

STATE OF CALIFORNIA
AGRICULTURAL LABOR RELATIONS BOARD

E. & J. GALLO WINERY,)	
)	
Employer,)	Case No. 75-RC-6-F
)	
and)	
)	
WESTERN CONFERENCE OF)	6 ALRB No. 60
TEAMSTERS,)	
)	
Petitioner,)	
)	
and)	
)	
UNITED FARM WORKERS OF)	
AMERICA, AFL-CIO,)	
)	
Intervenor.)	
)	

DECISION ON CHALLENGED BALLOTS

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

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. On September 19, 1979, the Board issued its Decision on Challenged Ballots.^{1/} The Amended Tally of Ballots showed the following results:

WCT	230
UFW	228
No Union	0
Challenges Sustained	77
Unresolved Challenged Ballots	<u>12</u>
Total	547 ^{2/}
Void Ballots	5

Thereafter, the Regional Director conducted an investigation as to the unresolved challenges. On July 30, 1980, the Regional Director issued his Supplemental Report on Challenged Ballots, in which he recommended overruling the challenges to the ballots of Luis Avila, Refugio Avila, Luis M. Coelho, Manuel DeCamaro, Scott DeSalvo, Maria Hernandez, Salvador Salado, Kalwant Sandhu, Jesse Sandoval, Antonio Savala, and Jose J. DeSouza. On August 8, 1980, the Regional Director issued an Addendum to the Supplemental Report on Challenged Ballots in which he recommended that the twelfth ballot, a consideration of which had inadvertently

^{1/} E. & J. Gallo Winery (Sept. 19, 1979) 5 ALRB No. 57.

^{2/} Regional Director's Report does not account for two ballots. Attempts to locate these ballots have not proved fruitful.

been omitted from the Supplemental Report, be declared void, as it was impossible to identify the voter who cast it and therefore impossible to investigate the basis for challenge.

As no exceptions were filed with respect to the recommended disposition of the challenges to the ballots of Luis Avila, Refugio Avila, Jose J. DeSouza, Luis M. Coelho, and the unidentified ballot, we adopt the Regional Director's recommendations. Accordingly, the challenges to the ballots of these individuals are hereby overruled, and the unidentified ballot is hereby declared void.

The UFW excepted to the Regional Director's recommendation that the challenges to the ballots of Manuel DeCamaro, Scott DeSalvo, Maria Hernandez, Salvador Salado, Kalwant Sandhu, Jesse Sandoval, and Antonio Savala be overruled, and filed a brief in support of its exceptions. Gallo filed a brief in opposition to the UFW's exceptions.^{3/}

The Board has considered the report of the Regional Director, and the exceptions and briefs filed by the parties, and has decided to adopt the recommendations of the Regional Director.

Scott DeSalvo

DeSalvo was challenged as being part of the security force at Gallo. The Regional Director found that DeSalvo was employed as an assistant to Gallo's horticulturalist and never held a guard

^{3/}Respondent has filed a brief requesting that the UFW's exceptions be disregarded because they were not timely filed. The UFW has filed a motion to strike Respondent's brief in opposition to its exceptions because it was not timely filed. As neither party has shown that it was prejudiced by the other's late filing, we hereby deny both requests.

position with Gallo or with any other employer. Accordingly, the Regional Director recommended that the challenge be overruled and that DeSalvo's ballot be counted.

The UFW claims that our decision in Jack T. Baillie Co. (July 17, 1978) 4 ALRB No. 47 permits it to now challenge DeSalvo on the grounds that he was a confidential employee. In that case, the Regional Director determined that a challenge should be sustained because the individual was a supervisor although she had originally been challenged because her name was not on the eligibility list. The employer contended that the Board could not adopt the Regional Director's recommendation that the challenge be sustained on one basis when the worker had been challenged on another. The Board held that an investigation may establish a valid basis for sustaining a challenge, different from the reason originally given, and that if a voter is found to be ineligible for any reason, the challenge to his ballot must be sustained.

The UFW in effect contends that since a Regional Director may sustain a challenge, despite the fact that the investigation does not support the original basis for the challenge, if other and valid grounds are discovered during the investigation, then a party may assert a different basis for a challenge after the Regional Director has completed his investigation and has determined that the original basis was not supportable.

This argument lacks merit. The policy considerations for permitting a Regional Director to sustain a challenge on any grounds he discovers during an investigation do not apply when a party seeks to argue a different basis for challenging a voter after the

Director's report on challenged ballots has issued. A Regional Director's investigation of challenged ballots is analogous to the General Counsel's investigation of a charge. The General Counsel is given broad power to investigate fully once a charge is filed and is not confined to the specific matters alleged in the charge. The General Counsel must undertake a full inquiry in order to properly discharge its duty of protecting the rights of agricultural employees. See NLRB v. Fant Milling Co. (1959) 360 U.S. 301, 307-308 [44 LRRM 2236].

Similarly, once a voter's ballot is challenged, the Director must undertake a full investigation to determine whether the voter was ineligible for the asserted reason or any other reason. It would be absurd and contrary to the policy of the Act to count the ballot of an ineligible voter when the Director has discovered a basis for ineligibility different from the grounds on which the voter was originally challenged. However, to permit the UFW to argue that DeSalvo is a confidential employee after the Director determined that he was not a security guard would constitute an impermissible post-election challenge and would allow the UFW a second attempt at challenging DeSalvo. It would also encourage further delays in an already lengthy process.

In addition, although the UFW argues that DeSalvo was privy to confidential information about "insect infestation, etc.," this alone would not establish that he was a confidential employee. To be a confidential employee excluded from the bargaining unit, an individual must "assist and act in a confidential capacity to any person who formulates, determines and effectuates management

policies with respect to labor relations." Miranda Mushroom (May 1, 1980) 6 ALRB No. 22, citing Hemet Wholesale (Feb. 2, 1976) 2 ALRB No. 24. The UFW has not presented any evidence to show that DeSalvo was so involved.

Finally, although the UFW claims that DeSalvo was a manager or supervisor, it has presented no evidence to support its claim. We therefore adopt the recommendation of the Regional Director and hereby overrule the challenge to Mr. DeSalvo's ballot.

Maria Hernandez

Hernandez was challenged because her name was not on the eligibility list. As Hernandez is deceased, the Regional Director obtained the following information from her daughter: Hernandez started working for Gallo in May 1975. She obtained a written leave of absence to go to Mexico. She worked for two days in September 1975, and she worked for two days in December 1975. The Director concluded that Hernandez was eligible to vote since she would have been working during the eligibility period but for her leave of absence.

The UFW excepts to the Director's recommendation, arguing that the information provided by Hernandez' daughter is uncorroborated hearsay which cannot form the basis of a factual finding under section 20370 (c) of the Regulations.

This argument is not valid. Section 20370 (c) states that hearsay evidence is not sufficient in itself to support a finding unless it would otherwise be admissible in civil actions. However, section 20370 applies only to investigative hearings. Since the Regional Director's report is based on an investigation and not a

hearing, that rule does not apply here. Furthermore, the information obtained from Hernandez* daughter was corroborated by company records as well as by a declaration from Gallo's Director of Industrial Relations.

The UPW questions the Regional Director's finding that Hernandez was on leave, arguing that Gallo's contract with the Teamsters prohibited Gallo from granting Hernandez a leave of absence for longer than 30 days. In addition, the UFW argues that even if such leave was granted for 60 days, Hernandez overstayed her leave.

This argument is resolved by Gallo's brief: Gallo submitted as exhibits a copy of the leave of absence granted to Hernandez and a declaration from its Vice-President stating that Gallo extended Hernandez¹ leave through September 8, 1975.

The UFW has failed to present any evidence to show that Hernandez lost seniority or other employee benefits because of her absence. Moreover, it has not established that the employment relationship was severed. Hernandez' reasonable expectation of continued employment is evidenced by the fact that she resumed work immediately after returning from her leave of absence. We find that Hernandez¹ fortuitous leave of absence was tantamount to a vacation and that she would have performed work for Gallo during the eligibility period but for her leave. Rod McLellan Co . (Apr. 21, 1978) 4 ALRB No. 22. Accordingly, we adopt the recommendation of the Regional Director and hereby overrule the challenge to Mrs. Hernandez' ballot.

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Manual DeCamaro

Mr. DeCamaro was challenged because his name was not on the eligibility list. DeCamaro, a 70-year-old man, began working for Gallo in the late 1960's as a general laborer. As he was receiving Social Security benefits which would be reduced if he earned more than \$2,500 per year, DeCamaro worked on a "continuous but casual" basis with Gallo (Regional Director's report at p. 11).

The Regional Director concluded that Mr. DeCamaro was on sick leave during the relevant payroll period, and was thus eligible to vote. Rod McLellan Co. (Apr. 21, 1978) 4 ALRB No. 22.

The UFW argues that the Director's report has not established that DeCamaro was on sick leave. The UFW¹'s position is that DeCamaro quit his job in August 1975 because of his advanced age and had no reasonable expectation of being able to perform work at Gallo because of his age and health problems. In addition, the UFW argues that the Director's report does not indicate a sufficient basis for the Board to overrule the challenge.

Unlike the situation in Coachella Imperial Distributors Mar. 16, 1979) 5 ALRB No. 18, cited by the UFW, the UFW has not here raised any material factual issues. In that case, the factual issues raised were whether the voter was a retired pensioner or a regular, part-time employee. In the instant case, the Director's report concludes that DeCamaro worked on a "continuous but casual" basis.

After a period of several months in late 1974 and early 1975 when health problems prevented him from working, DeCamaro returned to work in June or July 1975 in response to a company offer

of employment. Rather than permit him to quit because of health problems in August 1975, Gallo offered DeCamaro a maintenance position. After realizing that the maintenance work, like the harvest work, was too strenuous during the summer months, DeCamaro was given permission to return in February 1976. DeCamaro did return to work in February 1976, and worked sporadically until he retired completely in October 1976.

DeCamaro's work history establishes that he was permitted to take time off when his health was poor but could return to work when his health improved. Although marked by interruptions, DeCamaro's employment was continuous. He had worked for Gallo since the late 1960's.

The UFW claims that the fact that DeCamaro regularly withdrew himself from employment in order not to jeopardize his social security benefits argues against a finding that he was on sick leave during the eligibility period. However, a regular employee who works at least on a part-time basis would be eligible to vote if he was on leave during the eligibility period and had a reasonable expectation of continued employment. See Coachella Imperial Distributors, supra; Rod McLellan Co., supra. This rule should not be modified when the employee limits his working time and earnings solely so as not to decrease his social security annuity. See Quigley Industries, Inc. (1969) 180 NLRB 486 [72 LRRM 1633] .

The Regional Director found that DeCamaro was on sick leave during the eligibility period and had a reasonable expectation of returning to work. We agree with the Regional Director's

determination but limit our finding to the facts of the instant case. As the UFW has not raised any material factual issues as to this conclusion, we adopt the recommendation of the Regional Director and hereby overrule the challenge to Mr. DeCamaro's ballot.

Four working foremen (Salvador Salado, Kalwant Sandhu, Jesse Sandoval, and Antonio Savala), were challenged as being supervisors. The Regional Director concluded that these men did not exercise independent judgment in the discharge of their duties but, rather, were "conduits for information between the supervisors and the rest of the workers." Regional Director's Report p. 8. The Director recommended that the challenges be overruled and the ballots counted, on the basis of his findings that: (a) these individuals do not have authority to hire, fire, transfer, suspend, layoff, recall, promote, reward, or discipline, or to effectively recommend such action? (b) these workers refer disputes and requests for leaves of absence to supervisors for resolution; (c) they do not attend supervisory meetings; (d) they get strict instructions from their supervisors; (e) of the 12 working foremen employed in 1975, 6 voted in the election without challenge and 2 voted as economic strikers. The UFW excepts to the Director's recommendation and argues that the four individuals are supervisors who are ineligible to vote.

In E. & J. Gallo Winery (Sept. 19, 1979) 5 ALRB No. 57 the Board rejected the Regional Director's recommendation that the challenges to the ballots of Salado, Sandhu, Sandoval and Savala be sustained on the ground that they were supervisors. The Board found the declarations provided to the Director "were in

unresolvable conflict on the key issue of the job responsibilities of these individuals." Accordingly, the Director was ordered to conduct an investigation on these challenges.

The UPW states that foremen at Gallo enjoy additional benefits different from the benefits enjoyed by members of the bargaining unit (e.g. they had the use of company pickup trucks). Aside from the higher wages earned by working foremen, however, the UFW has presented no evidence that these particular individuals were granted additional privileges. As the UFW itself argued during the earlier hearing on challenged ballots, supervisory status does not depend on job title. Gallo, supra, 5 ALRB No. 57, ALOD p. 38. Thus, we must look to the responsibilities of these individuals, rather than to their job titles to determine whether they performed supervisory functions.

Gallo and the UFW have submitted conflicting declarations in support of their positions as to the status of Salado, Sandhu, Sandoval, and Savala. As pointed out in Gallo's brief in opposition to the UFW's exceptions, the declarations submitted by the UFW are based on "belief, conclusory allegations, and speculations." (at p. 9) Pages 9 through 11 of Gallo's brief point to specific deficiencies in the declarations submitted by the UFW. Basically, the UFW's declarations consist of conclusory statements of what the declarant "believes" or "understands". ("I believe ..."; "It seems to me ..."; "I understand ...".)

Gallo submitted declarations from three of the four challenged individuals, Salado, Sandhu, and Savala. These declarations specifically set out the duties performed by the

declarant. In addition, each states that the information therein was relayed to Ed Perez, the Regional Director who conducted the investigation.

The UFW currently points out that working foremen earned higher wages than bargaining-unit employees. However, this fact alone does not establish that the working foremen were supervisors. See Anton Caratan and Sons (Dec. 21, 1978) 4 ALRB No. 103.

One of the duties of the working foremen was to direct the tractor drivers of the gondolas to the next open row that had not been picked, This is also insufficient to establish that the working foremen are supervisors. This Board has held that the fact that a crew leader assigned rows to employees, absent evidence that this function called for the exercise of independent judgment, was not determinative of supervisory status. A. Caratan, supra, 4 ALRB No. 103 at p. 3. The UFW has not presented any evidence indicating that the working foremen exercised independent judgment in this regard.

Finally, it should be noted that working foremen were required to join the UFW and the Teamsters Union as unit employees when these unions had collective bargaining agreements with Gallo.
(Declaration of Kalwant Sandhu, p. 1)

Considered as a whole, the UFW's arguments and supporting declarations do not negate the findings or conclusions of the Regional Director or raise substantial or material factual issues. Accordingly, we adopt the recommendation of the Regional Director and hereby overrule the challenges to the ballots of Salvador Salado, Kalwant Sandhu, Jesse Sandoval, and Antonio Savala.

The Regional Director is hereby ordered to open and count the ballots of Luis Avila, Refugio Avila, Luis M. Coelho, Manuel DeCamaro, Scott DeSalvo, Jose J. DeSouza, Maria Hernandez, Salvador Salado, Kalwant Sandhu, Jesse Sandoval, and Antonio Savala, as to which the challenges are hereby overruled, and to issue a revised tally of ballots to the parties.

Dated: November 28, 1980

RONALD L, RUIZ, Member

HERBERT A. PERRY, Member

JOHN P. McCARTHY, Member

CASE SUMMARY

E. & J. GALLO WINERY (UFW)

6 ALRB No. 60
Case No. 75-RC-6-F

BOARD DECISION

Following issuance of an Amended Tally of Ballots as to a representation election held on September 10, 1975, the Board resolved the issues with respect to the 12 remaining challenged ballots, adopting the Regional Director's recommendation to overrule the challenges to 11 of the ballots and to void 1 ballot because it was impossible to identify the voter who cast it.

No exceptions were filed to the Regional Director's recommended disposition of five challenges. With respect to the remaining seven challenges, the Board concluded that: Scott DeSalvo was not a security guard as alleged by the UFW and was therefore eligible to vote; Maria Hernandez was on a valid leave of absence during the eligibility period and was eligible to vote; Manuel DeCamaro was on sick leave during the eligibility period and was eligible to vote; Salvador Salado, Kalwant Sandhu, Jesse Sandoval, and Antonio Savala were not supervisors as alleged by the UFW and were eligible to vote.

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

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