

AGRICULTURAL LABOR RELATIONS BOARD
CASE DIGEST SUPPLEMENT, VOLUME 33 (2007)*

- 102.01 The ALRB, when faced with the situation where an employee spends only a portion of their work time for a single employer engaged in agriculture, consistently has applied the substantiality test found in “mixed work” cases. Where the employer is a sole proprietorship, there is no legal distinction between the employer as business owner and as an individual; therefore, employees who worked part-time at the dairy and part-time as domestic workers may be considered to be working for the same employer.
ARTESIA DAIRY, 33 ALRB No. 3
- 102.01 Employee who works 25-50% of her time at dairy and the remainder as domestic worker for sole proprietor meets the “substantiality” test and is an agricultural employee eligible to vote.
ARTESIA DAIRY, 33 ALRB No. 3
- 102.01 Employee who works less than 16% of her time at dairy and the remainder as domestic worker for sole proprietor does not meet the “substantiality” test and is not an agricultural employee eligible to vote.
ARTESIA DAIRY, 33 ALRB No. 3
- 102.01 Employee who solely performed decorative landscaping work on dairy property without any operational connection to the dairy was not engaged in secondary agriculture because the work was not incidental to or in conjunction with the farming operation.
ARTESIA DAIRY, 33 ALRB No. 3
- 105.04 Under *Mann Packing Co., Inc.* (1989) 15 ALRB No. 11, in both challenged ballot and election objection cases, the Board will defer to the General Counsel’s resolution of the investigation of an unfair labor practice charge where the merits of the issues necessarily decided by the investigation also are determinative of the merits of related issues in the representation case. It is more than the mere existence of identical issues that triggers this rule, as it is well established that conduct sufficient to warrant the setting aside of an election does not necessarily constitute an unfair labor practice, and not all unfair labor practices necessarily constitute conduct sufficient to set aside an election. (See, e.g., *ADIA Personnel Services* (1997) 322 NLRB 994, fn. 2.) Thus, it is only where the issues in the two

proceedings are coextensive in terms of their legal merit that the Board is bound by the General Counsel's determination.
RICHARD'S GROVE & SARALEE'S VINEYARD, INC.,
33 ALRB No. 7

105.04 Where no related unfair labor practice charges have been filed, the Board retains its full authority to adjudicate all issues involving election objections and challenged ballots. In *Bayou Vista Dairy* (2006) 32 ALRB No. 6, the Board further explained that where a complaint was withdrawn and the underlying unfair labor practice charge dismissed pursuant to a settlement agreement without any admission of liability, it was the legal equivalent of no charge having been filed and the issue could be litigated in election objection proceedings. By extension, the withdrawal of a charge also would not preclude the Board from litigating a parallel issue in an election proceeding.
RICHARD'S GROVE & SARALEE'S VINEYARD, INC.,
33 ALRB No. 7

105.04 *Mann Packing Co., Inc.* (1989) 15 ALRB No. 11 reflects a reconciliation of the authority of the General Counsel and the Board that is consistent with both the ALRA and its implementing regulations. The General Counsel's final authority over the investigation of unfair labor practice charges and the issuance of complaints acts as a narrow limitation on the Board's exclusive authority over representation matters. *Mann Packing Co., Inc.* is settled law that is neither manifestly incorrect, nor has it proven unworkable in practice.
RICHARD'S GROVE & SARALEE'S VINEYARD, INC.,
33 ALRB No. 7

200.01 Employee who solely performed decorative landscaping work on dairy property without any operational connection to the dairy was not engaged in secondary agriculture because the work was not incidental to or in conjunction with the farming operation.
ARTESIA DAIRY, 33 ALRB No. 3

201.07 Nephews who were foster children living with employer at time of election were the functional equivalent of children and, therefore, excluded from eligibility under Regulation 20352.
ARTESIA DAIRY, 33 ALRB No. 3

201.14 The principal factors to be considered in determining if someone is an employee or an independent contractor are: 1) whether the worker performing services is engaged in a distinct occupation or business, 2) the worker's occupation, with a focus on whether the work is usually done under the direction of the principal or by the specialist without supervision, 3) the skill required in the particular occupation, 4) whether the principal or the worker provides the necessary tools and/or place of work, 5) the length of time necessary for the performance of the services, 6) the method of payment, including whether payment is based on time or on the job as a whole, 7) whether the work is part of the regular business of the principal, and 8) whether the parties believe they are creating an employer-employee relationship. Also included in the analysis must be factors such as 1) the remedial purpose of the legislation, 2) whether the alleged employees are within the intended reach of the legislation, and 3) the bargaining strengths and weaknesses of each party.

HENRY A. GARCIA DAIRY, 33 ALRB No. 4

201.14 To be covered under the Agricultural Labor Relations Act (ALRA; Labor Code sec. 1140, et seq.), a worker must be engaged in “agriculture” as defined in the statute and be an “employee” rather than an independent contractor. The exception is that under section 1140.4, subdivision (c), workers provided by a labor contractor are deemed to be the employees of the farmer engaging the labor contractor.

HENRY A. GARCIA DAIRY, 33 ALRB No. 4

204.03 Individual who responsibly directs work and in one instance effectively recommended transfer of employee, coupled with ample secondary indicia of supervisory status, is a supervisor ineligible to vote in representation election.

ARTESIA DAIRY, 33 ALRB No. 3

204.03 The fact that the work supervised is not complex and does not require close attention does not preclude a finding of supervisory status. (*Sourdough Sales, Inc.* (1979) 246 NLRB No. 20; *Colorflo Decorator Products, Inc.* (1977) 228 NLRB 408.)

ARTESIA DAIRY, 33 ALRB No. 3

204.04 Individual who responsibly directs work and in one instance effectively recommended transfer of employee, coupled with ample

secondary indicia of supervisorial status, is a supervisor ineligible to vote in representation election.

ARTESIA DAIRY, 33 ALRB No. 3

- 204.07 Individual who fills in one day a week as supervisor when regular supervisor has day off, and whose time as acting supervisor constitutes 16.7% of his worktime, spends “regular and substantial” time as a supervisor and is a supervisor ineligible to vote in a representation election. The percentage of time the individual holds the authority, not how much time is spent actively asserting the authority, is the relevant consideration.
ARTESIA DAIRY, 33 ALRB No. 3
- 312.01 The Board has consistently held that the Agricultural Labor Relation Act’s prescription for wall to wall bargaining units (absent operations in non-contiguous geographical areas) precludes the consideration of community of interest criteria.
ARTESIA DAIRY, 33 ALRB No. 3
- 312.01 The ALRB, when faced with the situation where an employee spends only a portion of their work time for a particular employer engaged in agriculture, consistently has applied the substantiality test found in “mixed work” cases. Where the employer is a sole proprietorship, there is no legal distinction between the employer as business owner and as an individual; therefore, employees who worked part-time at dairy and part-time as domestic workers may be considered to be working for the same employer.
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- 312.01 The principal factors to be considered in determining if someone is an employee or an independent contractor are: 1) whether the worker performing services is engaged in a distinct occupation or business, 2) the worker's occupation, with a focus on whether the

work is usually done under the direction of the principal or by the specialist without supervision, 3) the skill required in the particular occupation, 4) whether the principal or the worker provides the necessary tools and/or place of work, 5) the length of time necessary for the performance of the services, 6) the method of payment, including whether payment is based on time or on the job as a whole, 7) whether the work is part of the regular business of the principal, and 8) whether the parties believe they are creating an employer-employee relationship. Also included in the analysis must be factors such as 1) the remedial purpose of the legislation, 2) whether the alleged employees are within the intended reach of the legislation, and 3) the bargaining strengths and weaknesses of each party.

HENRY A. GARCIA DAIRY, 33 ALRB No. 4

312.01 To be covered under the Agricultural Labor Relations Act (ALRA; Labor Code sec. 1140, et seq.), a worker must be engaged in “agriculture” as defined in the statute and be an “employee” rather than an independent contractor. The exception is that under section 1140.4, subdivision (c), workers provided by a labor contractor are deemed to be the employees of the farmer engaging the labor contractor.

HENRY A. GARCIA DAIRY, 33 ALRB No. 4

312.01 Individuals providing services for agricultural employer who have independently organized businesses through which they perform the same service for numerous customers, provide their own equipment, are hired to do a distinct job requiring significant skill and apparently do so without supervision, set their own payment rates, bill their customers through invoices, pay their own taxes, hold themselves out as separate businesses, and are treated by the employer for tax purposes as independent contractors, are independent contractors ineligible to vote. These types of individuals are not within the intended reach of the ALRA. They each have sufficient bargaining strength, by virtue of their independent business and broad customer base, to have an “arms length” relationship with the Employer, without the provision of collective bargaining rights.

HENRY A. GARCIA DAIRY, 33 ALRB No. 4

312.01 While the fact that an individual is not on the regular payroll and/or is paid in cash creates no presumption of ineligibility, irregular payment practices may be probative evidence of independent

contractor status when viewed in the context of other evidence and the circumstances as a whole.

HENRY A. GARCIA DAIRY, 33 ALRB No. 4

- 312.04 Individual who fills in one day a week as supervisor when regular supervisor has day off, and whose time as acting supervisor constitutes 16.7% of his worktime, spends “regular and substantial” time as a supervisor, is a supervisor ineligible to vote in a representation election. The percentage of time the individual holds the authority, not how much time is spent actively asserting the authority, is the relevant consideration.
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- 312.05 Nephews who were foster children living with employer at time of election were the functional equivalent of children and, therefore, excluded from eligibility under Regulation 20352.
ARTESIA DAIRY, 33 ALRB No. 3
- 312.06 Employee who solely performed decorative landscaping work on dairy property without any operational connection to the dairy was not engaged in secondary agriculture because the work was not incidental to or in conjunction with the farming operation.
ARTESIA DAIRY, 33 ALRB No. 3
- 312.06 Challenge to ballot of woman who cleaned at dairy on a weekly basis, as well as at the owner’s house, set for hearing, as evidence gathered in investigation insufficient to establish if she is an independent contractor. While she provides the same service to 18 other clients and no taxes are withheld, her work is not specialized or particularly skilled, nor does she provide her own equipment or supplies. Helpful information would include the level of supervision she receives, the amount of discretion she has in determining when and how she performs the work, whether she sets her wage rate, etc.
HENRY A. GARCIA DAIRY, 33 ALRB No. 4
- 312.11 If worker hurt on the job had not been replaced legally by the time of the election, he would have worked but for the injury and thus was

eligible to vote. It is not necessary that the worker in addition have a reasonable expectation to return to work, as mistakenly suggested in *Cocopah Nurseries, Inc.* 27 ALRB No. 3, which is overruled.
ARTESIA DAIRY, 33 ALRB No. 3

314.06 Requiring disputed voters to vote by challenged ballot does not result in disenfranchisement, as challenged voters indeed are allowed to vote and their ballots simply are segregated pending resolution of their eligibility.

HENRY A. GARCIA DAIRY, 33 ALRB No. 4

314.06 Disputed voters may be left on the eligibility list, as this ensures that their votes will be challenged so that their eligibility can be resolved before their vote is counted. As explained by the Board in ARTESIA DAIRY (2006) 32 ALRB No. 3, there is nothing inherently wrong with such a procedure as long as no evidentiary burden is allocated as a result.

HENRY A. GARCIA DAIRY, 33 ALRB No. 4

321.01 The ALRB, unlike the NLRB, does not assign a burden of proof in representation proceedings. Rather, the party supporting a challenge, including one alleging that a voter is a supervisor, has only a burden of production.

ARTESIA DAIRY, 33 ALRB No. 3

321.02 *Mann Packing Co., Inc.* (1989) 15 ALRB No. 11 reflects a reconciliation of the authority of the General Counsel and the Board that is consistent with both the ALRA and its implementing regulations. The General Counsel's final authority over the investigation of unfair labor practice charges and the issuance of complaints acts as a narrow limitation on the Board's exclusive authority over representation matters. *Mann Packing Co., Inc.* is settled law that is neither manifestly incorrect, nor has it proven unworkable in practice.

RICHARD'S GROVE & SARALEE'S VINEYARD, INC.,
33 ALRB No. 7

321.02 Under *Mann Packing Co., Inc.* (1989) 15 ALRB No. 11, in both challenged ballot and election objection cases, the Board will defer to the General Counsel's resolution of the investigation of an unfair labor practice charge where the merits of the issues necessarily decided by the investigation also are determinative of the merits of related issues in the representation case. It is more than the mere existence of identical issues that triggers this rule, as it is well

established that conduct sufficient to warrant the setting aside of an election does not necessarily constitute an unfair labor practice, and not all unfair labor practices necessarily constitute conduct sufficient to set aside an election. (See, e.g., *ADIA Personnel Services* (1997) 322 NLRB 994, fn. 2.) Thus, it is only where the issues in the two proceedings are coextensive in terms of their legal merit that the Board is bound by the General Counsel's determination.

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RICHARD'S GROVE & SARALEE'S VINEYARD, INC.,
33 ALRB No. 7

323.01 That challenged ballot declarations written in English (though read to declarants in Spanish) and taken prior to voting, while reasonable concerns, did not warrant discrediting of declarations, especially where at hearing declarants made dubious wholesale denials of the contents of their declarations, rather than more credibly disagreeing over details or nuances.

ARTESIA DAIRY, 33 ALRB No. 3

323.08 The ALRB, unlike the NLRB, does not assign a burden of proof in representation proceedings. Rather, the party supporting a challenge, including one alleging that a voter is a supervisor, has only a burden of production.

ARTESIA DAIRY, 33 ALRB No. 3

324.02 Under *Mann Packing Co., Inc.* (1989) 15 ALRB No. 11, in both challenged ballot and election objection cases, the Board will defer to the General Counsel's resolution of the investigation of an unfair labor practice charge where the merits of the issues necessarily decided by the investigation also are determinative of the merits of

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contents of their declarations, rather than more credibly disagreeing over details or nuances.

ARTESIA DAIRY, 33 ALRB No. 3

- 325.01 Challenged ballot declarations taken by a Board agent with no interest in the outcome of the election are inherently more credible than those later taken by an interested party.
ARTESIA DAIRY, 33 ALRB No. 3
- 325.04 The ALRB, unlike the NLRB, does not assign a burden of proof in representation proceedings. Rather, the party supporting a challenge, including one alleging that a voter is a supervisor, has only a burden of production.
ARTESIA DAIRY, 33 ALRB No. 3
- 432.02 Mere claims that the underlying representation decision was wrongly decided does not constitute “extraordinary circumstances” warranting reconsideration of the decision.
ARTESIA DAIRY, 33 ALRB No. 6
- 432.02 Documents that were available far before the date of hearing, the content of which had to have been known at that time in order for the related claim to have merit, do not constitute “newly discovered” or “previously unavailable” evidence warranting reconsideration.
ARTESIA DAIRY, 33 ALRB No. 6
- 444.01 Before employees can be obligated to pay dues under a union security clause or requested to file a dues checkoff authorization, the union must give them a notice of their rights to object to use of dues for purposes other than direct representation of the bargaining unit. (*Breaux v. ALRB* (1990) 217 Cal.App.3d 730.)
UFW (VIRGEN/MENDOZA), 33 ALRB No. 2
- 444.01 Board found that standards stated in *Breaux* rather than the duty of fair representation standard applied by the NLRB in *California Saw & Knife* (1995) 320 NLRB 224 govern a union’s duty under the ALRA to inform employees of their rights to object to use of dues required under a union security clause for purposes not directly related to representation of bargaining unit.

UFW (VIRGEN/MENDOZA), 33 ALRB No. 2

- 444.01 Inclusion of *Breaux* notice under unrelated cover letter that did not refer to the *Breaux* notice was insufficient to satisfy the obligation to give employees notice of their *Breaux* rights. Face of written materials containing *Breaux* notice must refer to the presence of the notice prominently and in all appropriate languages.
UFW (VIRGEN/MENDOZA), 33 ALRB No. 2
- 444.01 Hand delivery of *Breaux* as conducted in this case constitutes sufficient manner of giving notice. Mailing is not required.
UFW (VIRGEN/MENDOZA), 33 ALRB No. 2
- 444.05 *Breaux v. ALRB* (1990) 217 Cal.App.3d 730 interpreted the member in good standing provisions of section 1153(c), which are expressly made subject to free speech and due process rights for members, as a statutory adoption of principles laid out in seminal Supreme Court cases regarding employees' right to object to paying for a union's non-representational activities.
UFW (VIRGEN/MENDOZA), 33 ALRB No. 2
- 444.13 *Breaux v. ALRB* (1990) 217 Cal.App.3d 730 interpreted the member in good standing provisions of section 1153(c), which are expressly made subject to free speech and due process rights for members, as a statutory adoption of principles laid out in seminal Supreme Court cases regarding employees' right to object to paying for a union's non-representational activities.
UFW (VIRGEN/MENDOZA), 33 ALRB No. 2
- 463.03 Early notification of intent to engage in technical refusal to bargain is some evidence of good faith challenge to underlying representation decision.
ARTESIA DAIRY, 33 ALRB No. 6

- 463.03 In light of the substantial evidence standard of review of the Board's factual findings, in the Board's view a close factual question does not in and of itself provide a reasonable litigation posture.
ARTESIA DAIRY, 33 ALRB No. 6
- 463.03 Where novel legal issues requiring clarification or extension of existing law governed the resolution of five challenges and the margin of victory in the election was two votes, it was reasonable to seek judicial review, thus the bargaining makewhole remedy was not appropriate.
ARTESIA DAIRY, 33 ALRB No. 6
- 466.04 Notice to Agricultural Employees shall be included with *Breaux* notice required by Board order.
UFW (VIRGEN/MENDOZA), 33 ALRB No. 2
- 700.01 Constitutionality of the MMC statute has been upheld by the courts (*Hess Collection Winery v. ALRB* (2006) 140 Cal.App.4th 1584.) and, in any event, the Board has no authority to declare a statute unconstitutional (Cal. Const., art. 3, sec. 3.5.)
D'ARRIGO BROS. CO., 33 ALRB No. 1
- 700.03 Section 1159 of the ALRA prohibits contracts with uncertified labor organizations, but only contracts entered into after the effective date of the ALRA. A contract whose duration expired prior to the passage of the ALRA was legally valid during its existence and the passage of the ALRA had no retroactive effect upon that status. However, such a contract is not disqualifying under Labor Code section 1164.11, subdivision (c).
D'ARRIGO BROS. CO., 33 ALRB No. 1
- 700.03 Requirement that there have been no binding contract between the parties refers only to contracts entered into after certification of the labor organization under the provisions of the ALRA. Therefore, pre-ALRA contracts are not disqualifying.
D'ARRIGO BROS. CO., 33 ALRB No. 1
- 700.06 Finding of unfair labor practice (ULP) pending review of appellate court is not final and, therefore, not a qualifying ULP.
D'ARRIGO BROS. CO., 33 ALRB No. 1

- 700.06 Board may take official notice of qualifying unfair labor practices rather than relying on cases cited by party submitting request for mediation.
D'ARRIGO BROS. CO., 33 ALRB No. 1
- 701.01 The reference in Regulation 20400 allowing “documentary and other evidence” to be filed in support of a declaration does not preclude the submission of argument in support of a party’s declaration that the statutory prerequisites for invoking the mandatory mediation process have been met.
D'ARRIGO BROS. CO., 33 ALRB No. 1

* There were no published court decisions issued in 2007 relating to the Agricultural Labor Relations Act.