

In the Matter of BERGUT-RICHARDS PACKING COMPANY, ET AL. *and*
CANNERY AND FOOD PROCESS WORKERS COUNCIL OF THE PACIFIC
COAST AND ITS AFFILIATED UNIONS: FOOD, TOBACCO, AGRICULTURAL
AND ALLIED WORKERS UNION OF AMERICA, C. I. O.

Case No. 20-R-1414, et al.

SUPPLEMENTAL DECISION

AND

ORDER

February 15, 1946

STATEMENT OF THE CASE

Pursuant to a telegraphic Decision and Direction of Elections issued on October 5, 1945, and confirmed in a printed Decision issued by the Board on October 12, 1945, elections by secret ballot were conducted under the direction and supervision of the Regional Director for the Twentieth Region (San Francisco, California), among the employees of members of California Processors and Growers, Inc., hereinafter referred to as C P & G, and among the employees of certain Independent Companies, herein jointly referred to as the Independent Companies. The elections were conducted from October 11 to October 18, 1945, inclusive,¹ with results, other than those subsequently reported, as set forth in the Tallies of Ballots and in the Regional Director's Report on Challenged Ballots and Report on Lincoln Packing Company ballots, issued on October 22, 1945, and on December 21, 1945, respectively.²

Between October 29, 1945, and January 5, 1946, the AFL duly filed objections to the conduct of the ballot in the several elections affecting employees of C P & G and of the Independent Companies.³ On December 7, 1945, the C. I. O. filed an answer to the AFL's objections. On January 16, 1945, the Regional Director issued a Report on Objec-

¹ Except for the election at Allen R. Parrish Co, which was held on December 20, 1945.

² The election results as reported in the Tally of Ballots and the Report on Challenged Ballots and Report on Lincoln Packing Company ballots are set forth in Appendix A. In view of our opinion concerning the objections, we find it unnecessary to make any disposition of the challenged ballots cast in the several elections.

³ The C. I. O. also filed objections with respect to elections at two of the Independent Companies, but has since withdrawn them with the statement that they were "insubstantial."

tions,⁴ in which report the Regional Director found that the Objections of the AFL raised no substantial or material issues with respect to the conduct of the elections and recommended that they be overruled. Thereafter, the AFL filed exceptions to the Report on Objections. On January 24, 1946, all parties argued orally before the Board in Washington, D. C., the issues raised by the AFL's objections.

The Issues Raised by the Objections

The AFL filed 21 objections. Some of the objections are highly technical, consistent with the AFL's unremitting attempts to block or discredit these particular elections. If, however, the Board is to do justice in such a case, it must weigh the merits without regard to the motives or methods of an objecting party.

An analysis indicates that the objections fall into four categories: (1) charges that Board agents displayed partiality to the C. I. O. and hostility to the AFL; (2) charges that irregularities occurred at the polling places through the failure of Board agents to stop electioneering near the booths, making last minute changes in the hours of voting, and impairing the secrecy of the ballot by letting several persons enter a booth at the same time; (3) charges that the Board failed to provide lists which revealed with any degree of accuracy the eligibility of the voters; and (4) charges that the Direction of Election was erroneously interpreted in two particulars, thereby resulting in the disenfranchisement of many employees, and in the improper use of the ballot by many persons ineligible to vote.

With respect to the first contention, we agree, after reviewing the Regional Director's analysis of the evidence, that his finding that no Board agent displayed any favoritism or prejudice towards any of the rival unions is amply sustained. Although there may have been some temporary confusion at some of the voting places, the record establishes no bias, misconduct, or neglect of duty on the part of the Regional Director or any of the Board agents in conducting the elections.⁵ It appears that the Director and his assistants performed a difficult task with diligence, but were seriously handicapped by the pressure of time, due to the Board's having ordered the elections at the very end of the season.

The objections falling into the second category were accompanied by several affidavits, most of them executed by AFL observers in the various plants where the elections were held. In investigating the truth of these affidavits, the Regional Director also obtained affidavits

⁴ In addition to reporting on objections, the Regional Director reported on challenged ballots in two inconclusive elections among employees of the Independent Companies.

⁵ Indeed, counsel for the AFL stated at the oral argument that he was not asserting any bias, misconduct or other failure of the Regional Director to perform his duty to the best of his ability under the circumstances. Counsel said that the task assigned was an impossible one on such short notice.

from other persons who had been at the polling places and reached the conclusion that these objections were without merit. It was the position of the AFL counsel at the oral argument that since the affiants made allegations which, if true, do point to serious irregularities, the Regional Director should not have held that these questions were so immaterial that a formal hearing was not required. We take the view that where affidavits do raise serious issues, the better practice is to resolve any question of the credibility of the affiant at a hearing rather than on the basis of reports and counter-affidavits.⁶ In this case, however, the taking of testimony on these issues would necessarily be extremely protracted, and, even assuming that the evidence led us to overrule the objections, it could not result in a final decision or certification until the 1946 season had been in progress for many months and new employees were working in the canneries. Because of other aspects of the case, we have concluded that a hearing is unnecessary.

We are much more seriously concerned with the objections in the third and fourth categories, because the Regional Director's report itself reveals that certain of these contentions have a real basis in fact. Under the Decision and Direction of Election, a person who had worked a total of 25 days at more than one plant in the C P & G unit was entitled to vote. In other words, even though the pay roll at the particular plant where the vote was taken might indicate that certain workers had not been employed for the requisite time, such voters nevertheless had a right to have the days worked at other plants "tacked on" to their record. Since there were some 61 plants in the association unit, no eligibility list for a single plant would be decisive on the voting rights of an employee who had worked previously for other companies in the association. Nevertheless, no master eligibility list was available for use at the polling places.⁷

Nor were many lists made sufficiently available to all parties well *before* the balloting began, although that is the invariable custom in Board elections. Thus, no one knew, sufficiently ahead of time, who should be challenged, or the facts upon which a challenge could be based. It therefore appears that, although the right to challenge was exercised in numerous instances by union observers, they had no sure means of determining objectively the eligibility of employees who claimed the right to vote by reason of having worked a total of 25 days at more than one plant in the C P & G unit.

⁶ See *Matter of Loose-Wiles Biscuit Company*, 60 N. L. R. B. 814.

⁷ It is apparent from the record that the necessity of conducting the elections immediately, in anticipation of a seasonal decline in canning operations, made it difficult to prepare a master eligibility list for use at the elections in the C P & G unit, and contributed to the inadequacy of those eligibility lists used at the elections among employees of the Independent Companies. No blame can attach to the Regional Director for not taking this conventional precaution, whatever our view of the important effect of its absence upon the merit of the objections

Even more serious is a parallel objection with respect to elections involving 3,500 employees at 10 C P & G plants (enough to affect the result of the entire C P & G election), where admittedly no pay rolls or other means existed which made it possible to ascertain eligibility under the 25-day requirement. No data was provided as to the number of days worked in these individual plants. In these instances, no extrinsic facts were available to indicate how many days particular voters had worked in the very plant being voted. Thus there was not even a sure figure to which additional days worked elsewhere might have been added or "tacked." We are of the opinion that in the absence of objective means for determining eligibility, the possibility of error in permitting ineligible employees to cast ballots was substantial. It was not precluded by the fact that in many instances the observers of the several labor organizations agreed upon the eligibility of individual employees, sometimes by refraining from challenging them. It is apparent from the record that such observers could not, in fact, have had adequate advance knowledge of the factors required for determining the eligibility of those employees who claimed to have worked the required number of days.

With respect to errors in the interpretation of the Board's Decision, the AFL maintains that the wording of the Decision created uncertainty as to whether the 25-day eligibility period expired on October 5, 1945, the date of the Board's telegraphic Decision, or whether it extended so as to permit days worked to be computed up to the date of the individual elections,⁸ which were held between October 11 and 18. The AFL further contends that the words "temporarily laid off" in the Decision should have been interpreted by the Regional Director to include "seasonal lay-offs" (employees who had worked during earlier peak periods in the 1945 season), as well as employees who were merely temporarily laid off during the week of October 5.

So far as the eligibility provision is concerned, while the issue was not specifically raised at the original hearing,⁹ both the language of the Decision and the applicable precedents indicate a limitation of the 25-day test to the period prior to October 5. Our usual practice of designating a pay-roll date is for the purpose of freezing eligibility immediately upon the publication of the Decision, lest employers be free to determine who may exercise the franchise by offering later employment to particular individuals. On the rare occasions in which we have permitted eligibility for voting purposes to be computed up

⁸ The latter interpretation was that adopted and applied by the Regional Director to all the elections involved herein. The telegraphic decision declared as eligible those employees "who were employed during the pay-roll period immediately preceding October 5, 1945, and have worked a total of 25 days during the current season within the unit . . . including employees who did not work during said pay-roll period because they were ill or on vacation or temporarily laid off . . ."

⁹ The parties agreed at the hearing to the inclusion of the eligibility provision substantially in the form adopted by the Board.

to the very day of the election, it has not been our practice to insert, as we did here, a specific pay-roll date in the Decision and Direction of Election. Although the Regional Director acted in good faith in adopting a contrary interpretation, a majority of the Board members construe the Decision otherwise. It follows that under the pre-election ruling an undetermined number of employees who would otherwise have been ineligible to vote were permitted to cast their ballots without challenge.¹⁰

Another complication developed from the use of the words "temporarily laid off" in the Board's telegraphic Decision. The issue as to whether employees known as "seasonal lay-offs"¹¹ should have been held eligible to vote was likewise not expressly raised by the parties at the original hearings, which were held during the summer. Accordingly, the Board adopted its usual language with respect to temporarily laid off employees, which language was accorded its normal interpretation by the Regional Director, without reference to the fact that this was an industry with fluctuating seasons. He advised the parties that the only persons eligible would be those employed during the then current tomato season, and that only those in *that* category who happened to be "temporarily laid off" during the week of October 5 might vote. Inasmuch, however, as the appropriate bargaining units necessarily include all persons employed at any time during the entire canning season, and that any certification issued would govern the relations of the employers with employees hired during *the entire* 1946 season, the franchise should not have been so lightly denied to any such 1945 employees^{11a} provided they had worked the requisite 25 days before October 5. Although there may be no direct evidence that any of the seasonally laid off employees were deprived of the right to cast challenged ballots, it is plain that an indeterminate number of the thousands of employees within the unit must naturally have refrained from taking the seemingly futile step of going to the polls, by reason of the Regional Director's previously announced interpretation.¹² It is this very uncertainty that gives us

¹⁰ To be sure, the Regional Director's Report on Challenges indicates that at some plants a certain number of voters were challenged on this ground. His Report on Objections, however, shows that in many plants his ruling was *accepted* by all the observers. As his report states on page 8:

Voters who were not shown as having worked 25 days up to the end of the pay-roll period immediately preceding October 5, 1945, but who showed evidence such as check stubs of a total of at least 25 days' work *through the voting date*, or in the absence of such evidence as to whose eligibility on this basis all the observers agreed, were voted without challenge.

It is therefore clear that his interpretation caused observers to waive their right to challenge in an indeterminate number of instances.

¹¹ and ^{11a} Employees who worked during the earlier spinach, asparagus, apricot, and peach seasons. Almost 40,000 men and women had been employed during the August-September peach season in 1944. About 12,250 voted in this election.

¹² *Chairman Herzog does not concur* in this paragraph to the extent that it implies that the Regional Director interpreted our opinion of October 12 erroneously. The first

pause. It raises more than a speculative possibility that the results were not fully representative.

Upon consideration of all the foregoing facts, we are of the opinion that the elections were not, under the circumstances here presented, attended by such procedural safeguards or certainty concerning eligibility as to constitute a proper foundation for a Board certification in an industry which has been the scene of such bitter strife. There is substantial doubt whether the results are truly representative of the desires of the employees who should have been eligible to vote therein.¹³ It is of vital importance to the Board's effectuation of the policies of the Act that the integrity of its procedures be maintained at all times and at all cost, and that the regularity of the conduct of its elections be above reproach. In this view of the matter, it is relatively unimportant that there is no sure proof that one party to the election was prejudiced more than the other.

We therefore are constrained to conclude that the balloting was not conducted in accordance with our usual standards or under conditions tending to create confidence in the result or to lay the foundation for satisfactory bargaining. We are of the opinion, therefore, that the purposes of the Act will best be served by setting aside all of the elections held herein.

While we view the record as requiring this result, we reach it with considerable reluctance because it means that the employees will have no bargaining representative to negotiate an exclusive collective agreement to cover the coming season, until a new election can be held which may result in one of the rival unions being certified. The current AFL contract will expire on March 1, and since the legal effect of the foregoing determination is to keep the question of representation pending before the Board, none of the unions is entitled to an exclusive status as the bargaining agent after that date. In accordance with well-established principles,¹⁴ the employers may not, pending a new election, give preferential treatment to any of the labor organizations involved, although they may recognize each one as the representative of its members. In this state of the record, no legal effect may be given the closed-shop provision contained in the current collective

paragraph of Section V of that opinion, relating to the tomato season, seems to the Chairman to support the Director's interpretation of the opinion as written. It remains true, however, that the original determination by the Board may well have done a substantial and avoidable injustice to a large number of other employees, and that it was probably incorrect when reached. The Chairman believes that there are substantial other reasons, already recited, which warrant the ultimate result herein.

¹³ See *Matter of Kennecott Copper Corporation*, 55 N. L. R. B. 929. See also *Matter of Mobile Steamship Company*, 11 N. L. R. B. 374.

¹⁴ See *Matter of Midwest Piping & Supply Co., Inc.*, 63 N. L. R. B. 163. See also *Matter of Ken-Rad Tube & Lamp Corporation*, 62 N. L. R. B. 21.

agreements after their expiration date;¹⁵ the inclusion of any such provision in any new agreements, or action pursuant thereto, would clearly be contrary to the proviso in Subsection 8 (3). Nothing in our decision, however, should be construed as requiring any change in the substantive conditions of employment now existing by virtue of the foregoing agreements.

In order to expedite final disposition of the case, the Board will conduct new elections as soon as eligibility lists can be prepared which meet the objections discussed herein. Upon appropriate motion, the Board will explore the possibility of holding the election at an early date by use of mail ballots as well as by the manual method, provided the feasibility of this procedure, with adequate safeguards, can be demonstrated by the submission of data not incorporated in the present record. As an alternative, the Board will consider holding a new manual election as early in the 1946 season as there is substantial reemployment.

In setting aside these elections, we are aware of the fact that the procedural defect arising from the absence of a master eligibility list is not applicable to the elections held among employees of the Independent Companies. However, the other defects based on uncertainty concerning the meaning of 25-day eligibility rule and the action taken respecting employees "temporarily laid off" are just as applicable to these elections as they are to the elections held among the employees in the C P & G unit. We are of the opinion that, by reason of these difficulties, the elections conducted among employees of the Independent Companies raise such a possibility of error that such elections should also be vacated and set aside. As a practical matter, this will be in harmony with our ruling regarding the elections in the C P & G unit and will avoid inconsistent disposition of the problems of the cannery industry.

ORDER

IT IS HEREBY ORDERED that the elections held from October 11 to December 20, 1945, inclusive, among the employees of members of C P & G and among the employees of the Independent Companies be, and they hereby are, vacated and set aside.

MR. JOHN M. HOUSTON, dissenting:

In the circumstances of these cases, I am of the opinion that the objections to the conduct of the election should be overruled and that the Regional Director's Report on such objections should be sustained. As is always the case when the Board is called upon to conduct a ballot

¹⁵ Moreover, no requests for discharges resulting from activity in the election are justified even under the present agreement. See *Matter of Rutland Court Owners*, 44 N. L. R. B. 587, 46 N. L. R. B. 1040.

in an industry, seasonal in nature, with geographically widespread operations and employing large groups of transient labor, the difficulties of obtaining a precise result unattended by imperfections are greatly magnified. In the present case my colleagues have pointed to a number of contingencies as the basis for their decision to set these elections aside. Granted that the possibilities alluded to in the majority opinion might have had the effect of producing deviations from normally acceptable consequences, the issue whether they are so serious as to have rendered a representative and fairly conclusive choice impossible must be answered, in my judgment, in the negative.

The Board in these cases was confronted with the necessity of designating a period of eligibility which would conduce to a representative vote. In order to do so the Board was careful to take as a period in which to conduct the ballot, a period in the operations of the industry during which the largest number of "year-round" employees were employed.¹⁶ Preparations for the elections were consequently speeded and, so far as I am aware, these preparations were carried on in a careful and skillful manner. The elections were conducted also with a view toward the quick settlement of a protracted dispute of particular significance to an industry vital to our national well-being. In the course of the Board's preparation for and conduct of these elections irregularities did occur, as they inevitably must have occurred in such circumstances. It is of extreme importance to note, however, that neither contestant can claim that its chances of success were thereby prejudiced. Both came to the polls with equal advantages and equal handicaps. While I am in whole-hearted accord with my colleagues that "it is of vital importance to the Board's effectuation of the policies of the Act that the integrity of its procedures be maintained at all times and at all cost, and that the regularity of the conduct of its elections be above reproach," I do not think that, in the peculiar conditions existing in this industry, we would endanger those policies by refusing to disturb these elections.

In view of the majority decision the challenged ballots will not be opened and counted. I should have ordered them opened and counted, in my view of the case. Because the tally shows a great probability that the C. I. O. Union would have secured a conclusive majority,

¹⁶ The suggestion in the decision that the words "temporarily laid off" in our Decision and Direction of Elections were erroneously interpreted is without substance in my judgment. The then current tomato season was the period during which most regular employees worked. Balloting of these employees was considered as likely to produce a highly representative vote. The Regional Director's interpretation of the above language to mean that only employees laid off during that period were to be considered temporarily laid-off employees was in accord with that purpose and I am constrained to disagree with the decision on this issue. The fact that a certification, if one issued, would be effective for all employees in the unit during the 1946 season does not support the majority view. Many times our certifications are based upon balloting considered to be most likely to produce a representative selection, although all employees in the unit certified do not participate. This is especially the case in industries which operate upon a seasonal basis.

needing approximately 63 votes of a total of 1291 challenged ballots, it would appear that a certification of representatives would have been issued. This doubtless would have clarified the respective rights and obligations of the parties apropos collective bargaining relationships for the coming season.

APPENDIX A

C. C. P. & G.

Approximate number of eligible voters.....	23, 545
Valid votes counted.....	10, 968
Votes cast for California State Council of Cannery Unions, A. F. of L.....	4, 701
Votes cast for F. T. A.-C. I. O.....	6, 067
Votes cast for Cannery and Food Process Workers Council of the Pacific Coast, Independent.....	110
Votes cast against participating labor organizations.....	90
Challenged ballots.....	1, 291
Void ballots.....	248

Allen R. Parrish Company

Approximate number of eligible voters.....	67
Valid votes counted.....	40
Votes cast for California State Council of Cannery Unions, A. F. of L.....	7
Votes cast for F. T. A.-C. I. O.....	33
Votes cast for Cannery and Food Process Workers Union of Stockton Area, Independent.....	0
Votes cast against participating labor organizations.....	0
Challenged ballots.....	14
Void ballots.....	0

Stanislaus Canning Company

Approximate number of eligible voters.....	154
Valid votes counted.....	80
Votes cast for California State Council of Cannery Unions, A. F. of L.....	9
Votes cast for F. T. A.-C. I. O.....	71
Votes cast for Cannery and Food Process Workers Union of Modesto Area, Independent.....	0
Votes cast against participating labor organizations.....	0
Challenged ballots.....	2
Void ballots.....	4

Califruit Canning Co.

Approximate number of eligible voters.....	136
Valid votes counted.....	101
Votes cast for California State Council of Cannery Unions, A. F. of L.....	22
Votes cast for F. T. A.-C. I. O.....	77
Votes cast for Cannery and Food Process Workers Union of Stockton Area, Independent.....	1
Votes cast against participating labor organizations.....	1
Challenged ballots.....	0
Void ballots.....	2

Scientific Nutrition Corporation, doing business as Capolino Packing Corporation

Approximate number of eligible voters.....	107
Valid votes counted.....	57
Votes cast for California State Council of Cannery Unions, A. F. of L.....	35

Scientific Nutrition Corporation, doing business as Capolino Packing Corporation—Continued

Votes cast for F. T. A.—C. I. O.....	22
Votes cast for Cannery and Food Process Workers Union of Modesto Area, Independent.....	0
Votes cast against participating labor organizations.....	0
Challenged ballots.....	0
Void ballots.....	0

Aron Canning Co.

Approximate number of eligible voters.....	29
Valid votes counted.....	26
Votes cast for California State Council of Cannery Unions, A. F. of L.....	20
Votes cast for F. T. A.—C. I. O.....	6
Votes cast for Cannery and Food Process Workers Union of Stockton Area, Independent.....	0
Votes cast against participating labor organizations.....	0
Challenged ballots.....	0
Void ballots.....	0

Ensher, Alexander & Barsoom, Inc.

Approximate number of eligible voters.....	225
Valid votes counted.....	96
Votes cast for California State Council of Cannery Unions, A. F. of L.....	64
Votes cast for Cannery and Food Process Workers Union of Sacramento Area, Independent.....	28
Votes cast against participating labor organizations.....	4
Challenged ballots.....	4
Void ballots.....	3

Booth Company, Inc.

Approximate number of eligible voters.....	296
Valid votes counted.....	176
Votes cast for California State Council of Cannery Unions, A. F. of L.....	123
Votes cast for F. T. A.—C. I. O.....	52
Votes cast against participating labor organizations.....	1
Challenged ballots.....	14
Void ballots.....	2

Raiter Canning Company

Approximate number of eligible voters.....	96
Valid votes counted.....	49
Votes cast for California State Council of Cannery Unions, A. F. of L.....	30
Votes cast for F. T. A.—C. I. O.....	19
Votes cast against participating labor organizations.....	0
Challenged ballots.....	10
Void ballots.....	2

Sardik Food Products Corporation

Approximate number of eligible voters.....	40
Valid votes counted.....	31
Votes cast for California State Council of Cannery Unions, A. F. of L.....	10
Votes cast for F. T. A.—C. I. O.....	21
Votes cast for Cannery and Food Process Workers Union of Modesto Area, Independent.....	0
Votes cast against participating labor organizations.....	0
Challenged ballots.....	1
Void ballots.....	1

Fruitvale Canning Company

Approximate number of eligible voters.....	591
Valid votes counted.....	234
Votes cast for California State Council of Cannery Unions, A. F. of L.....	56
Votes cast for F. T. A.-C. I. O.....	178
Votes cast against participating labor organizations.....	0
Challenged ballots.....	21
Void ballots.....	1

Basic Vegetable Products Company

Approximate number of eligible voters.....	494
Valid votes counted.....	285
Votes cast for California State Council of Cannery Unions, A. F. of L.....	115
Votes cast for F. T. A.-C. I. O.....	169
Votes cast for Cannery and Food Process Workers Union of Sacramento Area, Independent.....	0
Votes cast against participating labor organizations.....	1
Challenged ballots.....	47
Void ballots.....	5

Pacific Grape Products, Inc.

Approximate number of eligible voters.....	333
Valid votes counted.....	201
Votes cast for California State Council of Cannery Unions, A. F. of L.....	4
Votes cast for F. T. A.-C. I. O.....	193
Votes cast for Cannery and Food Process Workers Union of Modesto Area, Independent.....	4
Votes cast against participating labor organizations.....	0
Challenged ballots.....	1
Void ballots.....	0

Flotill Products, Inc.

Approximate number of eligible voters.....	305
Valid votes counted.....	205
Votes cast for California State Council of Cannery Unions, A. F. of L.....	105
Votes cast for F. T. A.-C. I. O.....	100
Votes cast for Cannery and Food Process Workers Union of Stockton Area, Independent.....	0
Votes cast against participating labor organizations.....	0
Challenged ballots.....	20
Void ballots.....	7

Sacramento Frosted Foods Co.

Approximate number of eligible voters.....	85
Valid votes counted.....	62
Votes cast for California State Council of Cannery Unions, A. F. of L.....	28
Votes cast for F. T. A.-C. I. O.....	34
Votes cast for Cannery and Food Process Workers Union of Sacramento Area, Independent.....	0
Votes cast against participating labor organizations.....	0
Challenged ballots.....	11
Void ballots.....	1

Lincoln Packing Company

Approximate number of eligible voters.....	150
Valid votes counted ¹⁷	77

¹⁷ The ballots in this election in which there were apparently no challenged ballots, have not been counted but have been impounded, pending a determination of the question as to whether the employees of Lincoln Packing Company should be included in the C. P. & G. unit or should constitute a separate appropriate unit.