agents' manual, the Employer reserves and exercises the right to control many aspects of their relationship with it and with its policyholders, actual and prospective, we find that the full-time and part-time agents [5] are not independent contractors but are employees within the meaning of Section 2 (3) of the Act.[6] Accordingly, we find that a question affecting commerce exists concerning the representation of employees of the Employer within the meaning of Section 9 (c) (1) and Section 2 (6) and (7) of the Act.

4. We find that the following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9 (b) of the Act:

All insurance agents, including full-time and part-time agents in the western area of the railroad department of the Employer, excluding all other employees and supervisors as defined in the Act.

[Text of Direction of Election omitted from publication.]

[5] We find no merit in the Employer's secondary contention that, in any event, its part-time agents are not employees but independent contractors. The record contains no evidence that part-time agents are treated differently from full-time agents, except that weekly activity reports are not required from them, they do not devote all of their time to selling insurance, and they are ineligible for participation in the Employer's group insurance plan. These circumstances are not sufficient, in our opinion, to require a different conclusion as to their status.

[6] See *Sweet-Orr and Co., Inc.*, 117 NLRB 796. We do not believe that the isolated instance of the sale of an agency 5 years prior to the hearing herein is a significant factor, standing by itself, pointing to the existence of independent contractor status.

Bob Saunders, d/b/a Bob Saunders Company, Petitioner *and* United Packinghouse Workers of America, Local 78, AFL–CIO.
Case No. 20–RM–213. July 1, 1957

SUPPLEMENTAL DECISION, DIRECTION, AND ORDER

On January 4, 1957, pursuant to a Board Decision and Direction of Election dated December 27, 1956,[1] an election was conducted herein, under the direction and supervision of the Regional Director for the Twentieth Region, among employees in the unit heretofore found appropriate. Upon the conclusion of the balloting, a tally of ballots was issued and served upon the parties in accordance with the Board's Rules and Regulations.

The tally of ballots shows that there were approximately 65 eligible voters; that 3 votes were cast for, and 10 votes were cast against, the Union; and that 68 ballots were challenged.

On January 9, 1957, the Union filed objections to the conduct of the election and to conduct affecting the results of the election. Thereafter the Regional Director investigated the issues raised by the challenged ballots and the Union's objections; and, on March 15,

[1] Not reported in printed volumes of Board Decisions and Orders.

1957, issued and duly served on the parties a report on challenged ballots and objections. The Union and the Employer have filed exceptions to the latter report.

The Union's Objections to the Election

In its objections (1), (2), and (3), the Union contended, in substance, that an election should not have been conducted herein because there existed no question concerning representation, because at the time of the election unresolved unfair labor practice charges were pending against the Employer, and because an unfair labor practice strike was in progress on the date of the election. As pointed out in the Regional Director's report, the substance of these objections was raised by the Union in the course of the earlier representation hearing herein, and the issues were decided adversely to the Union in the Board's Decision and Direction of Election. Moreover, the Regional Director's report also points out that although at the time of the election there was pending an appeal to the General Counsel in Case No. 20–CA–1235 from the Regional Director's dismissal of the Union's unfair labor practice charges against the Employer, the General Counsel, thereafter, on January 11, 1957, denied the Union's appeal. In agreement with the Regional Director, we therefore find that on the date of the election herein the strikers in question were economic strikers.

The Union's exceptions relative to its objections (1), (2), and (3) are for the most part only a reiteration of points previously disposed of by the Board in its Decision and Direction of Election. In addition, the Union now asserts that the Regional Director did not conduct a "complete investigation" of the Union's charges in Case No. 20–CA–1235.[2] We refuse, however, to consider this latter allegation in this, a representation, proceeding. Accordingly, in agreement with the Regional Director's recommendation, we hereby overrule objections (1), (2), and (3).

In its objection (4), the Union alleged that the Employer had "padded" its payroll. The Regional Director found no merit to this allegation. No exception having been filed to the Regional Director's finding in this respect, objection (4) is hereby overruled.

In its objection (5), the Union alleged that before the election herein, on or about December 31, 1956, the Employer announced and made effective a wage increase. The Regional Director found in his report that no wage increase was granted to employees on or about the alleged date, or upon any other date material herein. In addition, the Regional Director noted that the Union had withdrawn this por-

[2] In its exceptions, the Union asserts that on March 27, 1957, it filed a new charge against the Employer, "re-alleging the violation of 8 (a) (5)." It "suggests" that a hearing be ordered by the Board on both its new charges and its exceptions herein. We see no reason to adopt the "suggested" procedure.

tion of its objections. In its exceptions, the Union asserts that despite the withdrawal of its objection, the Regional Director should have found that a wage increase was granted employees "immediately after" the period October 1 to 4, 1956, which allegedly interfered with the employees' freedom of choice in the election. We find this exception without merit. The Union having withdrawn its objection in the course of the Regional Director's investigation may not now reassert the substance of this objection before the Board at this stage of the proceeding. Moreover, the Board does not consider election objections based upon alleged interference which occurs prior to the issuance of a Decision and Direction of Election.[3] Accordingly, the Union's objection (5) is hereby overruled.

The Challenged Ballots

The Union challenged the ballots of 39 voters on the ground that these voters were hired during a strike and were temporary replacements for striking employees. According to the Regional Director, 9 of these 39 voters were in fact hired before October 1956, the date on which the strike began, and the parties agree that these 9 voters are permanent employees. Neither party has excepted to the Regional Director's recommendation that the ballots of these nine voters, whose names appear on Appendix A attached hereto, be opened and counted. Accordingly, we hereby overrule the challenges to their ballots.

As to the other 30 ballots challenged by the Union, the Regional Director found that they were the ballots of employees hired between October 3 and December 18, 1956, and that these employees were laid off on January 10, 1957, when the Employer's packing season ended and all its employees were laid off. The Regional Director further found that the Employer had stated that the 30 employees in question will be recalled when the Employer's 1957–58 season begins, and that, although requested so to do, the Union had furnished no evidence to indicate that these employees had been hired on a temporary basis. Accordingly, the Regional Director recommended that the challenges to their ballots be overruled.

In its exceptions, the Union criticizes the manner in which the Regional Director conducted his investigation, repeats its contention that the 30 employees hired during the October 3 to December 18 period are temporary employees; attacks the Employer's credibility generally, and makes certain broad factual allegations which, according to the Union, supports its contentions. However, the Union admits that it does not have available "specific information with respect to each of the alleged temporary replacements," and submits no substantiating evidence, by affidavits or otherwise, to support its broad factual

[3] *F. W. Woolworth Co.*, 109 NLRB 1446, 1449.

allegations. Accordingly, we adopt the Regional Director's recommendations, and find that the 30 employees whose names appear on Appendix B attached hereto are permanent employees. The challenges to these ballots are hereby overruled.

The Employer challenged the ballots of 22 voters, whose names appear on Appendix C attached hereto, on the ground that they were economic strikers who had been permanently replaced. The Regional Director noted the number of persons employed in the plant during the course of the 1956–57 packing season, noted further that the "Employer has not taken the position that any strikers would be refused employment during the 1957–58 season," and concluded that "under the circumstances present in this case, including the seasonal nature of the operations, the strikers may reasonably be viewed as occupying a status similar to temporarily laid off employees with a right to reinstatement, whom the Board ordinarily permits to vote." Accordingly, the Regional Director recommended that the challenges to the ballots of these employees be overruled.

We do not adopt the Regional Director's recommendation in this respect. Section 9 (c) (3) of the Act states explicitly that "Employees on strike who are not entitled to reinstatement shall not be eligible to vote." Under well-established principles, economic strikers lose their right to reinstatement upon being replaced.[4] The Regional Director here appears to have superimposed upon this rule a distinction between economic strikers in a seasonal industry and economic strikers in a nonseasonal industry. We, however, perceive nothing in the language or intent of the Act to warrant the distinction. It is an irrelevant consideration, we think, that economic strikers in a seasonal industry who have actually been replaced by other employees may conceivably be rehired during the next, or a subsequent, season.[5] For whether the industry be seasonal or nonseasonal in nature, the narrow issue that is presented in a case of this sort is whether or not the economic strikers have in fact been replaced.

Proceeding, as he did, upon an erroneous interpretation of the law, the Regional Director did not squarely pass upon the narrow issue of whether or not the economic strikers here involved had in fact been permanently replaced. He cited no fact, however, which is inconsistent with the Employer's assertion that they had been replaced.[6]

[4] *N. L. R. B.* v. *Mackay Radio & Telegraph Co.*, 304 U. S. 333; *Kansas Milling Company* v. *N. L. R. B.*, 185 F. 2d 413 (C. A. 10); *The Pipe Machinery Company*, 79 NLRB 1322; *Midwest Screw Products Company*, 86 NLRB 643.

[5] See *John W. Thomas Co.*, 111 NLRB 226, 228–229; and *Dura Steel Products Company*, 111 NLRB 590, 592.

[6] The Regional Director cited certain statistics pertaining to the number of persons employed by the Employer at various periods of its operations, and also bearing upon the rate of employee turnover. The cited statistics, in our opinion, are susceptible of conflicting interpretations, and, therefore, lack probative value in resolving the instant factual issue.

Moreover, a finding, which the Regional Director implicitly made, that the 30 employees who were hired after the strike began were permanent employees, is itself inconsistent with any notion that those who remained on strike were not replaced. Accordingly, upon all the facts before us, we find that the voters whose names appear on Appendix C attached hereto were in fact economic strikers who had been permanently replaced, and the challenges to their ballots are hereby sustained.

The Employer challenged the ballots of four voters on the ground that they quit prior to the strike. As to these challenges, the Union has not excepted to the Regional Director's recommendation that the challenges to the ballots of two of such voters, Connie Larez and Lucy Melendrez, be sustained; and these challenges are accordingly hereby sustained. In accordance with the Regional Director's recommendation, we shall not at this time resolve the issues pertaining to the ballots of the other two of such voters, Bebe Larez and Lois Matasci.

The Employer challenged the ballot of Philip Torres on the ground that he did not work in the packingshed during the 1956–57 season, and hence was not within the unit. The Regional Director found that Torres was an agricultural employee during the 1956–57 season, and was actually offered employment in the Employer's shed, but refused the transfer. The Union does not dispute the Regional Director's factual finding, but contends that in the circumstances Torres, although he refused the Employer's offer of transfer, became a striking employee. We find no merit in this contention, and the challenge to Torres' ballot is hereby sustained.

The Employer also challenged the ballots of two striking persons, Leonard Correa and Juana V. Ortega, on the ground that the jobs they perform had been eliminated. As a conclusive election may result from the opening of the ballots hereinafter directed, we shall not at this time pass upon the issues raised by the challenges to the ballots of Correa and Ortega.

We shall direct that in the event that the ballots of the voters whose names appear on Appendix A and Appendix B give the Union a majority of the valid votes cast, the Union be certified as the collective-bargaining representative of the employees in the unit heretofore found appropriate; we shall also direct that if the Union does not receive a majority of the valid votes cast, the results of the election be certified. If the election is not concluded in either such way, the Board will, upon being so advised by the Regional Director, give further consideration to the disposition of the challenged ballots not ruled upon herein.

[The Board directed that the Regional Director for the Twentieth Region shall, within ten (10) days from the date of this Direction, open and count the ballots of the employees whose names appear on Appendix A and Appendix B attached hereto, and serve upon the parties a revised tally of ballots. If the Union receives a majority of the valid votes cast in this election, the Regional Director shall issue a certification of representatives; if the Union does not receive a majority of the valid votes, the Regional Director shall issue a certification of results of election. If the revised tally shows an inconclusive result, the Regional Director is hereby directed to so advise the Board, in order that the Board may proceed further in the matter.

[The Board ordered the above-entitled matter referred to the Regional Director for the Twentieth Region for disposition.]

CHAIRMAN LEEDOM and MEMBER MURDOCK took no part in the consideration of the above Supplemental Decision, Direction, and Order.

APPENDIX A

Berti, Margaret	Godina, Salome	Saunders, Floyd
Fellows, Fred	Negroni, Dorothy	Villalobos, Joe
Flores, Elfredo	Sandez, Loreto	Villalobos, Julia

APPENDIX B

Aquino, Benigno	Caraccioli, Louie	O'Connor, Bob
Arthurs, Cora May	Ellis, Arzula	Rianda, Jim
Arvizu, Jose	Fernandez, Gregorio	Robledo, Lupe
Baldwin, Effie	Fernandez, Kathalina	Robledo, Mercy
Barlogi, Aurelia	Garcia, Mary	Rowe, Dick
Bassetti, John	Garcia, Rubin	Silastre, Margaret
Bendelle, Nora	Handley, Jennie	Silastre, Rustice
Berti, Letitia	McDowell, Henry	Souza, Mary
Bianchi, Joe	Muniz, Connie	Teues, Connie
Bianchi, Ruby	Ochinaug, Aurora	Torres, Manuel

APPENDIX C

Abina, Aimeda	Melendrez, Isabel	Rodriguez, Enedina C.
Correa, Mary M.	Melendrez, Maximo R.	Rodriquez, Mercedes O.
Correa, Mike C.	Mena, Alexia	Rodriguez, Mike P.
Luna, Dolores	Mena, Vincente	Rodriguez, Robert P.
Luna, Mary	Ortega, Fermina V.	Torres, Maria P.
Macias, Eloisa V.	Ramirez, Evangelina	Villalobos, Frank
Marks, Cecilia	Renteria, Jesus D.	Villalobos, Petra
Marks, Eva		