

STATE OF CALIFORNIA
AGRICULTURAL LABOR RELATIONS BOARD

ALBERT GOYENETCHE DAIRY,)	Case No. 02-RC-1-VI
a Sole Proprietorship,)	
)	28 ALRB No. 5
Employer,)	
)	(June 20, 2002)
and)	
)	
U.F.C.W. AFL-CIO CLC, FRESH)	
FRUIT & VEGETABLE WORKERS)	
LOCAL 1096,)	
)	
Petitioner.)	
_____)	

DECISION ON CHALLENGED BALLOTS AND
CERTIFICATION OF REPRESENTATIVE

An election was held on February 22, 2002 among the agricultural employees of Albert Goyenette Dairy, a Sole Proprietorship (Employer). The tally of ballots shows that fifteen votes were cast for the Petitioner, U.F.C.W. AFL-CIO CLC, Fresh Fruit & Vegetable Workers Local 1096 (Local 1096), fourteen votes were cast for “no union,” and there was one unresolved challenged ballot. As the challenged ballot was outcome determinative, the Regional Director conducted an investigation and issued his Challenged Ballot Report on March 8, 2002. In that report, the Regional Director concluded that the challenged voter, Jose Luis Isusquiza (Isusquiza), was a supervisor and that, therefore, the challenge should be upheld. Upon review of the Employer’s

exceptions to the challenged ballot report, the Board ordered a hearing to take evidence on the issue of whether Isusquiza is a supervisor and, thus, ineligible to vote in the election. (*Albert Goyenette Dairy* (2002) 28 ALRB No. 2.) The hearing was held on April 18, 2002. On May 8, 2002, the Investigative Hearing Examiner (IHE) issued the attached decision, in which she found that Isusquiza is a statutory supervisor and recommended that the challenge to his ballot be sustained. The Employer filed timely exceptions to the IHE's decision.

The Board has considered the record and IHE's decision in light of the exceptions filed by the Employer and affirms the IHE's findings of fact and conclusions of law, and adopts her recommended decision.

ORDER AND CERTIFICATION OF REPRESENTATIVE

The IHE's decision sustaining the challenge to the ballot of Jose Luis Isusquiza is hereby AFFIRMED. Accordingly, U.F.C.W., AFL-CIO CLC, Fresh Fruit & Vegetable Workers Local 1096 is hereby certified as the exclusive bargaining representative of all of the agricultural employees of Albert Goyenette Dairy, a Sole Proprietorship, located at 6041 Brandt Road, Buttonwillow, County of Kern, California.¹

DATED: June 20, 2002

GENEVIEVE A. SHIROMA, Chairwoman

GLORIA A. BARRIOS, Member

HERBERT O. MASON, Member

¹ No election objections were filed in this case.

CASE SUMMARY

ALBERT GOYENETCHE DAIRY,
A Sole Proprietorship
(U.F.C.W. AFL-CIO CLC,
Fresh Fruit & Vegetable Workers Local 1096)

Case No. 02-RC-1-VI
28 ALRB No. 5

Background

An election was held on February 22, 2002 among the agricultural employees of Albert Goyenette Dairy, a Sole Proprietorship (Employer). The tally of ballots shows that fifteen votes were cast for the Petitioner, U.F.C.W. AFL-CIO CLC, Fresh Fruit & Vegetable Workers Local 1096 (Local 1096), fourteen votes were cast for “no union,” and there was one unresolved challenged ballot. As the challenged ballot was outcome determinative, the Regional Director conducted an investigation and issued his Challenged Ballot Report on March 8, 2002. In that report, the Regional Director concluded that the challenged voter was a supervisor and that, therefore, the challenge should be upheld. Upon review of the Employer’s exceptions to the challenged ballot report, the Board ordered a hearing to take evidence on the issue of whether Jose Luis Isusquiza (Isusquiza) is a supervisor and, thus, ineligible to vote in the election. (*Albert Goyenette Dairy* (2002) 28 ALRB No. 2.) The hearing was held on April 18, 2002. On May 8, 2002, the Investigative Hearing Examiner (IHE) issued her decision, in which she found that Isusquiza is a statutory supervisor and recommended that the challenge to his ballot be sustained. The Employer filed timely exceptions to the IHE’s decision.

Board Decision

The Board summarily affirmed the IHE’s decision and certified Local 1096 as the exclusive bargaining representative. In reaching her conclusion that Isusquiza was a supervisor, the IHE relied, inter alia, on the following: 1) credited testimony reflecting that Isusquiza had hired employees or at least effectively recommended such actions and had granted requests for time off, 2) Isusquiza’s declaration at the time of the election in which he stated that he supervised employees and could recommend hiring and firing, 3) the Employer’s admission that at the time Isusquiza was hired it was intended that he would be a supervisor and this was announced to the employees, 4) the Employer’s admission that neither the employees nor Isusquiza was informed that he would not be a supervisor as planned, 5) Isusquiza’s listing on payroll records as a “foreman” at the time of the election, and 6) Isusquiza’s salary, which was \$500 dollars per month more than the next highest paid employee.

* * *

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

State of California
AGRICULTURAL LABOR RELATIONS BOARD Estado de California
CONSEJO DE RELACIONES DEL TRABAJO AGRICOLA

In The Matter of:

ALBERT GOYENETCHE DAIRY,
A Sole Proprietorship,

Employer,

and

U.F.C.W. AFL-CIO CLC, FRESH FRUIT
& VEGETABLE WORKERS LOCAL 1096

Petitioner.

Case No. **02-RC-1-VI**

Caso Núm.

CERTIFICATION OF REPRESENTATIVE
CERTIFICACION DEL REPRESENTANTE

An election having been conducted in the above matter under the supervision of the Agricultural Labor Relations Board in accordance with the Rules and Regulations of the Board; and it appearing from the Tally of Ballots that a collective bargaining representative has been selected; and no petition filed pursuant to Section 1156.3(c) remaining outstanding;

Habiéndose conducido una elección en el asunto arriba citado bajo la supervisión del Consejo de Relaciones de Trabajadores Agrícolas de acuerdo con las Reglas y Regulaciones del Consejo; y apareciendo por la Cuenta de Votos que se ha seleccionado un representante de negociación colectiva; y que no se ha registrado (archivado) una petición de acuerdo con la Sección 1156.3(c) que queda pendiente;

Pursuant to the authority vested in the undersigned by the Agricultural Labor Relations Board, IT IS HEREBY CERTIFIED that a majority of the valid ballots have been cast for

De acuerdo con la autoridad establecida en el suscribiente por el Consejo de Relaciones de Trabajadores Agrícolas, por LA PRESENTE SE CERTIFICA que la mayoría de las balotas válidas han sido depositadas en favor de

U.F.C.W., AFL-CIO CLC, FRESH FRUIT & VEGETABLE WORKERS LOCAL 1096

and that, pursuant to Section 1156 of the Agricultural Labor Relations Act, the said labor organization is the exclusive representative of all the employees in the unit set forth below, found to be appropriate for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment.

y que, de acuerdo con la Sección 1156 del Acto de Relaciones de Trabajadores Agrícolas, dicha organización de trabajadores es el representante exclusivo de todos los trabajadores en la unidad aquí implicada, y se ha determinado que es apropiada con el fin de llevar a cabo negociación colectiva con respecto al salario, las horas de trabajo, y otras condiciones de empleo.

UNIT: All of the Agricultural Employees of the Employer located at 6041 Brandt Road, Buttonwillow, County of Kern, California.

UNIDAD:

Signed at Sacramento, California
on the 21th day of June, 2002

Firmado en Sacramento, California
En el 21th día de Junio, 2002

On behalf of
AGRICULTURAL LABOR RELATIONS BOARD

De parte del
CONSEJO DE RELACIONES DEL TRABAJO AGRICOLA2

**STATE OF CALIFORNIA
AGRICULTURAL LABOR RELATIONS BOARD**

In the Matter of:)	Case No. 02-RC-1-VI
)	
ALBERT GOYENETCHE DAIRY,)	
a Sole Proprietorship,)	
)	
Employer,)	
)	
and)	
)	
U.F.C.W., AFL-CIO CLC, FRESH)	
FRUIT & VEGETABLE WORKERS)	
LOCAL 1096,)	
)	
<u> Petitioner.</u>)	

DECISION OF THE INVESTIGATIVE HEARING EXAMINER

NANCY C. SMITH: Investigative Hearing Examiner: I heard this case in Bakersfield, California on April 18, 2002. It involves a challenge to a ballot cast in an election among the agricultural employees of Albert Goyenette Dairy on February 22, 2002. The Tally of Ballots showed:

Fresh Fruit & Vegetable Workers, Local 1096	15
No Union	14
Challenged Ballots	1

Because the challenged ballot was sufficient to affect the outcome of the election, the Regional Director of the Board's Visalia office conducted an investigation. He issued his report on March 8, 2002, recommending that the challenge to the ballot of Jose Luis Isusquiza be sustained, as he found that Isusquiza was a supervisor within the meaning of ALRA section 1140.4(j) and unable to vote in the election.

Albert Goyenette Dairy (Dairy or employer) filed exceptions to the Regional Director's Challenged Ballot Report on March 19, 2002. In *Albert Goyenette Dairy (2002) 28 ALRB No. 2*, the Board considered the exceptions and the supporting declarations and found that the declarations raised issues of material fact that required an evidentiary hearing to resolve. The Board set the following for hearing:

[W]hether Mr. Isusquiza is a supervisor and, thus, ineligible to vote in the election.

FACTS

Albert Goyenette Dairy is located in Buttonwillow, California. The Dairy is owned by Albert Goyenette and managed by his two sons, Mike Goyenette and John Goyenette.

The Buttonwillow operation was designed for 3600 dairy cows and 4000 heifers. (RT 164:10)¹
The Dairy employs 30 workers: 12 milkers, two pushers, four feeders, two maternity workers, two hospital workers, two breeders, a janitor, four general farm hands, and Jose Luis Isusquiza, who at the hearing was identified as a senior herdsman. (RT 114-120; 19-20; see also RDX # 2.)

At the time the petition for certification was filed, the Dairy provided a list of all agricultural employees with their job classifications and addresses. (RDX#2) The Dairy also provided a payroll list. (RDX #3) Jose Luis Isusquiza's name was not included on the list of workers eligible to vote in the election, although he was on the payroll listing. His name was not on the eligibility list because on the employee list provided to Goyenette's attorney, Isusquiza was listed as a foreman. Apparently the Goyenettes' attorney determined that Isusquiza was a statutory supervisor, and he did not include Isusquiza's name on the eligibility list provided to the Regional Director. (RT 160: 20-23; 161: 1-10.)

At the day and time set for the election, Isusquiza went to the polling site and, because his name was not on the eligibility list, he was told that he was not eligible to vote. Isusquiza was referred to the ALRB field agent in charge of the election, who took a declaration from him and permitted him to vote a challenged ballot. (RT 87: 11-25; 88: 4-8.) According to the Board agent, Jenny Diaz, her conversation with Isusquiza was in English. (RT 216:1-6.) He told her that he supervised the dairy workers and could recommend hiring or termination of dairy employees. He said "he told all the workers what to do." (RT 92: 6-8.) He additionally told her that he was paid a salary of \$4000.00. (RT 88: 12-25; 89: 1-10; 91: 18-25; 92: 1-10; see also

¹ References to the Reporter's Transcript will be to the page and the lines. References to the exhibits will be to the party offering and the exhibit number, e.g. RDX #1, for Regional Director Exhibit, number 1.

RDX #4, Isusquiza's challenged ballot declaration.)²

At the hearing, Isusquiza said that his conversation with Diaz was in Spanish. (RT 207: 7-11.) He stated that he could not read the declaration that Diaz prepared for his signature, and he signed it without its being read to him. (RT 185: 4-11.) Contrary to the statements in his declaration, Isusquiza said that he did not tell the Board agent that he had authority to "get workers" or to fire them; he said that he told her that he would have to ask Mike. (RT 183: 4-10.) He denied that he ever told her that he supervised workers. He first said that the Board agent did not ask him if he told the workers what to do. (RT 208: 7-14.) Then he reversed himself and said that she did ask him "Do you tell the workers what to do?" and that he had replied that he "didn't boss them." (RT 208: 23-24.)

Isusquiza testified that he started working in the Buttonwillow dairy in November 2000, and he had 25-26 years' experience in dairy work, previously working in Goyenette dairies in Chino and Corona. He stated that he did not hire or fire workers. (RT 179: 13-16, 22-24; 180: 9-14.) He also stated that he could not authorize time off or vacation time, he simply passed such requests on to Mike or John Goyenette, and they made the decision. (RT 198: 1-8.) Apart from his work as a senior herdsman, which includes filling in two days each week in the hospital and maternity positions and sorting cows, Isusquiza also translates for the two brothers, who speak little or no Spanish. (RT 120: 13-25; 128: 1-7; 178, 179, 180: 3-6.)

Although Isusquiza downplayed his role at the Dairy, he did say that Albert Goyenette asked him to go to the Buttonwillow dairy, because his sons could not talk to the workers. (RT

² Isusquiza did not really explain why he told Ms. Diaz that his salary was \$4000.00 per month. He stated that "they" should have known what his salary was. He did agree that he told her that he received \$4000.00 per month, even though he testified that he actually receives \$3500.00 each month.

189: 22-24.) Isusquiza said that Albert told him that “no one was doing the work right.” (RT 191: 9-12.) Isusquiza said that he was told by John and Mike that he would be making sure that “everything is fine” and that “all jobs were done right.” (RT 190 : 1-4; 191: 7-10.) Although Isusquiza said that John or Mike did not tell him that he would be a foreman, in the Goyenette Dairy Newsletter, which was distributed to the Dairy employees in November 2000, the Goyenettes announced:

We have a new director who will be starting this month.
Jose Luis Isusquiza has been working for us for 25 years.
Jose Luis will be leaving our Dairy in Chino to help
manage this Dairy. He shall have authority over all employees.
Whatever question or concern can be brought to him also. (Sic.)

(RDX #1; see English translation attached to the exhibit.)

According to Mike Goyenette’s and Isusquiza’s testimony at the hearing, Isusquiza’s salary at the Buttonwillow dairy is \$3500.00 per month. His salary at the Chino and Corona dairies had been \$3000.00 per month. Other workers at the Dairy are paid monthly as follows: breeders--\$3000.00; hospital workers--\$2400.00; milkers--\$2200.00. (RT 123: 21-25.) The others are paid less than \$2200.00 per month. All employees receive health insurance benefits. (RT 124: 14-20.) Isusquiza does not receive any benefit that is not also provided to other workers. (RT 124: 21-23.)

Mike Goyenette testified that Isusquiza could not hire, fire, or assign workers to any jobs around the Dairy. (RT 131: 18-20; 140: 15-24.) According to Goyenette, Isusquiza was never involved in decision-making at the Dairy. He stated that he and his brother were at the Dairy every day, and they were essentially in charge of every aspect of the operation of the Dairy. (RT 125: 4-5; 8-25; 126: 1-3.) He testified that sometime after Isusquiza started at the Buttonwillow dairy, he and his brother made the decision that Isusquiza would not be a

manager/supervisor at the Dairy. (RT 151: 3-10.) He said that neither he nor John communicated this change in plans to Isusquiza or the other workers. (RT 152: 4-13.)

In explaining the Dairy's hiring procedures, Goyenetche said that he and his brother interviewed all prospective employees, checked on their experience, and then tried them out working at the Dairy. (RT 130: 15-17.) He said that the Dairy had stopped the newsletter a month or two after Isusquiza started working at the Buttonwillow dairy; since Isusquiza could translate for them, they did not think that they needed the newsletter any longer to communicate with their workers. (RT 129: 5-20.)³ Goyenetche identified Isusquiza as a senior herdsman, not a manager or supervisor. (RT 120: 13-20.) He did acknowledge that the position of senior herdsman at a dairy is sometimes a supervisory position, although he denied that such was the case at Albert Goyenetche Dairy. (RT 174: 17-24.)

In addition to Isusquiza, three other Goyenetche employees testified. Jose Granados testified that he had been working at the Albert Goyenetche Dairy for one year. (RT 18: 18-20.) He testified unequivocally that Isusquiza had hired him. (RT 19: 7-24; 20: 7-18; 25: 17-24; 26: 1-5.) He said that after he had been working as a milker for three days, Isusquiza brought him an application. (RT 20: 19-25.) He stated that Isusquiza first told him that the job might be temporary, but later told him that he would have work permanently. (RT 38: 14-24.) He denied that he had ever spoken to the owners of the Dairy regarding his job. (RT 21: 4-6.)

Granados also testified that Isusquiza gave him permission to take a half-day off to take

³ Mike Goyenetche testified that there are four employees who are bilingual and who translate for him and John. (RT 144: 15-17.) This would seem to suggest that another reason might lie behind the decision to discontinue the newsletter as a means to communicate with the workers: the arrival of Isusquiza as a bilingual supervisor.

care of a court matter. (RT 22: 13-25; 35: 1-8; 36: 7-10.)⁴ Granados and the two other workers who testified said that on the notice board in the milking barn, there were the names and telephone numbers of John Goyenetche, Mike Goyenetche, and Jose Luis Isusquiza. The three workers recalled that the word “manager” was by Isusquiza’s name. (RT 21: 15-23; 22: 7-12; 49: 21-25; 71: 5-25; 79: 13-25; 80:1.) Granados also said that Isusquiza reviewed the production records and discussed production problems with Granados and the other milkers, and checked up on their work. (RT 31: 8-11,15-25; 32: 1-7; 41: 10-22.)

Ernesto Cholico, also a milker, has worked at the Dairy for two years. (RT 44: 23-24.) He described Isusquiza as the one who “orders the people around.” (RT 45: 3-9.) Cholico reported that when there are problems, Isusquiza explains what is wrong and “explains all things to us.” (RT 45: 15-16; 20-23.) Cholico remembered the Goyenetche newsletter reporting Isusquiza’s arrival. (RT 49: 1-8.) He understood from the newsletter that if he had a problem, he should tell Isusquiza, and Isusquiza would talk to Mike or John Goyenetche. He understood that Isusquiza was coming to the Dairy so he “would take care of the people.” (RT 50: 12-21.) Cholico reported that no one ever told him that Isusquiza was no longer the workers’ supervisor. (RT 49: 11-17.) He also testified that the names had been removed from the notice board a short time after the election. (RT 50: 1-11.) According to Cholico, Isusquiza came into the milking barn on a daily basis to check on the work, and Isusquiza talked about production with the milkers. (RT 47: 20-25; 62: 13-25; 63- 1-14.) Cholico also testified that if the workers were going to miss work they had to call Isusquiza, so he could advise the Goyenetches. He said that they were supposed to let Isusquiza know “[b]ecause he’s the one mostly in charge.” (RT 58:

⁴ Isusquiza initially testified that he did not remember Granados ever asking for a day off or leaving for a half-day. (RT 192: 1-6.) Then he said that he remembered Granados telling him that he had a court appointment and needed a half-day. Then he said that he did not remember Granados’ asking him for time off to go to court. (RT 192: 7-15.)

11-23.)

Edgar Villela worked at the Dairy for more than two years as a milker at the time of the hearing. (RT 68: 15-19.) He too remembered receiving the Goyenette newsletter announcing Isusquiza's arrival. (RT 69: 1-16.) Neither John nor Mike Goyenette ever told him that Isusquiza was no longer in charge of the workers. (RT 70: 2-8.) He stated that if any problems with the machinery arose, he told Isusquiza, since "[h]e's the manager." (RT 71: 2-4.) Villela said that the prior foreman, a man by the name of John Viveiros, hired him. He confirmed that Isusquiza hired Granados; he said that he saw Granados talking to Isusquiza, and then Granados started the next day. (RT 73: 8-19; 74: 5-16.) He also said that Isusquiza tells the workers of scheduling changes and assigns workers if a milker is absent. According to Villela, Mike or John Goyenette assign workers if Isusquiza is not around. (RT 82: 18-23.) He said that Isusquiza had never translated for him with Mike Goyenette, other of the employees did so. (RT 76: 17-18.)

The Regional Director also provided the declaration of Augustin Guerrero. In that sworn declaration, Guerrero states that he was terminated by Isusquiza when he failed to appear for work due to car problems. He states that after he learned of a vacancy at the Dairy, he went and spoke with Mike Goyenette who told Guerrero that he needed to check with Isusquiza to see if Isusquiza had filled the position. Guerrero says that he returned to the Dairy that evening and waited while Goyenette spoke with Isusquiza, and then Isusquiza told him that he could start work the next day. Guerrero was unavailable to testify as he was in Mexico. (RDX #5.)⁵

⁵ The Employer objected to the admission of Guerrero's declaration on hearsay grounds, claiming the declaration was unreliable. However, the Board's regulations provide that hearsay is admissible to supplement or explain other evidence. (Section 20370(d).) In this instance, Guerrero's statements supplement other testimony regarding Isusquiza's authority to hire. Moreover, much of what is in his declaration is confirmed by the testimony of Mike

Mike Goyenette and Isusquiza challenged Guerrero's version of his termination and subsequent rehire. Isusquiza testified that Guerrero told him that Mike had fired him, and that Mike made the decision to hire him back. (RT 187: 23-25; 188: 1-7; 196: 18-22; 198: 20-21.) Mike Goyenette testified that Guerrero was replaced when he failed to report for work, and that he was rehired, with one of the veterinarians translating for them. (RT 132: 21-25; 133: 1-11; 134: 11-21.) In his earlier declaration, Goyenette stated that when Guerrero came to him to inquire about a vacancy at the Dairy, a veterinarian who was not a Dairy employee, translated for Guerrero and Goyenette, and Goyenette told Guerrero to come back later when Isusquiza was available to translate for him. (See Exhibit A to Exception to Regional Director's Challenged Ballot Report.)

ANALYSIS

Jose Luis Isusquiza will be found to be a supervisor and thus ineligible to vote if he meets any one of the criteria enumerated in section 1140.4(j) of the ALRA, which provides that a supervisor is:

Any individual having the authority in the interest of the employer, to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward, or discipline other employees, or the responsibility to direct them or to adjust their grievances or effectively to recommend such action, if...the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

Dairy Fresh Products (1977) 3 ALRB No. 70, p. 5.) The burden of proof is on the party claiming supervisory status, in this case, petitioner United Food & Commercial Workers, Fresh Fruit & Vegetable Workers, Local 1096. (*NLRB v. Kentucky River Community Care Inc.* (2001)

Goyenette and Isusquiza, as well as Exhibit A to the Exceptions to the Regional Director's Challenged Ballot Report.

532 U.S. 706; 121 S.Ct. 1861; *King Broadcasting Co. d/b/a KGW-TV* (1999) 329 NLRB No. 39.)⁶ The NLRB has deemed it necessary to proceed cautiously in finding supervisor status because supervisors are excluded from the protections of section 7 of the NLRA. (*Entergy Gulf States, Inc. v. NLRB* (5th Cir. 2001) 253 F3d 203; *East Village Nursing & Rehabilitation Center v. NLRB* (D.C. Cir. 1999) 165 F3d 960, 962.)

Courts considering the interpretation of section 2(11) of the NLRA, the analog of the ALRA's section 1140.4(j), have observed that such questions are deeply fact-intensive. (*Brusco Tug & Barge Co.* (D.C. Cir. 2001) 247 F3d 273) In determining supervisory status, the Board's obligation is to enquire into actual duties, not merely job titles or classification. (*Longshoremen v. Davis* (1986) 476 U.S. 380, 106 S.Ct. 1904, 1915, fn.13; *Carlisle Engineered Products, Inc.* (2000) 330 NLRB No. 189.) The national board and the federal courts give little weight to job descriptions that attribute supervisory authority to an employee without independent evidence of its exercise. (*Chevron USA Inc.* (1992) 309 NLRB 59, 62.) Supervisory status does not depend on the exercise of the authority set forth in section 1140.4(j) for all or any definite part of the employee's time. A supervisor may spend most of his/her time doing the same work as other employees. (*American Diversified Foods, Inc. v. NLRB* (7th Cir. 1981) 640 F2d 893; *Graves Trucking Inc.* (1979) 246 NLRB 344, 348, enf'd in part (7th Cir. 1982) 692 F2d 470.)

The testimony offered by petitioner and the employer regarding Isusquiza's role at the

⁶ In this case, the Employer originally determined that Isusquiza is a statutory supervisor and thus did not include him on the list of eligible voters. Since he was not on the list, Isusquiza voted a challenged ballot. The Regional Director's investigation followed, upholding the challenge to Isusquiza's ballot based on his supervisor status. At the time of the hearing, the Employer was directly challenging the determination that Isusquiza is a statutory supervisor, while the Union was claiming that Isusquiza is indeed a supervisor. Although it was the Dairy's initial claim that initiated these proceedings, the issue of which party bore the burden of proof need not be resolved in this case since the issue of supervisor status was fully litigated and I have decided it based on the preponderance of the evidence which supports a finding that Isusquiza is a statutory supervisor.

Dairy was diametrically opposed. For the reasons set forth below, based on the record as a whole, including my observations of the witnesses, I conclude that Isusquiza could hire employees for the Dairy. I make that finding based on the testimony of Jose Granados, which is supported by that of Edgar Villela.⁷ Although one part of Granados' testimony lacks credibility,⁸ it is not disputed that he has been employed at the Dairy for one year, and I credit his testimony that Isusquiza hired him and brought him the job application and that he did not meet the Goyenette brothers during the hiring process.

Mike Goyenette testified that he did not know how Granados was hired and that he had never known his brother to hire any employees without talking to him first. (RT 146: 3-6.)⁹ Isusquiza said that he gave Mike Goyenette Granados' telephone number and then Mike told him to call Granados and offer him a job a few days after Granados came to the Dairy looking

⁷ Generally, I credit the corroborative testimony of Granados, Cholico, and Villela, since they are all still employed by Goyenette Dairy and are not discriminated with a direct financial interest in the outcome of the proceedings. (*Stanford Realty Associates, Inc.* (1992) 306 NLRB 1061, 1064.)

⁸ Specifically, his testimony that Isusquiza told him to go into the barn and try out milking on his own, without being observed by Isusquiza, does not seem credible. (RT 28: 1-11, 23-25.) Granados testified that he had four years' experience milking and that he told Isusquiza about that experience. There would not seem to be any need for Granados to "try out" the milking process at the Dairy, especially with no Dairy supervisor present. Villela testified that Granados did not come into the milking barn the day that he first talked to Isusquiza. (RT 80: 23-25.) Although the Employer argues that Granados' entire testimony should be disregarded, it cannot be disputed that Granados was hired and his account of the hiring is otherwise credible and supported by the record. Moreover, even if a witness's testimony is not credible in some respects, it does not follow that it is not credible in all respects. (*American Pine Lodge Nursing & Rehabilitation Center* (1997) 325 NLRB 98, fn. 1; *Colorflo Decorator Products* (1997) 228 NLRB 408, 415, enf'd (9th Cir. 1978) 582 F2d 1289.)

⁹ John Goyenette started at the Dairy in June 2000, and Mike Goyenette trained him in managing the Dairy. (RT 113: 23-25; 114: 1-8.)

for work. (RT 192: 21-24.) Isusquiza's testimony on this point directly contradicts Mike Goyenette's testimony that he did not know how Granados was hired and that he and his brother always met and interviewed prospective employees. (RT 147: 2-7.)

Thus, based on Granados' and Villela's testimony, I find that Isusquiza had authority to hire new workers for the Dairy. At the very least, based on the testimony of Goyenette and Isusquiza, Isusquiza effectively recommended the hiring of Granados. Guerrero's declaration also indicates that Isusquiza has authority to hire. Guerrero states that Mike Goyenette told him to come back later in the day to see if there was still a position open. According to Guerrero, Goyenette said that he had to see whether Isusquiza had filled the position vacated by Guerrero's cousin.

The exercise of any of the statutory functions may classify an employee as a supervisor even if most of his time is spent in normal production or maintenance duties. (*American Diversified Foods, Inc. v. NLRB*, *supra* 640 F2d 893; *Graves Trucking Inc., supra*, 246 NLRB 344, 348.) Since Isusquiza had the authority to hire workers, he is a statutory supervisor pursuant to section 1140.4(j). (*Oasis Ranch Management* (1992) 18 ALRB No. 11, p. 5, fn 5, ALJD, p. 6 [employee hired several workers which is sufficient to make him a statutory supervisor]; *Kenosha Newspublishing Corp.* (1982) 264 NLRB 270, 271 [on basis of employee's exercise of authority to hire three part-time reporters, national board finds employee to be supervisor].)

NLRB precedent looks both to the criteria set forth in the statutory definition of a supervisor, i.e. denominated primary indicia, as well as other "secondary indicia" of supervisory status. Those secondary indicia include: whether an employee attends management meetings, receives a higher wage than other unit employees, receives benefits not received by other unit

employees, completes time sheets, distributes paychecks, completes evaluation forms, and has a job title of equivalent to foreman or supervisor. The ratio of supervisors to workers is a further secondary factor in the analysis, as are whether the employer's employee handbook indicates supervisory status and the perceptions of other employees. (See generally *Monotech of Mississippi v. NLRB* (5th Cir. 1989) 876 F2d 514, 517; *NLRB v. Chicago Metallic Corp.* (9th Cir.1986) 794 F2d 527; *Maine Yankee Atomic Power Co. v. NLRB* (1st Cir. 1980) 624 F2d 347; *New York University Medical Center* (1997) 324 NLRB 887, enf'd in part. part (2nd Cir. 1998) 156 F3d 1998.)

A finding that Isusquiza is a supervisor finds further support in the record with regard to certain of these secondary indicia of supervisory status. Isusquiza was hired to be a supervisor at Albert Goyenetche Dairy, as set out in the Goyenetche Dairy newsletter and confirmed by the testimony of Mike Goyenetche. The newsletter makes Isusquiza's authority clear: he is coming to help manage the Buttonwillow dairy. "He shall have authority over all the employees." He is to be the "director" of the dairy. The newsletter was given to all Dairy employees. They clearly believed that Isusquiza is a supervisor. (See testimony of Granados, Cholico, and Villela referenced above.) Everything communicated to the workers by the Dairy indicated Isusquiza's supervisory status. He was introduced as a manager or director and his name was included on the board in the milking pits, along with the other managers of the Dairy, Mike and John Goyenetche.¹⁰ No information to the contrary was ever provided to the Goyenetche workers—

¹⁰Isusquiza's name on the dry erase notice board in the milking pit, whether or not he was denominated a manager on the board, seems of some significance. He was only one of four bilingual employees (RT 144: 15-17), the fact that he could interpret for Mike and John Goyenetche does not seem to be reason enough to list him on the board with the other managers of the Dairy. Indeed, Goyenetche testified that Isusquiza's name was only added to the board so that Spanish-speaking workers could call him, and then he could in turn call Goyenetche or his brother. (RT 142: 8-14.) However, there were other bilingual employees, who could have filled that position before Isusquiza came to the dairy, but their names were never listed on the board. Both Mike Goyenetche and Isusquiza

at least until after the election.

Mike Goyenette testified that when Isusquiza was hired, it was his and his brother's intention that Isusquiza develop into the manager of the Dairy, with authority to hire, fire, and discipline. (RT 151: 11-14.) Despite those intentions, after bring Isusquiza in as a manager, Goyenette testified that instead of training him or instructing him in his new duties, Mike and John Goyenette told him to "go walk around the dairy, kind of fit himself in where he might see people needing help...." (RT148: 10-14.) Then, for reasons that were not explicated by the Employer, Isusquiza just "did not fall into that role [of manager]." (RT 151: 10.) However, based on the testimony of Granados, Cholico, and Villela and Guerrero's declaration, it appears that Isusquiza did indeed assume that role.

I do not credit the testimony of Isusquiza that he was just a worker and that he could make no decisions on his own. I find Isusquiza's testimony improbable in light of his 26 years' experience with the family dairies and the announcement in the newsletter by the Goyenettes to the workers when Isusquiza started work. At the hearing, Isusquiza seemed anxious to avoid providing any information that would suggest that he had a position of authority. He tried unsuccessfully to disassociate himself from the declaration that he signed on the day of the election. I do not credit his testimony that his discussion with Board agent Diaz took place in Spanish, nor do I credit his testimony about the substance of his conversation with Diaz. Diaz was very clear as to what Isusquiza told her. She certainly had no interest in misrepresenting or

testified that Mike and John Goyenette used workers other than Isusquiza to translate for them. (RT 165: 2-6.) Although standing alone this may be a minor point, it lends further support to the conclusion that Isusquiza occupied a position of authority at the Dairy. Further, I credit the workers' testimony that all names were removed from the notice boards shortly after the election which suggests that the Goyenettes were attempting to erase any evidence of Isusquiza's supervisor status.

altering what Isusquiza told her. His name was not on the eligibility list supplied by the Employer. She permitted him to vote a challenged ballot, but documented what he told her about his job duties.

The common thread throughout Isusquiza's testimony seemed to be a desire to reduce his role at the Dairy to that of a worker with no authority. He testified that, although Mike and John Goyenette told him that he would be making sure that all the jobs got done right, the way he did that was to take on all incomplete tasks and complete them himself. With reference to Guerrero, Isusquiza said that Guerrero called him to report that Mike had fired him. (RT 196: 18-22.) When counsel asked whether Guerrero expected Isusquiza to do anything on his behalf, Isusquiza responded: "They all call me." (RT 197: 7-9.) When asked why they all call him, he then said "[a]bout 4 or 5 would call me" (RT 197: 19-23), seemingly worried that if they "all called him," he might appear to be a supervisor.¹¹

I do not credit the testimony of Mike Goyenette that Isusquiza never functioned as a supervisor. This testimony was inconsistent with the introduction of Isusquiza as a director in the Dairy newsletter, and as noted above, neither he nor his brother ever communicated any information as to a change in Isusquiza's status as a supervisor to the Dairy employees. Goyenette's testimony that (1) despite the announcement in the newsletter, neither he nor his

¹¹ Isusquiza showed a marked reluctance to answer any question directly. A further example was this interchange:

Q: Did you ever talk to the milkers about the production level?

A: That is talked about everywhere. Depending on the work that is done outside, the feeding. It depends on all of that. (RT 210: 18-23.)

Q: But did you ever go in the milking barn and talk with any of the milkers about changes in production or production levels?

A: That is not talked about with them. (RT 211: 1-4.)

It should be noted that Mike Goyenette testified that there may have been a couple of instances where he asked Isusquiza to discuss production problems, thus supporting the workers' testimony on this point. (RT 167: 15-17.)

brother ever told Isusquiza that he was being hired as a manager,¹² (2) they never told him what his job duties would be, and then (3) they never told him that he would not serve as manager was not credible to me. Nor was his testimony that, even though the Dairy employed only a few workers who could fill in for absent milkers, Isusquiza had no authority to assign these replacements to the milking barn if one of the milkers called Isusquiza directly to let him know that the milker would be absent from work. (RT 172: 7-12.)

Goyenette did say that he never told Isusquiza that he was not to make decisions on his own (RT 154: 2-9), which coupled with their “unspoken understanding” of Isusquiza’s job duties suggests that Isusquiza certainly had more authority than either Goyenette or Isusquiza would admit at the hearing. Goyenette’s credibility is further undermined by evidence such as the failure to change Isusquiza’s job title in the company records,¹³ the announcement of Isusquiza’s arrival and the recitation of his duties in the newsletter, the addition of his name to the notice board—and then the removal of the names after the election—as well as the introduction of a new job title for Isusquiza after the election.

Another secondary indicia of Isusquiza’s supervisor status is his salary, which was \$3500.00 per month.¹⁴ The next highest salary is \$3000.00, which is paid to the breeders. When

¹² Goyenette did testify that although he did not tell Isusquiza that he would be a manager, “they had an unspoken understanding (RT 149: 4-8)” regarding Isusquiza’s job duties.

¹³ Isusquiza’s name was left off the employee eligibility list provided to the Regional office because he was he had been listed as a foreman. In a declaration, Mike Goyenette states that he was listed as a foreman on the list provided to his counsel because “that was his designation on the payroll records when he first came to the Dairy in November 2000. His designation was not changed to reflect his actual duties.” (Exhibit A, Employer’s Exceptions to Regional Director’s Challenged Ballot Report,) To leave Isusquiza listed in the Dairy’s payroll records as a foreman for well over a year after his job duties had supposedly changed seems inefficient at best and suspect at worst. Although job titles and job descriptions, such as Isusquiza’s in the newsletter, are not controlling, in this case there is ample evident that Isusquiza actually exercised the authority conferred in his title and job description.

¹⁴ Although Isusquiza told the Board agent that his salary was \$4000.00, he testified that it is actually \$3500.00, as did Mike Goyenette. However, the employer did not introduce any corroborative evidence of Isusquiza’s salary, such as check stubs. In any event, Isusquiza’s salary was at least \$500.00 more than the next highest paid worker, perhaps even \$1000.00 more.

Isusquiza was hired in Buttonwillow, his previous salary was \$3000.00. The increase of \$500.00 each month suggests an increase in responsibilities.

The Regional Director argued that Isusquiza is a statutory supervisor based on his job duties sorting cows, during which he instructed other workers and essentially assigned duties using his independent judgment. Isusquiza's testimony on this point was difficult to pin down, as it was in most instances; however, I do not find Isusquiza to be a supervisor based on his sorting of the cows and his supervision of the workers assisting him in this task. His supervision of the workers in this task does not confer supervisory status because his assignment of tasks and direction of work seems to be based on his experience and knowledge in the job of cow sorting, rather than on any independent supervisory authority. (*Salinas Valley Nursery* (1989) 15 ALRB No. 4, p. 5; *North Shore Weeklies* (1995) 317 NLRB 1128.)

On the record as a whole, I find that Jose Luis Isusquiza is a statutory supervisor within the meaning of section 1140.4(j) of the ALRA, and I recommend that the challenge to his ballot be, and hereby is, sustained, and that the results of the election be certified.

Dated: May 8, 2002

NANCY C. SMITH
Investigative Hearing Examiner, ALRB