

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of:)	Case No. 2009-MMC-02
)	
FRANK PINHEIRO DAIRY dba)	
PINHEIRO DAIRY & MILANESIO)	35 ALRB No. 5
FARMS,)	
)	
Employer,)	(October 1, 2009)
)	
and)	
)	
UNITED FOOD AND COMMERCIAL)	
WORKERS, LOCAL 5,)	
Petitioner.)	

DECISION AND ORDER

On September 8, 2009, the United Food and Commercial Workers Union, Local 5 (Union or UFCW), the certified bargaining representative of the agricultural employees of Frank Pinheiro Dairy dba Pinheiro Dairy & Milanesio Farms (Employer), filed a declaration with the Agricultural Labor Relations Board (Board) pursuant to Labor Code section 1164 et seq. requesting that the Board issue an order directing the parties to mandatory mediation and conciliation of their issues.¹ The UFCW filed a supplemental

¹ The provisions governing the mandatory mediation and conciliation process are found at California Labor Code sections 1164-1164.13, and California Code of Regulations, title 8, sections 20400-20408.

declaration on September 11, 2009, which provided additional information to support its request for mandatory mediation and conciliation.

The relevant prerequisites for referral to mandatory mediation and conciliation are set forth in Labor Code sections 1164(a) and section 20400(b) of the Board's regulations. If, as here, the labor organization was certified after January 1, 2003, either party may file a request for mediation any time following 180 days after an initial demand to bargain. An "agricultural employer" for the purposes of this provision, is one "who has employed or engaged 25 or more agricultural employees during any calendar week in the year preceding the filing of a declaration pursuant to this subdivision." If the above prerequisites are met, either party may submit a declaration that the parties have failed to reach a collective bargaining agreement, and request that the Board issue an order directing the parties to mandatory mediation and conciliation.

A. Union's Declaration and Request for Mediation

The UFCW's declaration sets forth that the UFCW was certified as the collective bargaining agent at Employer on February 13, 2009. The UFCW first demanded bargaining with the Employer by way of a letter dated February 16, 2009. The declaration states that the parties have met June 4, June 11, July 30 and August 11, 2009 for collective bargaining, but have failed to reach an agreement.

Finally, the UFCW states that Employer has employed 25 or more agricultural employees during a calendar week preceding the filing of this declaration. In support of this contention, the UFCW attached the list of eligible voters provided by the employer in the course of the election case involving these same parties (2009-RC-001-

VIS). This list is dated January 26, 2009, and shows the names and addresses of 24 individuals. The UFCW argues that a 25th employee, Eliazar Reyes, was left off this list because he was on vacation during the period before the election and the day of the election, but that he returned to work shortly after the election was held.²

In addition, the UFCW attached a list of employees provided by the Employer on March 12, 2009, showing 27 employees, including two herdsmen, Albert Contreras and Joe Ferrumpau. The UFCW argues that the two herdsmen, Contreras and Ferrumpau, are agricultural employees and not supervisors and therefore they should be counted toward the 25 agricultural employee threshold.

B. Employer's Answer to the Declaration and Request

The Employer argues that it does not meet the 25 agricultural employee threshold required by Labor Code sections 1164(a); therefore, the Board should dismiss the UFCW's request for mandatory mediation and conciliation. The Employer does not dispute that the other statutory prerequisites have been met.³

The Employer contends that Eliazar Reyes was not on vacation during the pay period before the election because he had been laid off for the season. In support of this contention Employer attaches a California Employment Development Department (EDD) Unemployment Insurance Claim dated December 19, 2008, which states Reyes'

² The election was held January 30, 2009.

³ The Employer argues that the Board should not accept the UFCW Secretary-Treasurer, Tim Hamann's September 11, 2009 declaration because it does not state the place of execution. The declaration is signed under penalty of perjury, is dated, and the document is on the letterhead of attorney for the UFCW, David Rosenfeld whose office address is in Alameda, CA. The Board finds the declaration substantially complies with the requirements of Board regulation 20400(b).

last day worked was December 13, 2008, and the reason for separation was that “work ended.” Employer states that Reyes was recalled in February 2009.

The Employer argues that herdsmen Albert Contreras and Joe Ferrumpau are supervisors and not agricultural employees and therefore do not count toward the 25 agricultural employee threshold in Labor Code section 1164.

Finally, the Employer argues that exclusive of the above supervisory employees, it never employed more than 24 agricultural employees simultaneously at any given time during any calendar week in the 12 months preceding the request for mediation. In support of this contention, Employer submitted voluminous payroll data including electronic daily time records for each payroll period during the 12 months in question, and a spreadsheet showing the checks issued to employees of the dairy and summarizing all Employer’s pay periods from September 1, 2008, through August 30, 2009. Employer contends that while there are three payroll periods in which checks were issued to 25 or more individuals, a close examination of the payroll records shows that the number of agricultural employees never met or exceeded 25 on any given day.

DISCUSSION

As stated above, Labor Code 1164(a) specifies that an agricultural employer for purposes of the mandatory mediation and conciliation provisions of the statute is one “who has employed or engaged 25 or more agricultural employees during any calendar week in the year preceding the filing of a declaration pursuant to this subdivision.” Whether the Legislature intended for the mandatory mediation provisions to apply only to Employers who regularly employ 25 or more agricultural employees, the

language that appears in the statute is not reasonably susceptible to such a reading. Instead, it unambiguously requires a head count of agricultural employees who were on the payroll during any given week in the year prior to the filing of a declaration seeking a referral to mandatory mediation and conciliation. If there is no ambiguity in the statutory language, a court must presume that the Legislature meant what it said, and the plain meaning of the statute governs. (*Kim v. Superior Court* (2006)136 Cal.App.4th 937, 940; *Lennane v. Franchise Tax Board* (1994) 9 Cal.4th 263, 268.) Under the statute's plain meaning, the Board finds that the employment or engagement of 25 or more agricultural employees during any calendar week meets the threshold requirement, even if the threshold was only met for one or two weeks during the year long period or if fewer than 25 agricultural employees were employed at any one point in time during the week.⁴

Eliazar Reyes

The EDD unemployment insurance claim form indeed shows that Reyes' last date worked was December 13, 2008. The spreadsheet that Employer submitted summarizing all Employer's pay periods shows a notation that he was laid off on December 13, 2008. The spreadsheet shows Reyes returned on February 6, 2009.

The election petition in the election matter involving these parties was filed January 23, 2009. The Employer's last payroll period prior to the election petition being filed was January 5, 2009, through January 18, 2009, and Reyes' name does not appear during that payroll period. It appears that the UFCW's argument that Reyes was

⁴ Since the UFCW's declaration was filed on September 8, 2009, the pertinent time period is from September 8, 2008 to September 7, 2009.

improperly left off the January 26, 2009, voter eligibility list and that the addition of his name would trigger the 25 agricultural employee threshold is without merit.

Herdsmen Alberto Contreras and Joe Ferrumpau

It is reasonable to interpret section 1164 as excluding supervisory employees from the 25 agricultural employee threshold. Supervisory employees would not be included in any bargaining unit bound by a mediated collective bargaining agreement. Nor does the UFCW argue that supervisory employees should be included, rather the UFCW argues that the two herdsmen, Contreras and Ferrumpau, are not supervisors and therefore should count toward the 25 agricultural employee threshold.

In support of its argument that Contreras and Ferrumpau are supervisors, Employer submitted several declarations, including declarations from Contreras and Ferrumpau themselves in which they both state that they work independently, direct the work of dairy employees, assign work, and have the authority to give verbal or written disciplinary warnings. They do not state that they have the authority to fire or hire, but that they do make recommendations to dairy owners. Also attached is a declaration of dairy worker, Pedro Alejandro which states that Contreras and Ferrumpau tell workers what to do and give instruction and further, they can hire, fire and discipline workers when necessary.

We are not able to conclude from the declarations and the Employer's assertions whether or not Contreras and Ferrumpau are statutory supervisors. Therefore, their status is a material issue of fact that would need to be resolved through an expedited hearing as provided for in Board regulation section 20402(c). However, as explained

below, because we conclude that the Employer employed or engaged 25 or more agricultural employees exclusive of Contreras and Ferrumpau during at least two calendar weeks between September 8, 2008 and September 7, 2009, we need not resolve the status of Contreras and Ferrumpau.

Employer employed or engaged 25 or more agricultural employees during at least two calendar weeks between September 8, 2008 to September 7, 2009

The standard set forth in section 1164(a) is that the employer must have “employed or engaged 25 or more agricultural employees during any calendar week in the year preceding the filing of a declaration.” Employer’s argument is that it never employed 25 or more agricultural employees at any single moment in time or on any given day. However, the statutory provision is based on 25 agricultural employees being employed or engaged during any one calendar week period.

Calendar week May 25, 2009 through May 31, 2009

An examination of the payroll spread sheet and daily time records for the calendar week of May 25, 2009 through May 31, 2009 shows that 26 individuals, whose status as agricultural employees is not disputed, were employed or engaged during this week-long period.

Two individuals who left their employment on May 27, 2009, did indeed work during the week of May 25 through May 31 according to the daily time records submitted by the Employer. Juan Lizzaraga worked on the 25th, 26th and 27th, and Juan Barragan worked on the 27th. Three other individuals were hired to replace them. In its answer to the request for mediation, the Employer indicates Thomas Mendoza was hired

on May 28, 2009, Erain Miranda was hired on May 30, 2009, and Juan Zanchez was hired on May 30, 2009.

Juan Zanchez worked on May 30 and May 31. The daily time records indicate that Thomas Mendoza did not punch in for work for the first time until June 1, 2009, and Erain Miranda did not punch in for work until June 4, 2009; however, it appears from Employer's payroll records that the effective date of their employment was May 28 and May 30 respectively. The statute's phrase "employed or engaged" most reasonably refers to the date of hire. There is no requirement that 25 or more agricultural employees actually had to work during the calendar week, but rather that they be employed by the employer.⁵

Calendar Week May 11, 2009 through May 17, 2009

An examination of the payroll spread sheet and daily time records for the calendar week of May 11, 2009 through May 17, 2009 shows that 25 undisputed agricultural employees worked during this week long period. Included in this number is John Arnold, whose job title was "farm hand" and who was apparently paid a salary of \$1,250 per pay period. Unlike the other employees' daily time records, Arnold's daily time record shows no "punch in" or "punch out" times for the specific days, rather in the column labeled "hours" it shows Arnold's daily rate of just over \$89 per day. According to the Employer, Arnold was fired on May 25, 2009. The payroll spread sheet shows

⁵ The 26 individuals employed or engaged between May 25, 2009 through May 31, 2009 are: Juan Lizarraga, Guadalupe Abarca, Mario Aguirre, Pedro Alejandre, Juan Barragan, Salvador Becerra, Jose Bernardino, Israel Chavarin, Juan Devalos, Juan Enriquez, Pablo Gonzalez, Erik Vasquez Guzman, Gabriella Hernandez, Aristides Lozano, Thomas Mendoza, Erain Miranda, Alfonso Muniguia, Eliazar Reyes, Guillermo Rios, Adrian Rizo, Aldo Rubio, David Valadez, Omar Vargas, Reuben Vargas, Juan Zanchez and Luis Zapian.

Arnold was paid \$1,153.85 on May 26, 2009 to cover the period May 11, 2009 through May 24, 2009,⁶ so it is clear that Arnold was still employed or engaged by the Employer during the calendar week of May 11 through May 17, 2009.⁷

CONCLUSION

From an examination of the records submitted by the Employer, it is established that the 25 agricultural employee threshold was met during the calendar week of May 25, 2009 through May 31, 2009 and during the calendar week of May 11, 2009 through May 17, 2009. Therefore this prerequisite for a referral to mandatory mediation and conciliation is met.

ORDER

The Board has evaluated the declaration and the answer to the declaration in this matter in accordance with section 20402 of the Board's regulations, and finds as discussed above that the threshold requirements for referral to mediation set forth in Labor Code sections 1164(a) and regulation section 20400(b) are met.

Pursuant to Labor Code section 1164(b) and section 20402 of the Board's regulations, the parties in the above matter are directed to mandatory mediation and conciliation of their issues. The mandatory mediation process is governed by Labor Code

⁶ Without explanation, Arnold continues to appear on the daily time records for the period May 18, 2009 through May 31, 2009, and for nine days during the payroll period June 1, 2009 through June 14, 2009; however, his name does not appear on the payroll spread sheet after May 26, 2009.

⁷ The 25 individuals engaged or employed between May 11, 2009, and May 17, 2009, are Guadalupe Abarca, Mario Aguirre, Pedro Alejandro, John Arnold, Juan Barragan, Salvador Becerra, Jose Bernardino, Israel Chavarin, Juan Devalos, Juan Enriquez, Pablo Gonzalez, Erik Vasquez Guzman, Gabriella Hernandez, Shawn King, Juan Lizarraga, Aristides Lozano, Alfonzo Muniguia, Eliazar Reyes, Guillermo Rios, Adrian Rizo, Aldo Rubio, David Valadez, Omar Vargas, Reuben Vargas, Luis Zapian.

sections 1164-1164.13 and sections 20400-20408 of the Board's regulations. Upon the issuance of this order, the Board shall request that a list of nine mediators be compiled by the California Mediation and Conciliation Service and be provided to the parties. The parties shall then have seven (7) days from the receipt of the list to select a mediator in accordance with Labor Code section 1164(b) and section 20403 of the Board's regulations.

Dated October 1, 2009

GUADALUPE G. ALMARAZ, Chair

GENEVIEVE A. SHIROMA, Member

CATHRYN RIVERA-HERNANDEZ, Member

CASE SUMMARY

**FRANK PINHEIRO DAIRY dba
PINHEIRO DAIRY & MILANESIO
FARMS**

Case No. 2009-MMC-02
35 ALRB No. 5

(United Food and Commercial Workers
Union, Local 5)

On September 8, 2009, United Food and Commercial Workers, Local 5 (UFCW) filed a declaration requesting mandatory mediation and conciliation pursuant to California Labor Code section 1164(a). In addition to its September 8, 2009 declaration, the UFCW filed a supplemental memo on September 11, 2009 which provided additional information to support its request for mandatory mediation and conciliation.

On September 22, 2009, the Employer filed its answer to the UFCW's request for mediation and conciliation. The Employer argued that it does not meet the 25 agricultural employee threshold that is a prerequisite for a referral to mandatory mediation and conciliation. Labor Code section 1164(a) specifies that an agricultural employer for purposes of the mandatory mediation and conciliation provisions of the statute is one "who has employed or engaged 25 or more agricultural employees during any calendar week in the year preceding the filing of a declaration pursuant to this subdivision."

The Employer argued that one individual the UFCW counted toward the 25 agricultural employee threshold had been laid off and was not employed during the time the UFCW stated, and further argues that two individuals were supervisors and therefore are not agricultural employees counting toward the 25 agricultural employee threshold. Employer argued that it never employed more than 24 agricultural employees simultaneously at any given time during any calendar week in the 12 months preceding the request for mediation.

The Board held that the plain meaning of Labor Code section 1164(a) unambiguously requires a head count of agricultural employees who were on the payroll during any given week in the year prior to the filing of a declaration seeking a referral to mandatory mediation and conciliation. Under this standard, the Board found that an examination of payroll records submitted by the Employer revealed that the 25 agricultural employee threshold was met during the calendar week of May 25, 2009 through May 31, 2009 and during the week of May 11, 2009 through May 17, 2009. Therefore the Board found this prerequisite for a referral to mandatory mediation and conciliation was met and ordered the parties to mandatory mediation and conciliation.

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