10, 1975, a Tally of Ballots was served on the parties on September 12, 1975 which showed that 223 votes were cast for the Petitioner, 131 votes were cast for the Intervenor, 2 ballots were void and 195 votes were challenged. On September 18, 1975 the Agricultural Labor Relations Board, hereinafter referred to as the Board, held a pre-hearing conference with the parties, and on the same date issued an order directing a hearing on the issue of the eligibility of the economic strikers. The order also directed the Regional Director to consider the ballots involving other grounds for challenge.

Pursuant to such order the duly designated Hearing Officer held a pre-hearing conference with the parties on

October 1, 1975 and held hearings in Merced, California on some 24 days between October 6, 1975 and December 3, 1975. All parties were represented by counsel and were afforded full opportunity to present evidence, including the examination and cross-examination of witnesses, the presentation of documentary evidence and for argument. All parties presented "position papers" prior to the hearing, and very helpful post-hearing briefs from all parties were postmarked by January 15, 1976.

On November 17, 1975 the Regional Director issued a Report on Challenged Ballots dealing with 65 voters who were not listed as economic strikers. Seven of the voters considered by the Regional Director on the grounds that no reason was stated for the challenge or because their names did not appear on the eligibility list appeared as witnesses in this hearing claiming status as economic strikers. Consequently, their claims will here be considered in the light of the evidence presented.

Based on the entire record and his observations of the witnesses, the Hearing Officer makes the following findings of fact and conclusions.

BACKGROUND

E & J Gallo Winery, hereinafter called Gallo or the Company, operates ranches near Fresno, Snelling, Livingston and Modesto, California primarily for the production of wine grapes and apples. From 250 to 275 employees are usually engaged in field work from 10 to 11 months each year. The pruning season usually extends from the end of December to the middle of March, and an additional 75 workers are customarily hired for this period. The peak employment occurs during the harvest or "picking" season, an 8 week period extending from the latter part of August to the latter part of October when from 575 to 600 jobs are available. To fill that number of jobs in 1973 required the hiring of over 1000 employees.

In 1967, after a card check by the State Conciliation Service, the Company signed a 3 year contract covering its field workers with the union now known as the United Farm Workers of America, AFL-CIO, hereinafter referred to as the UFW. In 1970 a new contract which was to expire on April 18, 1973 was negotiated in three bargaining sessions. In spite of several earlier conversations, one preliminary meeting and exchanges of correspondence between the Company and the UFW, the first negotiating session in 1973 did not take place until April 25 after the contract had expired. After 12 bargaining sessions, the last one on June 20, no agreement had been completed.

On June 25, 1973 the Company received a letter from the Western Conference of Teamsters, hereinafter called the Teamsters, claiming to represent a majority of the field employees, and demanding recognition. On June 26 the Company distributed a letter to its employees advising that it "had received notice that the Teamsters Union represents a majority of our ranch, employees. We are scheduling an immediate meeting with Teamster representatives". That evening there were employee meetings held by UFW, and on June 27, 1973 the strike began.

On July 3, 1973 the Company received petitions signed by persons designating the Teamsters as their bargaining agent. After checking the signatures, the Company signed a contract with the Teamsters covering all of its field workers and effective from July 10, 1973 to May 1, 1977.

On August 28, 1975 the Alatorre-Zenovich-Dunlap-Berman Agricultural Labor Relations Act of 1975 became effective. One of the provisions was that a collective bargaining agreement entered into before that date would not be a bar to a petition for an election. Pursuant to that statute a petition was filed by the Teamsters on September 2, 1975, and an election was conducted on September 10, 1975 with the results previously listed indicating that the challenged votes could affect the results of the election.

SOME PRELIMINARY AND PROCEDURAL MATTERS

1. This hearing is non-adversary and part of a fact-finding process under Chapter 2, Article 2 and Chapter 5, Section 1157 of the statute. Investigation of challenged ballots is different than consideration of objections, and this hearing is not subject to that part of 1156 (c) which prohibits the hearing officer from making recommendations to the Board. This topic was discussed with the parties at the preliminary meeting on October 1, 1975, and prior to the initial session on October 6, 1975 each party expressed his willingness to have this specially designated hearing officer make recommendations concerning the issues raised before him. On January 7, 1976 the Board issued an order directing the hearing officer to file with the Board and serve on the parties his "findings of fact and recommended disposition of challenged ballots".

2. It should be noted that this statute calls for elections within 7 days of the filing of a petition without the prior hearing which serves to eliminate many issues under federal law. While this time period is fitted to the nature of seasonal agricultural employment, it creates a number of problems in identifying eligible voters. When strikers are involved, the complications increase, and the issue in this proceeding stems, from the second paragraph of Section 1157 which provides that for elections conducted within the first 18

months, economic strikers from disputes going as far back as 36 months prior to the Act may be eligible under rules to be adopted by the Board.

3. No prior Board decisions had established such eligibility rules or criteria for application of any rules. Section 20390 of the Board's Regulations provide that strict rules of evidence are not applicable to such investigative hearings. Under these conditions the parties desired to cover all bases in an effort to anticipate what might be required to protect their rights. As noted, the hearings including the time for filing brief's extended over a period of some four months from the election date, and some of the evidence presented might qualify as the proverbial "kitchen sink". A speedy resolution of representation issues contributes to industrial (and agricultural) peace, and this lengthy record may serve a purpose if it serves as a basis for the development of rules which will permit a more restrictive and time-saving approach. Some early answers may permit regional office investigations to eliminate the necessity for hearings in some cases.

4. One hundred and twenty-one of the challenged voters testified in person in this proceeding. Depositions from 3 voters were received and all-party stipulations covered 2 voters. Some evidence was received relating to 13 economic strikers who did not appear in person. When no reporter appeared on December 1, 1975, the testimony was taken with the assistance of

a tape recorder, and the copy of that recording was received in evidence as Board exhibit 13 with the agreement of all the parties.

5. On the last day of the hearing it was agreed that the record would remain open for some additional exhibits. Such exhibits were received from all parties, and made part of the record. When requested, copies of originals were accepted, although it must be observed that some of the copies are quite poor. Gallo has exhibits numbered 1 through 92, the Teamsters from 1 through 57, and the UFW from 1 through 21, except that UFW - 10, reserved for a card for Mr. Meza was never received. It may be that a card included in the Meza deposition was what was intended. UFW-Ex.-21, a list of employees on the election eligibility list who had the shortest tenure with Gallo, was received after the hearing from the Company pursuant to a request by the UFW.

6. Medical records concerning three individuals were received as part of the evidence, with his agreement in the case of Mr. Lindo, and in the other cases on the grounds that there had been a waiver of any privilege by virtue of testimony which had disclosed a significant part of such records. However, there was agreement by all parties that such records should remain sealed except when necessary for official examination in connection with this record. Those records are WCT Exhibits 8, 9 and 55 and Gallo Exhibits 25, 31 and 32.

7. The passage of time and the somewhat migratory work force make precise analysis of over-lapping categories difficult. An additional problem in matching the evidence with the names stems from the Spanish-American custom of using two family names, the maternal as well as the paternal surnames. Some of the records reflect one and some the other. Some of these individuals adhere to local American usage and some do not. The listing of names here attempts to use the paternal surname, but in the parlance of most of these witnesses, "?Quien Sabe?"

THE STATUTE

Before considering the evidence relating to individuals or classifications of strikers, it is necessary to consider the language and the meaning of the Statute. Section 1148 states that "The Board shall follow applicable precedents of the National Labor Relations Act, as amended." Section 1157 seems to parallel the federal law in providing eligibility for economic strikers in elections conducted within 12 months of the beginning of a strike. Then the second paragraph of Section 1157 provides the issue in this case:

In the case of elections conducted within 18 months of the effective date of this part which involve labor disputes which commenced prior to such effective date, the board shall have the jurisdiction to adopt fair, equitable, and appropriate eligibility rules, which shall effectuate the policies of this part, with respect to the eligibility

of economic strikers who were paid for work performed or for paid vacation during the payroll period immediately preceding the expiration of a collective-bargaining agreement or the commencement of a strike; provided, however that in no event shall the board afford eligibility to any such striker who has not performed any services for the employer during the 36-month period immediately preceding the effective date of this part.

The National Labor Relations Act has no similar provision, and the differing views as to its meaning must be considered.

Applicability of the NLRA.

Deferring consideration of NLRA precedents, the initial question is whether the Board must or should view those precedents as controlling. There is a paucity of legislative history. Conflicting interpretations of the second paragraph of Section 1157 were contained in messages sent to the Board after the election in this case by each of the four co-authors of this bill. These messages were served on the parties and presented to the hearing officer for his consideration.

Senator Zenovich apparently believes the Board is directed to follow NLRA precedents whereas Assemblyman Alatorre thinks such precedents are inapplicable, adding that the Board is "to give special consideration and the right to vote to those economic strikers who fall within the 36 month proviso although they do not appear on either payroll list mentioned specifically."

Assembly Berman believes "The second paragraph of Section 1157 was specifically included to permit the Board to deviate from National Labor Relations Board precedents regarding economic strikers involved in labor disputes pre-existing the Act. This is in contrast to the first paragraph of that section." Senator Dunlap states, "I don't believe it was legislative intent that technical precedents of a national "law which involved non-agricultural labor should defeat the purpose of the California Agricultural Labor Relations Act. It is possible, of course that the Board might still look to NLRA precedents in making determinations relative to this Act if such precedents are not inconsistent with State legislative intent as expressed therein."

The UFW would have all the strikers eligible under Section 1157 regardless of NLRA precedents and regardless of what has occurred since the strike. In part, this is because' the strike occurred in 1973 at a time when the passage of the law could not be anticipated, and because the objective of "guaranteeing justice for all agricultural workers" requires looking at the total picture including "the injustices committed upon these people in 1973, the employer's 'interference with the Teamsters' and an understanding of the basis of the striker's desire to return to the work at the Gallo Winery now".

While I, like the other parties involved, had been served with the above mentioned messages, they were also included with the UFW brief. In a subsequent letter the Company argues, with citations, that such declarations are inadmissible as exhibits in this proceeding. The Company contends that NLRA precedents should be controlling, and that such precedents would prevent any of the strikers from being eligible voters. The Teamsters believe some adaptations of NLRA precedents are required because of the seasonal nature of agriculture, but base most of their argument upon specific factual contentions.

Conclusions of the Hearing Officer

While the messages are not admitted as exhibits, I do believe that the views of the authors of the bill merit notice and consideration under the circumstances. Post legislative comment is generally viewed as of limited value, even when the authors are in agreement, because of a tendency to try to obtain through interpretation something different than was available through the legislative process. In the absence of legislative history in the form of committee reports or recorded debate on the issue involved here, what we do have is a transcript of a public hearing on May 21, 1975 before the Senate Industrial Relations Committee which clearly would permit conclusions as varied as those expressed in the messages.

Some questions must be answered in view of the conflicting claims of the parties before any evaluation of the evidence is possible. Accepting one view would mean that this investigation would be limited to the determination of whether a voter was an economic striker within the 36 month period. That would mean that the Legislature had established a completely different approach for strikers within the 36 month period than for any strikers within the 12 month period. That would be simple and quick, and might be equitable. I, however, cannot read the statute as making that distinction. The use of "applicable" in Section 1148 and the words of Section 1157 that the Board "shall have jurisdiction to adopt fair, equitable and appropriate eligibility rules, which shall effectuate the policies of this part" must be read: it seems to me, as compelling a choice to be made by the Board. Thus, some NLRB precedents may be applicable or may require some modification to fit this industry under the law at this time in this case.

ECONOMIC OR JURISDICTIONAL STRIKE

The Company contends that none of the strikers are eligible voters because this strike was jurisdictional rather than economic. This argument is based upon the Jurisdictional Strike Act of California and Smaymiotis v. Restaurant Employees, 64 Cal. 2d 30. The Company argues that California has clearly defined jurisdictional strikes, treats them differently from

economic strikes, and that only economic strikers are enfranchised by Section 1157. The evidence clearly showed that in this case the employees continued to work for two months after the expiration of the contract on April 18, 1973, and that the strike commenced on June 27 only after the Teamsters appeared on the scene.

The UFW relies on the history of the terms before the NLRB and Englund v. Chavez, 105 Cal. Rptr. 521, in vigorously denying that a jurisdictional strike was involved.

From the conflict of the London Cobblers and the Cord-wainers in 1395 and the Carpenters and Joiners in 1693 over coffin construction, the term "jurisdictional dispute" has been used to refer to two types of union rivalries, the representational or political and the work assignment. The term has become virtually unknown in Europe where "class-conscious" labor movements unite against common foes. In the United States the work-assignment dispute is related to the "private property" concept of jobs. Both representational and work-assignment strikes can be economic in nature, and while in some circumstances, either can be an unfair labor practice, they are treated differently under federal and California law. The distinction between economic and unfair labor practice strikes evolved from the NLRA. "Economic" has been used to mean strikes other than unfair labor practice strikes. No one contends that a conventional work-assignment dispute is involved in this case.

The terms are not very precise and depend upon factual contexts for meaning. Obviously many of the employees interpreted the Company's letter received on June 26, 1973 as describing recognition of the Teamsters rather than a claim of majority, and the employee meetings that evening discussed the advent of the Teamsters as well as the contract negotiations of UFW and Gallo. While the notice of the Teamster claim certainly precipitated the strike, in the context of the protracted negotiations at Gallo, the importance attached by the striking employees to a contract in the history of this case, the relationship of this statute to the NLRA and on the entire record, I believe it manifestly clear that this is an economic strike, and that determination of the status of these strikers under Section 1157 is required by legislative intent.

THE PAYROLL ISSUE

The statute refers to "economic strikers who were paid for work performed or for paid vacation during the payroll period immediately preceding the expiration of a collective-bargaining agreement, or the commencement of a strike; provided, however, that in no event shall the board afford eligibility to any such striker who has not performed any services for the employer during the 36-month period immediately preceding the effective date of this part". The payroll preceding the expiration of the contract is in evidence as Board Exhibit 9 and is dated April 13, 1973,

and the payroll just prior to the strike is dated June 27, 1973. Board Exhibits 11 B and C show slightly different dates for the payrolls for the Fresno employees, but that has no bearing on this issue. Some of the strikers involved in this proceeding were on both payrolls, some were on one, while some were on neither because they were ill, pregnant, on leave or just not scheduled to report back to work until the August harvest. Some of these had worked for Gallo for a short time, but some had been employees for years.

The UFW reads the statute to limit eligibility only by the requirement that some services must have been performed for the employer within the 36 month period. The Teamsters contend that one payroll or the other is applicable and that the Board has no power to make persons eligible who were not paid for work performed or for paid vacation during one or both of the applicable payroll periods.

The Company insists that the legislation limits eligibility to those, who were paid for work or vacation during the relevant payroll period, and that the 36 month provision does not broaden eligibility. The Company cites a recent Board decision, Yoder Brothers, Inc., 2 ALRB No. 4, where in footnote 10 the Board affirms a more restrictive approach in Section 1157 than in the NLRA on eligibility.

I note that in the cited case the Board was referring to the first paragraph of 1157, and in the sentence to which the

footnote is attached, the Board made an exception for economic strikers. Again, I believe that the legislative history provides little guidance. The Canons of Construction are not technical rules of law or very precise, but they are "axioms of experience", and generally teach that legislative intent must be derived not from a single sentence or provision but from looking at the whole law with its objectives and policies. In Phelps Dodge v. National Labor Relations Board, 313 U.S. 177, the Supreme Court stated, "Unlike mathematical symbols, the phrasing of such social legislation as this seldom attains more than approximate precision of definition. That is why all relevant aids are summoned to determine meaning. Of compelling consideration is the fact that words acquire scope and function from the history of events they summarize." In Cabell v. Markham, 148 F. 2d 737, enforced as 326 U.S. 404, Judge Learned Hand observed, "But it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning." Here the legislature made a special provision which has a limited duration for strikers antedating the Act. While the language in issue permits several interpretations, I am convinced that only one payroll is intended, and that the facts in each case will determine which it should be. In this case the strike did not begin until two months after the expiration of the contract, and

it would be my view that the June 27 payroll should be the beginning point. In most cases it probably would not make any difference, but since both are mentioned in the statute, it might save time as a practical matter if both were used. Nevertheless, the analysis which follows will first consider those on the June payroll, then those on the April payroll and not on the June, and finally those strikers who were not on either payroll.

I do not believe that the legislature in making special provisions for pre-Act strikers intended to permit people paid for vacation to vote while denying the vote to persons who retained their status as employees although absent because of illness, an approved leave without pay, temporarily laid off, etc. I conclude that legislative intent requires the Board to adopt "fair, equitable and appropriate eligibility rules" for persons who retain the status of economic strikers limited only by the requirement that they must have performed some services for the employer within the 36 months.

NLRA PRECEDENTS

The 1959 amendments to the NLRA added a provision that made economic strikers even if replaced eligible to vote in any election conducted within 12 months of the commencement of the strike under rules to be developed by the NLRB. Starting with W. Wilton Wood, Inc., 127 NLRB 1675, that board established rules on a case by case basis. In 1962 in Pacific Tile and Porcelain Company,

137 NLRB 1358, the NLRB reviewed its experience, and made some revisions in its rules which remain as basic guidelines. Finding that trying to determine the subjective intent of employees at some time in the past presented investigatory and decisional problems which brought unjustifiable delays in resolving representational matters, the NLRB announced that an economic striker would be presumed to retain his status absent affirmative "objective evidence that he has abandoned his interest in his struck job." The party challenging the status has the burden of supplying the objective evidence. Application of this approach by the NLRB can be found in such cases as Roylyn, Inc., 178 NLRB 197, Akron Engraving Company, Inc., 170 NLRB 232, Q-T Tool Company, Inc., 199 NLRB 500, Globe Molded Plastics Company, Inc., 200 NLRB No. 65, Holiday Inns of America, Inc., 176 NLRB 939, etc.

I believe it is incumbent upon this Board to adopt a similar approach, but that it must be adapted to this industry and should not be mechanical. Whether moving from the area constitutes abandonment of one's interest in a struck job must have a different meaning for a migratory work force, and permanent employment assumes different aspects for seasonal and agricultural employees. The time element obviously makes a difference when one is concerned with the 36 month period. In a number of cases I would have reached a different conclusion if I had been evaluating the evidence within 12 months of the beginning of the strike. Changing times are a constant part of life, and I believe the

second paragraph of 1157 requires an appraisal of the facts as they exist as of the time of the election or of the hearing.

In this proceeding 71 of the challenged voters who testified either in person or by way of deposition or stipulation were on the June payroll (all but three were also on the April payroll), 35 were on the April payroll only and 20 were on neither. My first effort to apply NLRB precedents or modifications thereof will begin with the June payroll, followed by the other two categories, and will conclude with consideration of the evidence concerning 13 alleged strikers who did not appear at these hearings. The following analysis starts with the assumption that each of these witnesses has testified that he worked at Gallo, went on strike, walked on the picket line, participated in some fashion in the boycott as a continuation of the strike, wanted to return to his Gallo job; and is, therefore, presumptively an economic striker whose vote should be counted. Where appropriate, comment will be made with respect to pertinent facts relating to each individual and to the evidence and argument proffered to overcome that presumption.

EMPLOYEES ON JUKE 23, 1973 PAYROLL IN FRSNO
AND JUNE 27, 1973 AT OTHER RANCHES

Other Permanent Employment

1. Robert F. Abbott

Abbott was a year round employee at Gallo and a member of the UFW negotiating committee. He participated in the strike,

but obtained employment at Carton Ford in August, 1973 as a mechanic at \$3.75 per hour as compared with the \$3.10 per hour he had been making at Gallo as a mechanic. He worked steadily at Garton until he was laid off the week of April 8, 1975. He was earning \$4.50 per hour at the time of the separation, and was eligible for certain benefits such as health insurance, paid vacation, holiday pay and a yearly bonus. The office manager of Garton testified that Abbott probably would not be recalled there, but Abbott has subsequently gone to work as a mechanic for Naraghi Farms. Abbott voted in the election and testified that he would return to work at Gallo if the UFW won the election.

Abbott worked steadily from around August 1, 1973 to April 8, 1975 at a job with better benefits than he enjoyed at Gallo. If the law had been in effect in 1973 and if the 12 month period were involved, different answers might have appeared, but that is speculative and contrary to fact. Under all of the circumstances, I cannot say that Abbott has "abandoned his interest in his struck job", and I would find him to be an eligible voter. See Akron Engraving Company, Inc., 170 NLRB 232 for a holding that acceptance of a job with better benefits does not necessarily forfeit a striker's eligibility.

2. Jose Amaral

Amaral had worked for Gallo for seven years, and company records show that he worked 9 hours on the first day of

the strike. He testified that he joined the picket line in support of the UFW for four weeks. He was living in company housing and understood that he had to vacate it if he was not working. He sold part of his furniture, left some in California and moved with his wife to Bristol, Rhode Island where he obtained a job with the Converse Rubber Company on August 17, 1973. At Gallo he had been making \$2.40 per hour and his starting rate at Converse was \$2.22. When he was laid off on March 31, 1975 Amaral was earning \$3.50 per hour, and during the entire time had been enjoying health insurance, a pension plan, life insurance and 10 paid holidays per year. His records at Converse reflect that on June 20, 1975 while in layoff status, Amaral quit with the entry on the company's record stating, "Vol. quit- Relocating to California." In California Amaral has again been doing field work, he voted in the election, and states that he would return to Gallo if there were a UFW contract. Some company testimony sought to establish that Amaral and his wife had stopped work because they were afraid rather than because of support of the UFW, but his testimony was clear and convincing. Amaral did state that after the strike provoked the move to Rhode Island, he had intended to remain in Rhode Island, but that the climate had precipitated his return to California. He once stated that he might have stayed in Rhode Island had he not been laid off, but wasn't sure that the climate would not have brought him back anyway.

Amaral also testified that he might have returned to California much earlier if Gallo had had a UFW contract. Notice must be taken of his sworn testimony that he had intended to stay in Rhode Island at the time of his move; but since the law was not in effect, the move was precipitated in part by that fact, and the 36 month provision is designed to provide some equitable compromise of competing considerations, I would find that his interest in his struck job might have wavered, but under all the circumstances as of the time of the hearing, he had not abandoned his interest. I would find Jose Amaral to be an eligible voter.

3. Jose Amaya

Amaya made \$2.45 per hour at Gallo. He spent approximately four months on the picket line and 5 months in working on the boycott in Los Angeles. In early 1974 he obtained work for a cannery in Wilmington, California, around 300 miles from his Gallo work, moved his entire family, and continues to work there under a union contract which provides a rate of \$4.33 per hour and fringe benefits better than what he had at Gallo. Under the present contract the minimum wages for a field worker are \$3.10 per hour. He returned to vote in the election and to testify in this hearing where he said that he would return to work at Gallo if there were a Chavez contract. In part, his desire to return to field work was explained as the result of rheumatism which he attributed to the wet work conditions in the cannery.

In spite of the distance involved and the wage rates, I would find no abandonment of interest in the struck job, and would find that Amaya is an eligible voter.

4. Moises Inacio de Souza

De Souza worked seasonally for Gallo from 1971 to 1973, went on strike, represented the UFW in San Diego in the boycott, and then obtained a job in May of 1974 at a dairy paying \$550 per month. After he lost that job, he obtained work around September of 1975 at an hourly rate of \$3.05 with fringe benefits. An argument was made that employees who left Gallo because they did not want the Teamsters had surrendered that position when they went to work somewhere else under a Teamster contract. Some distinction was made by the UFW about Teamster contracts in plants as contrasted with field work, but, in either case, I can not find that fact to be significant. De Souza testified emphatically about his preferences and his support of the UFW, and I would find him to be an eligible voter.

5. Candelario Guerrero (Velasquez)

Guerrero worked two years for the Company, joined the strike and picketed, but went to work for Joe Gallo driving a tractor on November 11, 1973. He was hoping to continue working for Joe Gallo, but was discharged on September 16, 1975 for driving his tractor over a bluff. Again, recognizing that this employee at one time may have thought he had as permanent a

job as such jobs go in agriculture, I would find that under all the facts this employee was an eligible voter.

6. Manuel C. Lopez

Lopez had worked at Gallo since 1964 or 1965, and joined the strike in 1973 because "we were all placed in some buses, and we were told that we were Teamsters, and it was not convenient for us to be Teamsters." Lopez did field work for contractors and others after walking on the picket line and helping with the boycott, and in December of 1974 obtained work which might be permanent at L & D Properties paying \$3.10 per hour. While indicating a desire to return to Gallo under a UFW contract, he stated in response to one question that if faced only with an opportunity of returning to Gallo at the bottom of the seniority list, he was uncertain what his choice would be.

Many times in this hearing an argument was made that the strikers had abandoned their interest unless they were willing to return to Gallo at the bottom of the seniority list. Within the specified time periods, the eligibility of an economic striker depends upon his interest in his old job, even if he has been replaced and not upon acceptance of inferior working conditions. Outside of the relevant time periods, a replaced striker may lose his eligibility, but that has no bearing on the issues in this case. I would find Lopez eligible.

7. Antonio Silva

Silva meets all the other tests, and is doing field work for Canisso starting about May of 1974 as one of ten year-round employees. He has been laid off at times and stated that he wanted to return to Gallo. I think he is clearly eligible.

8. Joao Souza

Souza worked for Gallo, went on strike, picketed and worked in the boycott. He now has a year-round job with Rich of California under another union contract with fringe benefits earning \$3.46 per hour at a plant which is closer to his home than Gallo. While I had some doubts as I heard him testify that he wanted to return to field work at Gallo under a UFW contract, I find no objective evidence that would warrant overturning a presumption of his continuing interest in his struck job. I find him eligible as a voter.

9. Feliciano Urrutia, Jr.

Urrutia, Jr. was a tractor driver at Gallo earning \$2.75 per hour for a 9 hour day and 6 days a week on a year round basis. He was a member of the ranch committee and of the UFW negotiating committee. On the morning of June 26, 1973 after being advised of the Teamster claim, he requested two hours to check with the employees in his capacity as a union representative. When this was denied, he left anyway; and when he returned to work, was advised that he had been discharged for "walking off

the job". After strike and boycott activity, Urrutia had several jobs, but on March 3, 1975 went to work in a civil service job as a janitor for the State Department of Water Resources at Los Banos, California. After a six month period of probation, he was accorded permanent civil service status with a 40 hour week, protection against unjust discharge and all of the perquisites of such status. He reported his salary at \$635 per month with increments to be expected, while his supervisor said it was in the area of \$765 per month at the present time. His family has moved to Los Banos and his children are in school there, although he still owns a home in Livingston. He did state that he would return to Gallo under a Chavez contract "if they win my case."

Deferring consideration of the impact of a discharge under the circumstances related above, I would find that Urrutia, Jr. has abandoned his interest in his struck job if that concept is to have any bearing under Section 1157.

10. Hermino G. Vierra

Vierra was a year-round employee of Gallo who lived in company housing. In January of 1974 he obtained work as a milker on a dairy farm for his family as a unit, and moved into a house on the farm which he says is much better than the one he had at Gallo. He and his son do the milking and earn \$500 each per month plus the housing, beef to slaughter, milk, and utilities.

While stating, that he would rather work at Gallo, he once replied that that would depend on whether he would be supplied suitable housing since he did not like to drive to work. When advised that company housing was no longer available at Gallo, he stated that they might rent him one nearby or that he might.

I find this to present a difficult case, but do conclude that his interest in returning to Gallo is conditional, and that he is not an eligible voter.

11. Hipolito Ybarra

Ybarra, after strike and boycott activity, obtained field work at L & D which has been steady. While it is contended that this is permanent, I find no basis for contradicting his testimony concerning his continued interest in Gallo, and I find him eligible.

No Substantial Objection

Most of the following 32 employees were on strike, have been doing sporadic field work and testified that they desired to return to a Gallo job under a Chavez contract. Some of their work has been under a Teamster contract elsewhere, but, as I have previously noted, I do not believe this is disqualifying. A few have worked almost full time for the union, in a processing plant or in what is alleged to be other permanent farm work. On the record, I find that all have maintained their interest in their Gallo jobs and are eligible voters.

1. Guadalupe Abrego
2. Cruz(Cardona) Briones
3. Jaime Caetano
4. Leonardo Cavazos
5. Alfredo Castillo
6. Ana Maria Culebro
7. Carmen DeLeon
8. Jose Gutierrez (Gonzalez)
9. Cesario Hernandez
10. Jose M. Inacio
11. Manuel Inacio
12. Joao Lindo, Jr.
13. Joao Lopes
14. Trinidad Madrigal (Garibay)
15. Haul Maldonado (Pech)
16. Salvador (Chavez) Mejia
17. Antonio Meza (By deposition)
18. Marcelino Montoya
19. Francisco Nava
20. Jose Pacheco
21. Pedro Pacheco
22. Lozaro Perera
23. Manuel Perez
24. Frank Perry
25. Florentine Sandoval
26. Manuel Souza
27. Manuel F. Terra, Sr.
28. Refugio Trujillo
29. Mario Vargas
30. Norberto Vargas
31. Jesus Zuniga
32. Rosa Zuniga

Abandoned the Strike

Four employees are alleged to have abandoned the strike because of preference for other work. These cases illustrate an ever-present problem caused by the fact that most of the witnesses did not feel at home in the English language and testified through interpreters. Some of the colloquial or idiomatic expressions differ, and there is no precise translation for some words such as "boycott". In reply to questions these employees stated, that "the strike was over "when they took other jobs or that they would "have continued to work" in the new job had they not been laid off. This was generally sporadic field work, but again was sometimes in processing plants and was sometimes under a Teamster contract. Around October of 1973 the picketing of Gallo ceased with the union shifting its emphasis to boycott activity in various places. The testimony clearly showed that these witnesses were referring to the picket line when they replied

that the strike was over, and that they continued to support the UFW and to have an interest in the struck jobs. In addition to the above, Regino DeLeon was injured a time or two, but swore he was now able and willing to work. I find these employees clearly to be eligible voters.

1. Agustin Avalos, Sr.
2. Antonio Caetano
3. Manuel Cunha
4. Regino DeLeon

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Reapplied at Gallo During the Strike

While others are to be considered under this category in different factual contexts, Jose Valencia (Y Lopez) is the only employee on the June payroll falling in this group. Valencia was sick at the time of the strike, and when asked to participate in the strike refused to do so. Even after he was well, while affirming his support of Chavez, he refused to engage in any strike and boycott activity. On two occasions he reapplied for work at Gallo, and stated that he would work if called whether or not there was a UFW contract. I find that Valencia is ineligible to vote as an economic striker. Valencia was found to be eligible by the Regional Director since on the record before him he had no reason for the challenge.

Moved from the Area

1. Luis Avila

Avila was a seasonal worker at the Company earning \$2,890 in 1972. After walking on the picket line and supporting the boycott, he moved with his family to Salinas, approximately 100 miles. On March 20, 1974 Avila signed a sharecropper agreement with Timothy T. Miyasaka covering 4 to 4 1/2 acres of strawberries. From this he received \$15,270.76 in 1974 and \$12,252.70 through 9/30/75. These amounts apparently covered work by all the family members. Avila has agreed to sign such agreement for 1976, although the document had not been signed at the time of the hearing. In spite of his testimony that he would prefer to work at Gallo, I find that the objective evidence would eliminate Luis Avila as an economic striker.

2. Refugio Avila

The facts concerning Refugio Avila are essentially the same as those covering Luis Avila except that Refugio Avila was a year round employee at Gallo, and received \$5987 from Gallo in 1972. Under his sharecropper agreement he received \$24,479.73 in 1974 and \$16,097.54 to 9/30/75. He also has agreed to sign such an agreement for 1976. I find that Refugio Avila is not an eligible voter.

3. Pedro Bautista

4. Rebeca Bautista

Pedro Bautista and his wife, Rebeca supported the strike and boycott, and stated that they would return to Gallo under a Chavez contract. They moved to Arvin, California in 1973, are buying a home there, and work for a nursery. Mr. Bautista stated that it was the best paying job he ever had, that it was permanent and intended to keep it. He makes from \$10,000 to \$14,000 per year at the nursery, and is given leave for 2 months each year when he works for Del Monte at around \$40 per working day. Mrs. Bautista has three small children, but also works part of the time for the nursery and at Del Monte. Part of the testimony is contradictory, but I find both Bautistas to be ineligible as voters.

5. Florentine Haro Campos

After the strike Campos went to Los Angeles to push the UFW boycott, and subsequently moved to Visalia with his family where he apparently has steady farm work earning \$2.40 per hour plus housing. While the work is regular, it is similar to what he was doing at Gallo; and in view of his expressed desire to return to Gallo, I see no objective evidence which would justify sustaining the challenge to his ballot. I find Campos to be eligible.

6. Roberto Rios

Rios has been in Los Angeles since the end of the picketing, working as an organizer for the UFW, repairing union vehicles and promoting the boycott. The contention is that Rios has abandoned his struck job by making a permanent move to Los Angeles. His activity merely confirms his interest in my view, and I would find him eligible.

7. Guadalupe Rivas

Rivas moved to El Paso, Texas after the picketing ceased, and obtained work at \$3.25 per hour. He returned to California in 1974 and has been doing some agricultural work. An argument is offered that he abandoned his interests as a striker when he went to El Paso to seek steady work, but I find no merit therein, I find that Rivas is an eligible voter.

8. Francisco Rosa

Rosa had worked for the Company since 1954, and was a year round employee when he joined the strike. Around Christmas in 1973 Rosa and his wife went to San Rafael, California where he had a son, a daughter and grandchildren. After a time he rented, and then purchased for \$45,000 a home in San Rafael. He started receiving social security in April of 1974, and stated that he wanted to work only for enough not to affect his social security pension. Although Rosa stated that he would like for that

extra work to be at Gallo if Chavez obtained a contract, I must conclude that he has not maintained his interest in his struck job, and that he is ineligible.

Own Their Own Business

1. Jose Maria Arroyo

Arroyo was a working foreman at Gallo (an issue to be discussed later), and participated in the strike. A contention is made that he quit rather than joined the strike, because of the way he expressed his regret to the officials at Gallo when departing. Considering his testimony and his activity, I do not find that he quit. He invested \$1000 and his son \$5000 to open a restaurant in Merced, and in July, 1974 signed a 2 year lease on a building. The restaurant seems to be doing an expanding amount of business, and in the first months of 1975 showed a profit of \$14,865 on a gross of over \$43,000. Although he works in the restaurant almost every day, he did take off for a period of 5 or 6 weeks to serve as a working foreman for Cortez Associates. Based on the entire record, I cannot find Arroyo eligible.

2. Amado Fernandez

Fernandez testified that he did some farm work after the strike, and in 1975 with three other persons rented some land on which to grow cherry tomatoes. He said it was not very profitable, and they abandoned it. A broker testified that he sold crops for Fernandez which grossed \$10,700 and estimated the

costs at approximately 45%. At Gallo in 1972 Fernandez earned \$4362. Some of this testimony is not clear, but in an agricultural context, I cannot say that the objective evidence has eliminated Fernandez' status as an economic striker. I find him eligible.

3. Julio R. Caetano

Caetano had about 16 milk cows while he was working at Gallo. At the time of the hearing he had about 52 cows and 3 milking machines which he and 2 sons used in early morning and late afternoon. It is contended that this is a substantial family-owned business producing an income of approximately \$1200 to \$1500 each 15 days, and that Caetano has abandoned his interest in his former Gallo job. Caetano had quit a steady job he had at Armour to "stay home". His explanation was that he did not like cannery work but did like to work in the fields. He had taken care of the smaller number of cows' and insisted that he had always been on time for his work at Gallo. He now says that he and his family can do the same thing for the larger number, and emphatically indicated his desire to return to Gallo under a Chavez contract. He has worked other places while maintaining the herd, and testified that he had worked at Montecillo Vineyards just the day before he attended the hearing. I do not believe these facts overcome the presumption as to his status as an economic striker. I find Caetano eligible.

Receiving Social Security

1. Salvador Hernandez (Solis)

Hernandez is 67 years old, and started receiving Social Security benefits in 1974 after the strike began. He has not worked since receiving those benefits, but stated that he would like a little, light work from time to time. I believe Hernandez has forfeited his status as an economic striker and would sustain the challenge to his ballot.

2. Jose De Souza (Listed on Board Exhibit 14 as Jose Garza)

De Souza is 66, but apparently was advised that he had too few quarters of coverage when he applied for Social Security. He has been doing sporadic field work, and I believe him when he says he is still interested in his job at Gallo. I find De Souza eligible.

3. Feliciano Urrutia, Sr.

This employee was year-round at Gallo, and is now receiving Social Security benefits at the age of 67. He continues to do some field work but stays within the earning limitations of his benefit payments. He clearly expressed his past and present support for the UFW, and would like to do some seasonal work at Gallo. Since he is doing some work, and seasonal work at Gallo is available, Urrutia might find some work there in the future. However, the criteria suggested herein for economic strikers would indicate that this employee has not maintained

his interest in his struck year-round job, and I find him ineligible.

But see Holiday Inns of America; Inc. 176 NLRB 939.

Disabled

Two of the strikers, Manuel Cabral and Julio Parra, were stipulated to be totally and permanently disabled, and not available for gainful employment. If the 36-month proviso makes all economic strikers within that period eligible, these men would qualify. If NLRB-like criteria are to be applied, they do not. I find them to be ineligible.

3. Tomas DeLeon meets all the eligibility tests except that he suffered a heart attack on October 6, 1974, has done no work since, is receiving permanent disability payments from Social Security, and while he appears hopeful that he may be able to work in the future, it cannot be determined as of this time that that is possible. I find him ineligible.

4. Joao S. Lindo, Sr.

Mr. Lindo has been plagued by illness which incapacitates him for work for several years, has been hospitalized and continues under medical care and treatment. Testimony indicates that he receives disability payments, and based on the entire record, I cannot find that Mr. Lindo is able to work. I would sustain the challenge to his ballot.

Discharged or Quit

1. Rodolfo Gonzales

Like Feliciano Urrutia, Jr. discussed above, Gonzales was discharged on June 26, 1973 for walking off the job to attend to union business. Application of the standards being used here would clearly prevent someone who had been discharged for cause prior to a strike from being eligible to vote as an economic striker. In Pacific Tile and Porcelain, supra, ruling on the ballots of two employees whose discharges were involved in grievance procedures at the time of a strike was deferred. Here no law was in effect covering such discharges, and under these facts, no grievance procedure was available. The delivery of the company letter and the surrounding circumstances on the morning of June 26, 1973 present some confusion. While it is a matter of judgment, I would view the "walking off the job" for union business on that morning to be part and parcel of the strike and I would find Gonzales to be an eligible voter. I do not find the evidence concerning recent application for work at Gallo to be convincing.

Working Foremen

Gustavo Florez Cruz and Jose Culebro meet all the other tests, but issues about their status as supervisors are raised by the fact that both were "working" foremen. These

classifications have been included in the unit under both UFW and Teamster contracts. The Company and the Teamsters would include them now except that the same issue has been raised in other proceedings, and they believe judgment should be reserved so that the same answer might apply in all cases. The UFW argues that supervisory status is an individual rather than a title matter. The evidence in this proceeding would establish that the working foremen involved here are more like leadmen and are not supervisors who would be excluded under the statute. Cruz was ruled not eligible by the Regional Director in his report in this case because he was not on the list, and other working foremen were found not eligible because they were supervisors. I, of course, do not know what evidence he had before him, but Cruz is on the June payroll as employee # 228, and on this record, I find both Cruz and Culebro to be eligible voters.

Students

Umberto Hernandez, also a working foreman, and Felipe Miramontes Gonzalez were both alleged to be ineligible as students. See Harlem Rivers Consumers Cooperative, Inc., 191 NLRB 314.

1. Hernandez entered Merced Junior College in February,

1974 under the G.I. Bill studying industrial technology, drafting, mathematics and chemistry, in a program which he hopes will lead to a degree in Applied or Associate in Science by June of 1976. When asked if he were serious about returning to Gallo as a field worker, his answer was, "Well, I am not serious about going back to work as a field hand, but Gallo is a growing company. It's constantly buying lands and there is always an opportunity there for land surveying and the shop has a draftsman there and I can always try to apply for a job there."

While his study is to be commended, I cannot find that he has maintained his interest in his struck job.

2. Felipe Miramontes Gonzales

Gonzalez is studying English at the Community Center and has studied welding and operation and maintenance of equipment. Since the strike at Gallo he has had some work as a tractor driver, but has also done field work. While he is clearly trying to improve his skills, they remain related to agriculture, and I find nothing in this record which would establish that he is not an eligible economic striker.

EMPLOYEES ON THE APRIL PAYROLL

As indicated previously, while the statute makes reference to "the payroll period immediately preceding the expiration of a collective-bargaining agreement", the April payroll in this case, I see little connection between that date and the facts and issues in this case. Since the Board might reach a different decision, my views concerning the 35 voters whose names appear on the April but not the June payroll will be presented in this section under the same categories used previously. Although there is some overlapping of the categories in the contentions with respect to some voters, the voters will be listed here only under one of the classifications.

Other Permanent Employment

1. Francisco Inacio

Inacio was laid off from Gallo in May of 1973 after only 6 months of employment, but expected to work in the harvest. He visited Portugal, was married, and returned July 10, 1973 when he joined his parents in the strike in progress. He soon obtained steady farm work, but insists he wants to return to his Gallo job. I find that he meets the essential tests and is eligible.

2. Jose Orosco

Orosco was a seasonal worker who was laid off in May of 1973, and on May 30, 1973 obtained a job with the Merced Cemetery District where he continues to be employed. He obtained permanent status after 6 months, has job protection, a higher salary, retirement, vacation and other fringe benefits. I find that Orosco is not an economic striker and is not an eligible voter.

3. Mark E. Whalen

Whalen started at Gallo in April of 1973, and was laid off May 10, 1973. His brother is in the construction industry. He had earlier made an effort to start his own business, and has since returned to work for his brother at construction industry wages. I do not find that Whalen is an economic striker, and therefore, he is not an eligible voter.

No Substantial Objection

The use of this category as the Hearing officer's classification, of course, represents his conclusion, and is not intended to disparage any objections made by any of the parties. With the exceptions noted, the following employees were laid off in May, 1973, were expecting to return in August for the harvest, but joined the picket line, supported the boycott, subsequently did other farm work, and demonstrated a

continuing interest in their struck job. Some had worked for Gallo for several years, while some were working for the Company for the first time. Barbara Guzman was not on the June payroll because of pregnancy, Paula de Avalos due to injury and Manuel Hernandez, Jr. because he was on paid vacation. I find that all qualify as eligible voters under the 36 month provision.

- | | |
|-------------------------|----------------------------|
| 1. Agustin Avalos, Jr. | 8. Rosario Del Toro |
| 2. Paula de Avalos | 9. Ramon Gonzalez |
| 3. Andres Cardona | 10. Barbara Antonia Guzman |
| 4. Gabriel Chavez- | 11. Manuel Hernandez, Jr. |
| 5. Rosalinda DeLeon | 12. Manuel D. Terra (Jr) |
| 6. Vicente De Leon, Jr. | 13. Rogelio Villanueva |
| 7. Guadalupe Del Toro | |

Abandoned the Strike

1. Rosa Vierra

Mrs. Vierra was a seasonal employee at Gallo for 3 years, and actively supported the strike and boycott. However, in January of 1974 she moved to Gustine, California with her husband and has not sought work since that time. Mr. Vierra was found not to be eligible in the preceding section, and I do not find that Mrs. Vierra has demonstrated a continuing interest in her struck job. She is not eligible.

Moved from Area

1. Magdalena Real

Mrs. Real was laid off in May 1973 and expected to

return in August for the harvest. After picketing and working in the boycott, she moved to Salinas to work for Interharvest from February, 1974 through October. In December she returned to the area, was married to a man who works for Joe Gallo, and strongly expressed a desire to have her job with Gallo back so that she could work near her husband's place of employment. The company contends that she abandoned her Gallo job by her move to Salinas for "permanent" work, and the Teamsters insist that she abandoned Gallo, returning only to get married rather than for a job. I find Mrs. Real to be an eligible economic striker.

Receiving Social Security

1. Luis M. Coelho

Coelho is 66, has applied for social security, but there has been some mix-up between his social security number and his son's. He believes that is now cleared up, and that he will be receiving a pension. He was a year-round employee who apparently was not also on the June payroll only because of an industrial injury. He picketed and spent some five months in San Francisco in boycott activity. He had recently been doing farm work. Only the future can tell about Coelho and social security. As of now, he testified that he would be working at Gallo if they had a Chavez contract, and I believe that he continues as an eligible economic striker.

2. Augustin Del Toro

Del Toro is 67 and does receive social security payments. Although he testified that he would work at Gallo under a UFW contract "even though I wouldn't get a dime for Social Security", he has neither worked nor looked for work since he started receiving social security payments. I must conclude that he has not maintained his status as an economic striker, and is not an eligible voter.

3. Manual Hernandez, Sr.

Hernandez, employee number 225, was a year-round employee who apparently was not on the June payroll because he was on vacation. He is now 74 and is receiving social security. He started receiving it in 1962, but stopped in 1965 to go to work for Gallo, and started again in 1974. He appeared quite vigorous and had been doing farm work a week before the hearing. He expressed a desire to return to Gallo. On the facts in this Record, I can only conclude that he has retained his status as an economic striker and as an eligible voter.

Disabled

1. Vicente DeLeon

As a result of a blow on his head around June of 1974 DeLeon has a plate in his head, and continues to have problems

of dizziness. At this hearing on October 28, 1975 DeLeon testified that he understood his doctor would clear him for work in about 2 months.

However, records in evidence as WCT-Exhibit 9 reflect that on November 7, 1975 he had fallen and received treatment for dizzy spells. He apparently has not worked since the injury, and I cannot say that this record establishes that he will again be able to work. I must find him not eligible.

2. Bernardina Del Gado

Mrs. Del Gado was laid off in May, expected to return to work in August for the harvest, but spent about 2 months on the picket line. Her husband was seriously ill, and has since died. She testified once that she would have returned to work under a Chavez contract, but then said she would not have been able to work because *she* had to care for her husband. This is argued to have removed her from the labor market, and thus to prevent her from being an economic striker. She is working now and desires to return to Gallo. In view of her picket line activity, and all of the testimony, I believe she continues to be eligible.

3. Juan Del Toro

Del Toro was laid off in May, expected to return in August but joined the strike. He also testified that he had a

back injury in an automobile accident in June of 1973, and did not work again until January of 1974. It is contended that he could not have worked in the harvest in August of 1973, and thus never made a choice of striking or working. Again, speculation about events that never occurred, can bring different conclusions, but I find Del Toro has demonstrated a continuing interest in his struck job and is eligible.

4. Felipe Haro

Felipe's father testified that Felipe became ill during a trip to Mexico as a result of "some drug that he took in a drink". Felipe testified that he is still going to a Mental Health clinic every fifteen days for treatment, and is taking vocational training in a State-sponsored program designed to equip him for lighter work than field work. He has not worked for two years as a result of the illness, and this record does not show him to be still in the status of an economic striker with a continuing interest in a job to which he could return. I find that he is not an eligible voter.

5. Ramundo Martinez

It is argued that Martinez could not have returned to work in August of 1973 "even if the strike had not occurred" because an ulcer had become worse and he was receiving medical treatment at that time. Martinez stated that his ulcer has

bothered him from time to time over the years, that he gets treatment and returns to work. He has been doing field work for contractors, and clearly is an eligible voter.

Discharged or Quit

1. Maria Amaral

Mrs. Amaral, the wife of Jose Amaral, was with him and worked in Rhode Island, and the same reasoning would apply to her. Other issues were raised, however, which require consideration. She testified on the first day of the hearing, and an inexperienced Portuguese translator helped create some confusing testimony. Mrs. Amaral was tying vines on April 19, 1973, but did not appear for work on April 20. Company policy was that an unexcused absence of 3 days or more was a quit, and company records show that she quit as of April 19, 1973. She says that she stopped because the work was too hard, and would have returned for the harvest except for the strike. She did not picket or engage in boycott activity, but expressed her support of the UFW in her testimony. I think this testimony is ambiguous, but am unable to find that she is a striker on these facts.

2. Ricardo Barros

Barros worked at Gallo for 5 years, the last 3 on a year-round basis. He was granted a leave on June 19, 1973 to

extend to July 25 to return to Portugal. As a result of illness he did not return until August. He had a Portuguese doctor's certificate which apparently would have excused his absence, but did not present it to the Company because he joined the strike in progress. The Company lists him as quit because of failure to contact the Company within the required time. I find him to be an eligible voter. His steady work on a dairy does not constitute abandonment of interest in his struck job in light of his testimony.

3. Roberto De la Cruz

In one of the most contested cases De la Cruz is reported by the Company to have been discharged on April 15, 1973 for 9 days of unexcused absences. He had been working for Gallo for only approximately 3 months, but, as bi-lingual and educated, he had become a union steward, and had been involved in a number of grievances. On April 16, 1973 De la Cruz was reported to the Company as being ill. After an absence of 9 days, he reported for work with a letter from an administrator at a UFW clinic which the Company refused to accept as an adequate medical excuse. De la Cruz testified that he had the flu; and while not working, decided to drive to Coachella where he heard of a strike in progress. On April 17 and 18 he was arrested for trespassing while engaged in union activity. He

then returned to Livingston, spent 3 days in bed and reported to work. After the company made some effort to check the medical report, De la Cruz was discharged, and the Company still insists that they never received an adequate medical certificate signed by a doctor which would have made the absences excused. Gallo exhibit 47 is the administrator's statement that De la Cruz was unable to work as of April 16, 1973. UFW exhibit 19, received after the hearing closed with permission granted by the hearing officer to all parties, is a medical report in some detail on De la Cruz' physical condition and a letter addressed to George Dias, manager of the Snelling ranch of the company and signed by Dr. John Radebaugh. This letter, if received, would appear to have met all the Company's requirements for a medical excuse. As indicated, at the hearing the Company denied ever having received such a letter, but nothing has been heard since receipt of this exhibit. Under all circumstances, while I make no findings about who received what letter in 1973, I do believe that in border-line cases doubts should be resolved in favor of the beneficiaries of special provisions, and I would find that De la Cruz is eligible as an economic voter.

4. Estelvino Inacio

Mrs. Inacio knew that an absence of 3 days or more required notice to the company or an approved excuse. She quit

work on May 16, 1973 for reasons of illness and never returned to the Company, probably because of the strike. There was some problem in understanding questions and answers as translated, but I find that Mrs. Inacio quit, and has no status as an economic striker.

5. Cecilia Mendoza

Mrs. Mendoza was discharged on June 14, 1973 for failure to perform duties properly. No grievance was filed over the discharge; and while the UFW insists that no grievance was possible because the contract had expired, I find no basis for reviewing this discharge. Mrs. Mendoza is not an eligible voter.

6. Eusebio Moreno (YBanez)

Moreno was a year round employee who reports that he had asked someone to report him sick, but that the individual failed to do so. When Moreno reported for work, the Company refused to let him continue as a tractor driver, but offered other work. Moreno wanted to return only as a tractor driver and quit on or about May 20, 1973. Although he participated in strike and boycott activity, I cannot find that Moreno was an economic striker.

7. Angelo Picanco

Picanco first worked for Gallo in 1973. He received permission in June of that year to take a month's leave to go to Portugal, but returned only after an absence of 3 months. At that time in September of 1973, he crossed the picket line to request his job, which was refused. After that, he joined the strike, but I do not find that he is an economic striker.

8. Walter Regnier

Regnier started for Gallo in March of 1973 and quit in May of the same year. He stated that he didn't want to work under a "teamster contract and by insight anticipated what was to happen almost two months later. I do not find that he is an economic striker.

9. Pedro Torres

Torres testified that he quit because of pressure from supervisors. In any event, he has no claim as an economic striker.

GALLO EMPLOYEES NOT ON THE APRIL OR JUNE PAYROLL

As I have indicated previously, I do not believe that the statute expresses legislative intent to grant eligibility to employees who were on paid vacation for a payroll period and preclude eligibility, for employees who were off at the same time for illness, approved leave or a host of other valid reasons. Such an interpretation would raise serious questions about equal protection of the laws under the constitution. Adoption of such an interpretation would mean that none of these employees are eligible. All have worked for Gallo previously and expected to return, but joined the strike. All had been paid by the employer for services performed within the 36 month period. As a group they remained employees in the conventional sense, but some individual analysis is required.

1. Maria Alfaro
2. Vicente Alfaro

Mr. and Mrs. Alfaro present a number of the issues raised about these seasonal employees. They spend part of the time in Mexico, part of the year in other parts of the United States and have been coming to this area for the harvest for several years. They worked for Gallo at harvest time in 1970, 1971 and 1972 and appeared for work in 1973, but joined the strike, walked on the picket line and actively supported the boycott. Both continue do farm work and wish to return to

Gallo. Company records reflect that both failed to return when recalled 1/13/73. The meaning of that entry in the face of testimony that they were in the area only at harvest time was not explored on this record. Agnes Rose who had done the dispatching in the UFW hiring hall stated that people who had picked the year before were always given preference at harvest time over anyone but seniority employees. I cannot see that failure to return in the case of these seasonal employees can operate to destroy their status as economic strikers.

Evidence was introduced on December 3, 1975, the last day of the hearing, that the Alfaros had reapplied for work at Gallo on August 25, 1975. This information had just recently come to the attention of the company representatives involved here, and the Alfaros were not questioned about it when they testified on October 7, 1975. At one time when Vicente Alfaro was questioned about voting in the election, he mentioned "signing up" and in response to another question, said, "I went and signed up because I know that the contract has ended with the Teamsters." The meaning of that may have been missed at the time. As indicated in some of the previous analysis, an economic striker can lose his status by seeking to return to his struck job before the strike is over. However, in view of the time that has elapsed, I do not believe that such unexplored

evidence can serve to overcome the presumption of eligibility. I would find Maria and Vicente Alfaro to be eligible. In Pacific Tile, supra, the NLRB found "that placing themselves on a hiring list for future openings" did not, in itself, constitute abandonment.

3. Camilo Avalos

Camilo Avalos worked for Gallo during harvest in 1970 when company records show that he quit, in 1971 with the records showing that he was laid off 11/7/71, failed to return when recalled 11/9/71, but was rehired for the harvest 8/21/72 but failed to return 10/25/72. He testified without contradiction that he received a letter from the company in Mexico in 1973, asking him to return for the harvest. When he returned to find the strike, he joined the picket line and subsequently travelled about the State in support of the boycott. That picture of employment tends to strengthen the conclusion that these seasonal employees had a basis for expecting to work in the harvest, and I find Avalos to be an eligible economic striker.

4. Basilio Chavez

Chavez was not on either payroll, but unlike most of the employees considered in this section, Chavez was not a seasonal employee, and his record illustrates the lack of logic

in restricting eligibility to the two payroll periods and paid vacations. Chavez had worked for Gallo for about five years and lived on Gallo property. He had been ill, and was not working during the two payroll periods, although he continued to live in Gallo housing, and was President of the Ranch Committee. I would certainly find Chavez to be eligible except that he was discharged on June 22, 1973 for bringing a pistol on company property. The evidence strongly suggests that it was a plastic toy, but this discharge cannot be said to be part and parcel of the strike and no grievance was filed since the contract had expired. While I have serious doubts that the discharge was for just cause, I see no basis for overruling the decision of the company under the circumstances. I must find Chavez not eligible.

5. Lucinda Coelho

Mrs. Coelho worked for Gallo from 1969 to December 29, 1972 when she "quit" because she had the flu. While a voluntary quit may prevent a claim as an economic striker, these terms are not works of art, especially after filtered through an interpreter. She was ready to work in 1973, but joined the strike, picketed and spent five months in San Francisco on the boycott. I would find her to be an eligible economic striker.

6. Serrafin Correia

Correia also was not a seasonal employee. He had worked at Gallo since 1966, and was granted leave in November of 1972 for a month for a visit to Portugal. He was ill in Portugal and did not return until around March 15, 1973, when he presented a doctor's certificate to the company. According to his testimony, he was told that in spite of the certificate, he had failed to notify the company in advance, and would not be rehired until harvest time. A grievance was filed, but not pursued after denied at step 2. Under all the circumstances, including the timing of these events with respect to the expiration of the contract and the strike and the apparent offer of a chance to return to work in the harvest and his picketing and boycott activity, I find that Correia is an eligible economic striker.

7. Andronico Duran 8. Bertha Duran

9. Concepcion (Flores) Duran

Andronico and Bertha started for Gallo on 10/9/72 and Concepcion on 10/5/72 and all three were laid off on 10/26/72. While short term employees, they were entitled to preference in the next harvest season, and insist they wish to return. Andronico and Bertha picketed and all three supported the boycott. I think all three are eligible voters.

10. Maria Fernandez

Mrs. Fernandez started for Gallo in 1971, was not a full-time employee and last worked from May 2, 1973 to May 22, 1973 when she was laid off. Thus, she was on neither payroll, but joined the strike, picket line and boycott. The payroll issue is the only serious matter involved, and I find her eligible.

11. Rosalio Gonzalez

Rosalio Gonzalez was hired in December of 1972, was laid off 3/28/73, was on a leave of absence from 3/31/73 to 5/30/73, and was laid off June 5, 1973. He both picketed and participated in the boycott activity, and although he has had fairly steady farm work, he testified that he would rather return to Gallo under a Chavez contract because it was closer to where he lived. I find that he is an eligible voter.

12. Jose Macias (Mejia)

Macias worked at Gallo in 1972, and as in some cases mentioned above, is listed by the Company as failing to respond to a recall notice. He also joined the strike in 1973, continues to do farm work, and as in the other cases, could be expected to have returned in 1973 absent the strike. I find him eligible.

13. Daniel Magdaleno (Verdusco)
14. Jesus Magdaleno
15. Jose Magdaleno
16. Ramona Magdaleno

This family of four has a home in Santa Paula, California, but the summary of company records prepared by the Company and in evidence as UFW Exhibit - 3 shows they have been working during harvest time at Gallo since 1967, with minor differences in the dates for each individual. All four are listed as having failed to return when recalled in 1973. Jose Magdaleno illustrates some of the previous analysis of these seasonal employees in that he is shown to have failed to return when recalled 11/9/71, but was still hired for the harvest 8/16/72. Both Jose and Daniel are shown as quits in previous years, but were rehired for the harvest in the following years. All four joined the strike, picket lines and boycott in 1973, have continued to return to this area to do farm work and expressed their continuing interest in Gallo. I believe all four clearly to be eligible as seasonal employees who are economic strikers.

As in the case of the Alfaros, there was testimony on the last day of the hearing that the Magdalenos had reapplied for work at Gallo on September 29, 1975, and Gallo Exhibit 90,

received after the hearing and admitted, is a copy of the sign-up sheets. They testified in this proceeding on October 10 and 11, and were not questioned about this matter. Again, in view of the entire record including the amount of time in a seasonal industry, I am unable to evaluate this evidence, and do not conclude that it operates to overcome the presumption of eligibility of an economic striker.

17. Esperanza Nunez

Mrs. Nunez started at Gallo in 1970, and in 1973 worked from March 5 to March 28 and from May 2 to May 22 when she was laid off. She picketed only for a few days. She has since worked in packing houses, but stated a preference for field work at Gallo. The record in this case is sketchy, but I find no objective evidence which would destroy her claim to be an economic striker.

18. Juana de Rivas

Mrs. Rivas started at Gallo in 1971 and worked some in March and again in May of 1973. She joined the strike and was very active in the post-picketing boycott. She went to El Paso with her husband and returned to California with him. She stated that her activities had been restricted to being a housewife until harvest time in 1975 in picking grapes. In a

1976 application of the law to a 1973 striker, I would find that she has retained her eligibility.

19. Manuela Sanchez

Mrs. Sanchez worked at Gallo in 1972 and 1973, being laid off 5/22/73. She participated in the picketing and boycott, and expressed a desire to return to her struck job. Little objection is raised except that she was not on either payroll mentioned in the statute. I find her eligible.

20. Maria Sandoval

Mrs. Sandoval worked at Gallo in 1972 and until 3/31/73 when she obtained leave from the company because she was expecting a child. The child was born September 12, 1973, and while the pregnancy apparently prevented her participation in the picketing, she did join in the boycott. An argument is made that she had quit because she did not respond to recall in June of 1973; but in the circumstances, that would seem to be irrelevant. I find that she is an eligible voter.

EMPLOYEES WHO DID NOT TESTIFY

Thirteen employees whose names were on the list of challenged economic strikers did not testify in this proceeding in person or by deposition, and no stipulations were entered into about the status of such employees. One, Catalina Serrano (Garcia) appeared to testify, but was not permitted to do so, after all parties agreed that no challenged ballot bore her name.

Some evidence was introduced under formal protest by the Company because of the hearing officer's ruling that the investigatory hearing was designed to obtain all information available. These 12 employees had ballots challenged on the ground that they were economic strikers. Such evidence as was presented shows that some of them were on one or both payrolls (Avelino E. Da Silva, Tomas Faria, Melvin Nightengale, Eva Quesada and Abdon Salazar). It was agreed that Luis Coelho, Jr. had not performed any services within the 36 month period and thus was not eligible. Tomas Faria was clearly shown to have worked for Gallo in 1974 after the strike, and the UFW admits that he is not eligible. What evidence was admitted would also tend to show that Socorro A. Duran, Jose Duran (Garcia), and Francisco Vega Garcia, and Ricardo Gonzalez also worked after the strike. The Company reported that a search of Company records revealed no evidence that Pedro Vega Garcia had ever

worked for the company. Enrique Quesada, who apparently was not on the payrolls because of illness, is operating a bar with his wife, which the Company argues is abandonment. Avelino E. Da Silva and Nightengale were reported as working in permanent jobs within 15 miles of the hearing site, and did not appear to testify.

After consideration of the available evidence, it is the conclusion of this hearing officer that there is insufficient basis for any judgment as to the eligibility of such former employees. Therefore, no recommendation is made with respect to employees who did not testify.

CONCLUDING RECOMMENDATIONS

Pursuant to the preceding analysis, it is my recommendation that the employees listed in Appendix A be found to be eligible voters and that the employees in Appendix B be found to be ineligible for the reasons heretofore indicated. Signed this day of February, 1976.

Respectfully submitted,

Gerald A. Brown, Hearing Officer

APPENDIX A

EMPLOYEES RECOMMENDED TO BE FOUND ELIGIBLE VOTERS

From the June Payroll

- | | |
|-------------------------------------|---------------------------------|
| 1. Robert F. Abbott | 28. Manuel Inacio |
| 2. Guadalupe Abrego | 29. Joao Lindo, Jr. |
| 3. Jose Amaral | 30. Joao Lopes |
| 4. Jose Amaya | 31. Manuel Lopez (Cabrera) |
| 5. Augustin Avalos, Sr. | 32. Trinidad Madrigal (Garibay) |
| 6. Cruz (Cardona) Briones | 33. Raul Maldonado (Pech) |
| 7. Antonio Caetano | 34. Salvador (Chavez) Mejia |
| 8. Jaime Caetano | 35. Antonio Meza |
| 9. Julio R. Caetano | 36. Marcelino Montoya |
| 10. Florentine Haro Campos | 37. Francisco Nava |
| 11. Alfredo Castillo | 38. Jose Pacheco |
| 12. Leonardo Cavazos | 39. Pedro Pacheco |
| 13. Gustavo Flores Cruz | 40. Lozaro Perera |
| 14. Ana Maria Culebro | 41. Manuel Perez |
| 15. Jose Culebro | 42. Frank Perry |
| 16. Manuel Cunha | 43. Roberta Rios |
| 17. Carmen DeLeon | 44. Guadalupe Rivas |
| 18. Regino De Lean | 45. Florentine Sandoval |
| 19. Jose De Souza | 46. Antonio Silva |
| 20. Moise De Souza | 47. Joao Souza |
| 21. Amaro Fernandez | 48. Manuel Souza |
| 22. Felipe Miramontes Gonzalez | 49. Manuel F. Terra, Sr. |
| 23. Rodolfo Gonzales | 50. Refugio Trujillo |
| 24. Candelario Guerrero (Velasquez) | 51. Mario Vargas |
| 25. Jose Gutierrez | 52. Norberto Vargas |
| 26. Cesario Hernandez | 53. Hipolito Ybarra |
| 27. Jose M. Inacio | 54. Jesus Zuniga |
| | 55. Rosa Zuniga |

From the April Payroll

- | | |
|-------------------------|----------------------------|
| 1. Augustin Avalos, Jr. | 12. Guadalupe Del Toro |
| 2. Paula de Avalos | 13. Juan Del Toro |
| 3. Ricardo Barros | 14. Rosario Del Toro |
| 4. Andres Cardona | 15. Ramon Gonzalez |
| 5. Gabriel Chavez | 16. Barbara Antonia Guzman |
| 6. Luis M. Coelho | 17. Manuel Hernandez, Jr. |
| 7. Roberto de la Cruz | 18. Manuel Hernandez, Sr. |
| 8. Rosalinda DeLeon | 19. Francisco A. Inacio |
| 9. Vicente DeLeon, Jr. | 20. Ramundo Martinez |
| 10. Bernardina Del Gado | 21. Manuel D. Terra |
| 11. Magdalena Del Real | 22. Rogelio Villanueva |

APPENDIX A CONTINUED

On Neither Payroll

- | | |
|-----------------------------|---------------------------------|
| 1. Maria C. Alfaro | 11. Rosalio Gonzalez |
| 2. Vicente Alfaro | 12. Jose Macias (Mejia) |
| 3. Camilo Avalos | 13. Daniel Magdaleno (Verdusco) |
| 4. Lucinda Coelho | 14. Jesus Magdaleno |
| 5. Serafin Correia | 15. Jose Magdaleno |
| 6. Juana de Rivas | 16. Ramona Magdaleno |
| 7. Andronico Duran (Garcia) | 17. Esperanza Nunez |
| 8. Bertha Duran | 18. Manuela Sanchez |
| 9. Concepcion Duran | 19. Maria Sandoval |
| 10. Maria Fernandez | |

APPENDIX B

EMPLOYEES RECOMMENDED TO BE FOUND INELIGIBLE

From the June Payroll

- | | |
|-----------------------|----------------------------|
| 1. Jose Maria Arroyo | 9. Umberto Hernandez |
| 2. Luis Avila | 10. Joao S. Lindo, Sr. |
| 3. Refugio Avila | 11. Julio Parra |
| 4. Pedro Bautista | 12. Francisco Rosa |
| 5. Rebecca Bautista | 13. Feliciano Urrutia, Sr. |
| 6. Manuel Cabral | 14. Feliciano Urrutia, Jr. |
| 7. Tomas DeLeon | 15. Jose Valencia (Lopez) |
| 8. Salvador Hernandez | 16. Hermino G. Vierra |

From the April Payroll

- | | |
|------------------------|--------------------|
| 1. Maria Amaral | 8. Jose Orosco |
| 2. Vicente DeLeon, Sr. | 9. Angelo Picanco |
| 3. Augustin Del Toro | 10. Walter Regnier |
| 4. Felipe Haro | 11. Pedro Torres |
| 5. Estelvino Inacio | 12. Rosa Vierra |
| 6. Cecilia Mendoza | 13. Mark E. Whalen |
| 7. Eusebio Moreno | |

On neither Payroll

1. Basilio Chavez

APPENDIX C

EMPLOYEES WHO DID NOT TESTIFY AND ABOUT WHOM
NO RECOMMENDATIONS ARE MADE

- | | |
|--------------------------|-------------------------------|
| 1. Luis Coelho, Jr. | 8. Ricardo Gonzalez |
| 2. Avelino E. Da Silva | 9. Melvin Nightingale |
| 3. Jose Duran (Garcia) | 10. Enrique Quesada |
| 4. Socorro A. Duran | 11. Eva Quesada |
| 5. Tomas Faria | 12. Abdon Salazar |
| 6. Francisco Vega Garcia | 13. Catalina Serrano (Garcia) |
| 7. Pedro Vega Garcia | |