Visalia, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

ARIE DE JONG dba MILKY WAY DAIRY,	)	Case No. 02-RC-2-VI
Employer,	)	
and	)	29 ALRB No. 4
FRESH FRUIT & VEGETABLE WORKERS, U.F.C.W., AFL-CIO, LOCAL 1096, CLC,	)	(September 3, 2003)
Petitioner.	)	

DECISION AND ORDER

On May 20, 2003, Investigative Hearing Officer (IHE) Nancy Smith issued the attached Recommended Decision in this matter. In her decision, the IHE recommended that the challenges to the ballots to four individuals be overruled and that their ballots be opened and counted, and that the challenges to the ballots of fifteen workers be sustained. Both Arie DeJong dba Milky Way Dairy (Milky Way, Employer or Dairy) and Fresh Fruit and Vegetable Workers, U.F.C.W., AFL-CIO, Local 1096, CLC (UFCW, Union or Petitioner) timely filed exceptions to the IHE's Recommended Decision.

The Agricultural Labor Relations Board (ALRB or Board) has considered the record and the IHE's Decision in light of the exceptions and briefs of the parties, and has decided to affirm in part and overturn in part the IHE's rulings, findings and conclusions as noted in this Decision.

Background

The Employer, Milky Way Dairy, is located on approximately 200 acres in Visalia, California. A representation election was conducted at Milky Way Dairy on August 15, 2002.[1] Sixty-five ballots were cast. Twenty-four votes were cast in favor of the Union, 16 votes were cast for "No Union," and 25 voters were challenged.

All twenty-five challenges were made by ALRB Regional Office agents. The Union joined in challenging three of the voters. One voter was challenged on the basis that she was a confidential employee. One voter was challenged on the basis that he was not on the eligibility list and was a supervisor. Twenty-three (23) voters were challenged on the basis that they were not on the eligibility list and not employed in the appropriate unit during the applicable payroll period.[2]

After a post election investigation of the challenged ballots, the Regional Director (RD) issued his Challenged Ballot Report on October 2, 2002.

[1] All dates refer to the year 2002 unless otherwise noted.

[2] In its response to the Petition for Certification, the Employer submitted payroll records dated July 30, 2002 from American Employers' Group (a payroll service) for 43 employees. At the same time, the Employer also submitted a list of names entitled "Employees Not on Regular Pay." The ALRB Regional Director requested that the Employer submit supporting documentation regarding the names on the "Not on Regular Pay" list. The Regional Director determined that the documentation submitted was not sufficient to establish that these individuals were employed by Milky Way Dairy during the eligibility period. These individuals were therefore not included on the eligibility list.

He recommended that 3 ballots be opened and counted[3], that challenges to 21 ballots be sustained[4], and that 1 ballot remain unresolved unless it should become outcome determinative.[5]

Milky Way and the Union both filed exceptions to the Regional Director's Challenged Ballot Report.[6] On November 22, 2002, the Board issued Administrative Order No. 2002-8, which rejected in part and affirmed in part the Regional Director's Challenged Ballot Report.[7] The Board set an investigative hearing to resolve challenges to the ballots of the following individuals: Esteban Aguirre, Paulina Betancourt Lopez, Damian Chick, Douglas DeGroot, Bert DeJong, Jason DeJong, Peter DeJong, Philip Heynen, Charles Millar, Gerrit Roeloffs, Natalie Walker, Steven Wells, Karl Gailey, Deanna Helming, Brenda Leatherberry, Ignacio (Nacho) Escovedo, Mike Rodriguez and Frank Garcia. The Board directed the IHE to take evidence on the issue of whether these 18 challenged voters were agricultural employees within the meaning of Labor Code section 1140.4 (b), and if so, whether they were employed during the eligibility period (July 11, 2002 through July 25, 2002). The Board also set for hearing the challenge to

[3] Ballots of Manuel Espinoza, David Rodriguez, and Araceli Burleson.
[4] Ballots of Esteban Aguirre, Paulina Betancourt Lopez, Damian Chick, Eric Danzeisen, Douglas DeGroot, Bert DeJong, Jason DeJong, Peter DeJong, Matthew Gailey, Philip Heynen, Charles Millar, Gerrit Roeloffs, Johannes Vellema, Natalie Walker, Steven Wells, Karl Gailey, Deanna Hellming, Brenda Leatherberry, Ignacio "Nacho" Escovedo, Mike Rodriguez and Frank Garcia.
[5] Ballot of Benjamin Cruz.
[6] There were no exceptions to the recommendation that the ballots of Manuel Espinoza, David Rodriguez, and Araceli Burleson be opened and counted.
[7] The Board ordered the challenges to voters Eric Danzeisen, Matthew Gailey, and Johannes Vellema be overruled, but that the opening and counting of their ballots be held in abeyance until the final resolution of the challenged ballot process.

the ballot of Benjamin Cruz and directed the IHE to consider whether he was a supervisor.[8]

Summary of the IHE Decision[9]

The IHE recommended that the challenges to the ballots of Paulina Betancourt Lopez, Douglas DeGroot, Esteban Aguirre, and Charles Millar be overruled, and that their ballots be opened and counted.

The IHE further recommended that the challenges to the ballots of Steven Wells, Ignacio Escovedo, Frank Garcia, Mike Rodriguez, Brenda Leatherberry, Deanna Helming, Jason DeJong, Gerrit Roeloffs, Philip Heynen, Peter DeJong, Karl Gailey, Damian Chick, Bert DeJong, and Natalie Walker be sustained. In addition, she found that voter Benjamin Cruz was a supervisor, and therefore the challenge to his ballot should be sustained.

Summary of Union's Exceptions to the IHE Decision

The Union excepted to the IHE's recommendation that the challenges to the ballots of Charles Millar, Douglas DeGroot and Esteban Aguirre be overruled and that

[8] On December 2, 2002, the Petitioner filed a Motion for Reconsideration of the Board's Order Rejecting in Part and Affirming in Part Regional Director's Challenged Ballot Report and Order Setting Challenges for Hearing. On December 20, 2002, the Board issued Admin. Order No. 2002-10 denying Petitioner's motion as the Petitioner had not set forth any extraordinary circumstances which would warrant the reconsideration of the Board's order, nor had the Petitioner raised any new issues or shown that the evidence it submitted in support of its motion was previously unavailable or newly discovered. The Petitioner requested at the outset of the hearing that the IHE reconsider the Board's ruling in Admin. Order No. 2002-8 that workers Eric Danzeisen, Matthew Gailey, and Johan Vellema were agricultural employees. The IHE ruled at the hearing that she did not have the authority to consider this request. The Petitioner again requested reconsideration in its post-hearing brief, and the IHE denied this request in her decision (Decision of IHE, pg. 6, fn 5). The IHE properly denied the Petitioner's request for reconsideration.

[9] A detailed discussion of the IHE's analysis and of the Employer's and Petitioner's exceptions to the IHE's decision can be found below in the section entitled "Discussion of Individual Voters."

their votes be counted. The Union also excepted to the IHE's failure to consider whether these three individuals worked as independent contractors instead of employees.[10]

Summary of Milky Way's Exceptions to the IHE Decision

Milky Way filed 20 exceptions to the IHE's decision. Namely, Milky Way excepted to the IHE's recommendation that challenges to the ballots of Damian Chick, Bert DeJong, Jason DeJong, Peter DeJong, Philip Heynen, Gerrit Roeloffs, Natalie Walker, Steven Wells, Nacho Escovedo, Mike Rodriguez, Frank Garcia, Karl Gailey, Deanna Helming, Brenda Leatherberry, and Benjamin Cruz be sustained.

Milky Way also excepted to the IHE's placing the burden of proof on the Employer on the basis that the challenged voters were not on the eligibility list generated before the election. Milky Way points out that the eligibility list it submitted included the names of the challenged voters, while the list relied on by the IHE was formulated by the Regional Director and did not include their names.

Milky Way excepted to the IHE's failure to use the presumption set forth in Labor Code sections 2750.5 and 3357[11], and also excepted to the IHE's failure to identify the employment relationship between Milky Way and the workers listed immediately above (save Benjamin Cruz).

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[10] In arguing that the ALRB has followed National Labor Relations Board (NLRB) precedent to exclude independent contractors in the past, the Union cites a non-precedential order the Board issued in *Dairy Employees Union, Local No. 17,* Case No. 86-RC-9-EC (SD). We note that such an order may not be cited as controlling authority.

[11] For purposes of California Workers' Compensation law, there is a presumption that the employer-employee relationship exists and the party asserting the status of independent contractor has the burden of proving independent contractor status. In addition, there is a presumption that any person rendering service for another, other than as an independent contractor, or unless expressly excluded by the Labor Code, is an employee. Milky Way argues that these presumptions operating under Workers' Compensation law are also applicable in determining whether a person in an employee under the Agricultural Labor Relations Act (ALRA). Strictly speaking, these presumptions do not apply under the ALRA, but see the discussion on the determination of a worker's employment status below on pages 12-15.

Finally, Milky Way excepted to the IHE's credibility determinations that resulted in her recommendation to sustain challenges to the voters' ballots, especially her credibility determinations as to General Manager Johnny Gailey.

Analysis and Discussion

IHE's Assignment of Burden of Proof:

Milky Way argues that the IHE incorrectly applied the burden of proof in this case. The IHE discussed the issue of who bears the burden of proving the employee's status in light of the Board's decision in *Rod McLellan* (1978) 4 ALRB No. 22. In that case the Board noted that "because representation proceedings are investigatory in nature, the concept of 'burden of proof' does not, strictly speaking, apply." (*Rod McLellan* at p.2, fn.1.) The Board went on to note in that case, however, that there is an underlying status quo as to each voter, and the party seeking to upset the status quo by challenging a voter initially has the burden of producing evidence regarding that voter. The Board stated that absent any other evidence, presumptions created by the eligibility list would stand.

Milky Way argues that the IHE should have applied this presumption in favor of the Employer because the list that it submitted included the names of all of the challenged voters. However, the Regional Director deemed the list including only individuals on regular payroll to be the eligibility list. This list did not include the names of the voters in question. Therefore, the IHE assigned the burden of producing evidence to Milky Way, who argued that these workers were indeed eligible voters.

Not only does Milky Way assert that the wrong eligibility list was used, it also argues that a burden of proof was improperly assigned to it by the IHE. We

emphasize that in the case before us, the burden here is one of production, not of persuasion. It appears to us that this is the burden the IHE used when examining each challenged voter's eligibility. While the derivation of the eligibility list does raise an issue as to the propriety of assigning a burden of production in this case, we find the issue moot, as the IHE found that Milky Way had satisfied that burden. Therefore, we have undertaken our review solely on whether or not the preponderance of evidence establishes voter eligibility.

IHE's Evidentiary Rulings:

The IHE drew adverse inferences from Milky Way's failure to provide documentary evidence that was under its control on the employment status of challenged voters during the eligibility period. We agree with the IHE's handling of this issue, as it is consistent with California Evidence Code section 412 which states: "if weaker and less satisfactory evidence is offered when it was within the power of the party to produce stronger and more satisfactory evidence, the evidence offered should be viewed with distrust."

Further, some of the workers at issue did not testify at the hearing, and the evidence in the record as to the status of these individuals consisted primarily of Milky Way General Manager Johnny Gailey's testimony, the workers' pay stubs, and their declarations. Obviously, the declarations were hearsay evidence. Section 20370 (d) of the Board's regulations provides that in ALRB representation hearings, hearsay evidence may be used for the purpose of explaining or supplementing other evidence, but is not sufficient in itself to support a finding unless it would be admissible in a civil action.

(*Triple E Produce Corp. v. ALRB* (1983) 35 Cal. 3d 42.) Thus, while hearsay is admissible in these proceedings, mere uncorroborated hearsay evidence does not constitute substantial evidence to support a finding of the Board. While branding evidence as hearsay does not alone affect its admissibility, it does affect the weight given to it. (*O.P. Murphy and Sons* (1977) 3 ALRB No. 26.) Where the IHE found Gailey's testimony unreliable and where workers in question did not testify, the IHE properly found that the workers' declarations alone were not adequate to supplement or explain the non hearsay documentary evidence submitted, namely the paychecks that were dated August 1, 2002 but bore no other indication of the dates worked.

Discussion of Individual Voters:

1. Paulina Betancourt Lopez

The IHE recommended that the challenge to Lopez's ballot be overruled.[12] As neither party excepted to this recommendation, and as we find the IHE's analysis and conclusion to be sound, we affirm the IHE's findings and conclusions as to Paulina Betancourt Lopez, and order the challenge to her ballot be overruled and that her vote be counted.

2. Esteban Aguirre

The IHE concluded that Aguirre was an agricultural worker employed during the eligibility period, and recommended that the challenge to his ballot be overruled. The IHE pointed out that Department of Labor guidelines provide that

[12] The record indicates that Lopez's duties include cleaning restrooms, lunchrooms, and offices that are used by dairy employees. The IHE found that Lopez spent a regular and substantial amount of her time in work incident to Milky Way's farming operations and was therefore engaged in secondary agriculture. Her timecard (EX #9A) shows that she worked on July 11, 17 and 18, 2002 which was during the eligibility period of July 11 to July 25, 2002.

"transportation to the farm by the farmer of materials and supplies for use in his farming operations, such as animal…feed would be incidental to the farmer's actual farming operations." (29 CFR section 780.157) Aguirre hauls alfalfa hay from Arizona, the Sacramento area, and Nevada to the Dairy as feed for the cows. He works seasonally, but is employed full-time during the season, which runs from June through November in Nevada, but begins in April in Arizona. Milky Way has employed Aguirre since 1998. Aguirre was covered by the Milky Way medical insurance plan in July 2002. Aguirre is paid $.50 per mile. (RT 53: 20-21) Milky Way submitted payroll records for Aguirre indicating that he was paid $1192.18 on July 29, 2002, and $1324.22 on August 3, 2002. Gailey testified that the July 29th check would most likely have been for work during the final week of July and the August 3, 2002 check would have been for work done during the last week of July. (RT 56)

Union's exceptions:

The Union argues that the IHE erred in concluding that Aguirre fell under the jurisdiction of the Agricultural Labor Relations Act (ALRA or Act) because the activities he was engaged in were not done on a farm or by a farmer. The Union cites *Sierra Citrus Association* (1979) 5 ALRB No. 12 for the proposition that "one engaged in secondary agricultural activity such as truck driving is not within the purview of Labor Code section 1140.4(b) unless the work is performed on a farm or by a farmer." The Union also argues that Aguirre is an independent contractor and not an employee as he controls all aspects of driving and delivering hay to the Dairy.

Analysis and Conclusion:

We find that *Sierra Citrus Association* is inapposite here, as the reason the workers in question in that case were not agricultural employees was because their employer was not a farmer but instead was a farmers' cooperative which harvested and packed the products of its shareholders. In contrast, in the instant case, the Employer is clearly a farmer, and the hauling of hay to feed the dairy cows is incidental to Milky Way's actual farming operations. In addition, there is nothing in the record to indicate that Aguirre is anything other than an employee. Milky Way owned the truck Aguirre drove, and he was covered by the Milky Way medical insurance plan in July 2002. We therefore affirm the IHE's findings and conclusions as to Esteban Aguirre, and order the challenge to his ballot be overruled and that his vote be counted.

3. Charles Millar

The IHE found that Millar was engaged in secondary agricultural activities and was therefore an agricultural employee of Milky Way. The IHE recommended that the challenge to Millar's ballot be overruled.

Charles Millar lives in Arizona. (RT 311: 17) He knows Arie DeJong and performs specialty work at Milky Way, consisting of electronic repair and calibration of engines. He began work at Milky Way in early January 2002. (RT 307: 12-14; 312: 3-7) In 2002, he went to Milky Way several times to perform repairs. Millar testified that when Johnny Gailey contacts him to work at Milky Way, he feels free to take the work or not, as he wishes. Millar is retired; as he put it, "I do what I want when I want." (RT 321: 15-24; 324: 3-4, 14-16) He travels to Milky Way, an 8-hour trip, either using his

own vehicle or occasionally riding with Arie DeJong in his private airplane. (RT 321: 4-7; 322: 2-6) When he drives, he is not compensated for his mileage. (RT 320: 22-24)

Millar worked at Milky Way for eight hours during the period July 17-19, 2002, doing carburetion work on a Dodge pickup. (RT 313: 9-15) Millar signed delivery invoices on July 18, 2002. (EX #23C and #23D) Thus, the IHE concluded that he was present and working at Milky Way during the eligibility period. Millar was paid an hourly rate of $15.00. No deductions were made from the check he received. (RT 312: 15-17; EX# 23A) In addition to his work in July 2002, he traveled to Milky Way three to five other times to work in 2002. (RT 323: 5-24)

The IHE concluded that Millar was not engaged in primary agriculture, but that he was engaged in secondary agriculture, and thus is an agricultural employee. (IHE Dec. p. 15, citing *California Coastal Farms* (1976) 2 ALRB No. 26, p. 2; *Carl Joseph Maggio* (1976) 2 ALRB No. 9, p. 10.) She also stated that "although Millar's employment connection to the Dairy is tenuous, given that his employment is so limited, he performs the same type work that Johan Vellema and Francisco Martinez perform, who have been found to be agricultural employees." (IHE Dec. p. 15.)

Union's exceptions:

The Union argues Millar was not engaged in secondary agriculture as Milky Way failed to prove that Millar did work on actual farm vehicles and equipment. The Union argues that the record does not support a finding that Millar was engaged in work incident to Milky Way's farming operation.

In addition, the Union argues that Millar is an independent contractor, not an employee, and points out that to be an eligible voter, a worker must not only be engaged in agriculture, but also be an employee of an agricultural employer.

Analysis and Conclusion:

While we find that the record supports the IHE's conclusion that the nature of Millar's work can correctly be viewed as secondary agriculture, we find merit in the Union's contention that the IHE's analysis of Millar's employment relationship with Milky Way is incomplete. The IHE's analysis turns solely on the discussion of whether Millar is engaged in secondary agriculture, i.e., whether the practices he is engaged in are "performed either by a farmer or on a farm incident to or in conjunction with such farming operations," and in addition "whether the activity in question in the particular case is carried on as part of the agricultural function or is separately organized as an independent productive activity." (*Farmers Reservoir & Irrigation Co. v. Mc Comb* (1949) 337 U.S. 755.) While this analysis is correctly applied to determine whether a worker is engaged in secondary agriculture, it is not an analysis that can, in all circumstances, conclusively determine the worker's employment relationship with the employer. The issue in *Farmers Reservoir* was not the employment relationship, but whether the worker was engaged in agriculture and thus not covered by the National Labor Relations Act (NLRA).

Individuals eligible to vote in the election at Milky Way Dairy included those agricultural employees of the Employer who were employed at any time during the last payroll period that ended prior to the filing of the petition. (Labor Code section 1157;

California Code of Regulations, Title 8, section 20352.) The IHE stated on page 7 of her decision that the "primary focus of the definition of employee [under the ALRA] is not on the conventional indicia defining the relationship between a farmer and someone who works for him/her, but on the involvement in certain activities."

We conclude that determining whether or not a particular worker is engaged in primary or secondary agriculture will not always answer the question as to whether he or she is covered by the ALRA. An individual could clearly be engaged in agriculture and providing a service on a farm, but he or she could be doing so as part of an independently organized business, and would therefore not be an employee of the farm. Therefore, the inquiry of whether a worker is an "agricultural employee" must under some circumstances be conducted as two inquiries: a) whether the worker is engaged in agriculture (either primary agriculture or secondary agriculture), and b) whether the worker is an "employee."

The National Labor Relations Board (NLRB) typically examines employee status by applying the common law right of control test which is grounded in the Restatement (Second) Law of Agency (section 220), which defines "servant" or employee as "a person employed to perform services [for] another and who with respect to the physical conduct in the performance of services is subject to the other's control or right to control."[13]

[13] The hiring party's right to discharge a worker at will is compelling evidence of control. The common law test also includes an examination of the following eight factors: 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

In *S.G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal. 3d 341, the California Supreme Court examined whether workers harvesting cucumbers were employees or independent contractors for the purposes of the California Workers' Compensation Act. The court stated that the "right of control" test for determining whether a person is an employee "must be applied with deference to the purposes of the protective legislation." *Borello* at 353.

The test articulated in *Borello* modifies the common law agency test with a "social-legislation analysis" which may extend a statute's protections to workers who might otherwise be found to be independent contractors under the common law test. In addition to an inquiry into common law factors, the *Borello* test adds an inquiry into 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.[14] The court indicated that this inquiry into statutory purpose was appropriate when determining coverage under other California legislation intended for the protection of employees, including laws enacted specifically for the protection of agricultural labor, such as the Agricultural Labor Relations Act, the Fair Employment and Housing Act, certain provisions of the Occupational Health and Safety Act, and laws covering minimum wages, maximum hours and the employment of minors. *Borello* at 359.

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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.

[14] The court noted that even the fact that the parties had an express agreement characterizing the workers as independent contractors did not mandate a finding that the Act didn't apply to the workers in question because "the protections conferred by the Act have a public purpose beyond the private interests of the workers themselves." *Borello* at 358.

Therefore, where necessary to determine eligibility of a purported independent contractor or employee of an independent contractor for coverage under the ALRA, the Board will apply the test set forth in *Borello*. Our analysis of the employee/independent contractor dichotomy thus will be informed by the policies underlying the ALRA, and doubts will be resolved in favor of coverage. The policies underlying the ALRA include the preservation of peace in the agricultural fields of California by providing agricultural workers, otherwise unable to bargain individually on their own behalf on an equal plane, full freedom of association and self-organization, the right to designate representatives of their own choosing to negotiate on their behalf, the right to engage in other concerted activities for mutual aid and protection, and the right to be free of coercion in the exercise of these rights. (See ALRA, sec. 1140.2 and preamble to ALRA, Sen. Bill 1, Sec. 1, 1975-1976 Reg. Sess., filed with Sec'ty of State June 5, 1975.)

Millar's work for Milky Way was sporadic and infrequent, but this fact alone does not mandate finding that he is not working as an employee when he performs services. Indeed, the services many agricultural workers perform for agricultural employers come at irregular intervals or are of short duration. The specialized nature of Millar's services, which apparently is beyond the expertise of the regularly employed mechanics, is a factor that could support a finding that he is an independent contractor; however, as the IHE pointed out, even though the work he does for the dairy is infrequent, it is structured similarly to that of Vellema and Martinez. He is paid by the hour and there is no indication that he provides services as part of an independent

business. The work is performed at Milky Way's shop, and the tools needed are supplied by Milky Way. (RT 313: 16-20)

We therefore affirm the IHE's conclusion that Millar was employed by Milky Way during the eligibility period and order that the challenge to his ballot be overruled and that his vote be counted.

4. Peter DeJong

The IHE recommended that the challenge to Peter DeJong's ballot be sustained. Peter DeJong along with his father, Arie DeJong,[15] works as a hoof trimmer on Milky Way Dairy. When working with his father, who has his own business, Peter and Arie use a special vehicle that holds the cow while they check and trim the hooves. Arie usually came to Milky Way on Tuesdays and Fridays. (RT 545: 11-25; 546: 5-25; 547: 550: 15-18) According to one of the workers, Peter came less frequently than Arie and never came to the Dairy alone to do the hoof trimming until after the August election. (RT 778: 19-19: 779:4) John Gailey said that Peter started working for Milky Way in June 2002, and worked on Tuesday and Fridays. He said that Peter was trying out the work, in a sort of apprenticeship, and was on the Dairy's payroll, not his father's. (RT 280: 19-25; 281: 1-20) Peter was paid by check in the amount of $112.00 from the Milky Way account, with no deductions taken. (EX #18A)

John Gailey testified that he knew that Peter was working during the eligibility period because he saw him trimming hooves during the period July 11-July 25,

[15]As the IHE noted, this is not the same Arie DeJong who is the sole proprietor of Milky Way Dairy, but is a cousin of the owner.

2002, "for sure." In response to her question as to how he knew what days Peter was at the Dairy, Gailey replied that Peter was at the Dairy every Tuesday and Friday, every week. (RT 102: 11-20)[16]

Although in his declaration Peter denied that he owned or supplied the equipment that he used at the Dairy, John Gailey testified that Peter used a specialized truck, belonging to either Peter or his father, when Peter did the hoof trimming. (RT 566: 5-8) Gailey also testified that Arie billed him for his work at the Dairy. (RT 549: 20-23)

The IHE found that Peter DeJong is involved in practices that are primary agriculture. However, the IHE found that he performs those activities for his father, rather than as an employee of Milky Way Dairy. The IHE went on to conclude that "his activities are organized as part of an independent productive activity." (IHE Dec. p. 26.)

The IHE also found that the Employer failed to establish that DeJong worked during the eligibility period and emphasized that the payroll record that Milky Way submitted to show that Peter was employed to help with the hoof trimming does not match up with the hours Peter claimed to have worked in his challenged ballot declaration. (EX # 18B)[17]

Discussion and Analysis:

We find that the IHE's analysis as to Peter DeJong's status is incomplete. As she did in her analysis of Charles Millar discussed above, the IHE used language crafted by the U.S. Supreme Court in *Farmers Reservoir & Irrigation Co. v. Mc Comb*,

[16] The IHE took judicial notice of the fact that in the last two weeks of July 2002, Tuesdays fell on the 16th, 23rd, and 30th, and Fridays fell on the 19th and 26th.

[17] Peter stated in his declaration that he worked three days during the eligibility period, for six hours each day at a pay rate of $8.00 per hour.

supra, 337 U.S. 755, and reasoned that Peter's activities were organized as part of an "independent productive activity" in concluding that Peter was not an employee of Milky Way. As discussed above, an analysis of whether the activity in question in the particular case is carried on as part of the agricultural function or is separately organized as an independent productive activity will not always determine the nature of the worker's employment relationship with the employer. Even assuming that the IHE used "independent productive activity" as a synonym for "independent contractor," the analysis is incomplete.

The IHE concluded that Peter was engaged in primary agriculture. We note that if agricultural status were the only issue here, the IHE could have stopped with her finding of primary agriculture. In this situation, however, a determination of agricultural status will not answer all questions as to whether Peter is covered by the Act, and an examination of the employment relationship is necessary. As with worker Charles Millar, discussed above, we find that it is necessary to evaluate Peter's status using the test set forth in *Borello*.

An inquiry into the common law agency factors supports the conclusion that Peter is employed by his father, an independent contractor, and is not an employee of Milky Way. Credited testimony confirms that Peter DeJong's father, Arie, has his own hoof trimming business. (RT 545: 21-24; 777: 4-8) Arie submits an invoice to Milky Way for services rendered, and Gailey considers payment to Arie a bill payment. (RT 549: 14-23) Although Johnny Gailey testified that Peter was on Milky Way's payroll and that they were initially paying Peter separately from his father, as part of an

apprenticeship so he could gain experience before actually working for his father (RT 565: 1-10), Gailey also testified that by June 2002, Peter and his father were coming to the dairy to work together "a couple of times a week." (RT 566: 11-19) Milky Way employee David Rodriguez also testified that he always saw Peter trimming hooves with his father rather than alone and that they always arrived in a specialized truck. (RT 774: 4-8) Gailey also testified that when Peter did hoof trimming, he arrived in a specially modified hoof trimming truck owned by his father and used the equipment on the truck to trim the cows' hooves. (RT 548: 9-16) This supports the inference that Peter did his work under the direction of his father rather than under direction of Milky Way.

Moreover, there is no evidence that Milky Way employees trimmed the cows' hooves as part of their regular duties, and the record supports the conclusion that restraining and positioning them in the hoof trimming apparatus required some specialized skills.

We believe that the evidence, in light of the test set forth in *Borello*, compels the conclusion that Peter is the employee of an independent contractor, in this case his father, and not an employee of Milky Way. The business dealings between his father and Milky Way appear to be at arms' length, and Peter enjoys any statutory protections that attach from employee status as a function of his employment by his father. We do not believe that the ALRA was intended to cover such a worker and we find no policies underlying the ALRA that dictate finding Peter to instead be an employee of Milky Way.

Conclusion:

Based on the above discussion, we affirm the IHE's conclusion that the challenge to Peter DeJong's ballot should be sustained. In light of our finding that Peter is ineligible to vote because he is not an employee of Milky Way, we find it unnecessary to discuss whether Milky Way failed to show he worked during the eligibility period.

5. Natalie Walker

The IHE recommended that the challenge to Natalie Walker's ballot be sustained. She found that there was not adequate information to show that she worked during the eligibility period, and that even if there were, she is not an agricultural employee.

Walker does computer assisted drafting for Milky Way. (RT 62: 11-23) Ninety to ninety–five percent of her work is done at home. (RT 66:6-12; 252: 11-17) She comes to the Dairy to bring the files of her plans to John Gailey so that he can print out plans she has drafted. (RT 66: 6-12) She was paid through the Dairy's business account; there were no deductions from her checks. (See EX #25A) She is paid $10.00 per hour; she did not testify at the hearing, although the Dairy submitted her challenged ballot declaration, in which she stated that she worked for 15 hours, drafting plans for the new offices for the Arizona dairy, during the eligibility period. In that declaration, she does not specify the days on which she worked. (See EX #25B) Based on the above, the

IHE found that Milky Way had not provided adequate information as to whether she in fact worked during the eligibility period.[18]

The IHE went on to state that Walker "is certainly not engaged in primary agriculture, and I further find that she is not engaged in secondary agriculture as she is not a farmer, she did not do her work on a farm, and there is no evidence in the record to show that she performed any practice incident to Milky Way's dairy or cattle operations." (IHE Dec. p. 16.)

Employer's Exceptions:

The Employer argues Walker's drafting work was directly related to the maintenance, repair remodeling or construction of the Dairy buildings. Under the reasoning utilized in arguing that Steven Wells and his crew agricultural employees, the Employer argues that Walker, too, performs agricultural work.

Analysis and Conclusion:

As stated above, the IHE found that Walker was not engaged in secondary agriculture as she is not a farmer, she did not do her work on a farm, and that she did not perform any practice incident to Milky Way's dairy or cattle operations. We find the IHE's analysis of Walker's status problematic as it is not necessary that she be a farmer to be engaged in agricultural activity. The phrase "by a farmer" in the definition of agriculture includes employees of the farmer. Her work clearly is incident to or in conjunction with the farming operations, just as is the work of a secretary or janitor.

[18] The IHE did not credit Natalie Walker's declaration as to her working 15 hours during the period July 11-July 25, 2002, because she found that the documentary evidence submitted by the Dairy does not support that claim. She received a check dated August 1, 2002 for $225.00. The IHE reasoned that if she had indeed worked 15 hours, then she should have been paid $150.00.

As with Charles Millar, the specialized nature of her work, presumably performed independently and without supervision, requires an analysis of whether she is an employee or an independent contractor. The fact that Walker was paid only $10.00 per hour for her work tends to indicate that a high level of skill was not required to perform the computer assisted drafting work that she did. John Gailey testified that he and Arie DeJong actually designed the new buildings to be built at Milky Way, and Walker just drew up the designs on the computer. Also, Walker was paid by the hour and not by the design job, and this tends to support a finding that she performs her drafting work as an employee of Milky Way.

While the application of the test set forth in *Borello* points toward finding Walker to be an employee of Milky Way, it is not necessary to definitively decide this question, as we agree with the IHE that there is insufficient evidence that Walker worked during the eligibility period. We note that Gailey admitted that he could not say which days in July Walker worked and no other nonhearsay evidence indicated that Walker worked during the eligibility period. Therefore, we affirm the IHE's conclusion that the challenge to Walker's ballot be sustained on that basis alone.

6. Karl Gailey

The IHE found that Karl Gailey is not an agricultural employee of the Dairy and recommended that the challenge to his ballot be sustained. Karl is the brother of manager John Gailey, and periodically drives parts from Southern California to the Milky Way Dairy. Karl lives in Escondido. (RT 325: 17-18) He testified that either John Gailey or Arie DeJong calls him when they need something delivered. He is a

student and also maintains several part-time jobs in the Escondido area. At least one of those other jobs also includes making deliveries. (RT 331: 5-25) Karl is paid by the mile only for the one way trip up to Visalia and then his truck is filled up with gas at the Dairy for the return trip. (RT 109: 18-22; 333: 22-24; 328: 1-2) Karl is paid with a check from the Milky Way business account from which no deductions are made. (EX #19A) Karl was present at Milky Way on July 12, 18 and 19, 2002. He drove up to Visalia to bring milking barn equipment from another dairy on July 18, 2002. He also drove to Fresno on July 18, 2002, apparently on Milky Way Dairy business. (RT 328: 10-22)

The IHE found that Karl Gailey "is not engaged in primary agriculture nor is he engaged in any practice that can be viewed as incidental to or in conjunction with the Dairy's agricultural practices, since his activities constitute an independent business." (IHE Dec. p. 23-24, emphasis added.)

Employer's Exceptions:

The Employer argues that Karl Gailey's activities qualify as agricultural work under the definition of agriculture set forth in 29 C.F.R. section 780.157(a), and that it was unrefuted that he engaged in these activities during the eligibility period.

Analysis and Conclusion:

We find that the IHE's analysis with respect to Karl Gailey's status is incomplete. Although Karl testified that his other part time jobs include, among other activities, making deliveries, there is no indication that Karl has his own distinct delivery business. He testified his various work activities were all "kind of part time jobs to keep [him] going through school." He testified that when making deliveries to Milky Way, he

sometimes uses his own truck, and sometimes uses Milky Way Dairy's truck. (RT 327: 8-19). In addition, he is paid by the mile as Leatherberry and Aguirre are rather than by the load. (RT 327: 25, 328: 1-2) He stated that he had gotten a W-2 form from Milky Way, but also stated that he wasn't sure whether deductions were taken from his check. A W-2 form would be a persuasive indicium of employee status, but curiously, this form was not submitted by the Employer as an exhibit at the hearing. (RT 337:16-24) He stated that he didn't think he had gotten a 1099 form from Milky Way. (RT 337: 14-21) There is nothing in the record regarding whether he received W-2 forms from his other workplaces. While the information in the record with regard to Karl is admittedly sparse, we find that the evidence that was presented does not indicate that Karl was anything other than an employee when making deliveries to Milky Way.

Further, the Employer is correct that under the Department of Labor guidelines, "transportation to the farm by the farmer of materials and supplies for use in his farming operations such as…farm machinery or equipment would be incidental to the farmer's actual farming applications," and thus secondary agriculture. (29 C.F.R. section 780.157(a).) Karl testified that during the eligibility period, he delivered a milk tank to Milky Way, clearly farm machinery used in Milky Way's dairy operation.

Based on the above discussion, we conclude that Karl was engaged in secondary agriculture and that he worked during the eligibility period. We order the challenge to his ballot overruled and that his vote be counted.

7. Douglas DeGroot

The IHE recommended that the challenge to DeGroot's ballot be overruled. DeGroot works at Milky Way fixing fences and patrolling the pasture fences. There are 16 miles of pasture fence. (RT 464: 15-16; 93) He patrols the fences usually on the weekends, either every week or every other weekend, usually working eight hours each month. He began work at Milky Way at the beginning of 2002. (RT 464: 20-21) He testified at the hearing that he is paid $8.00 per hour, was sometimes paid in cash and was also allowed to pasture his three horses at Milky Way for a time. Currently he is paid by check. (RT 465: 9-15) DeGroot testified at the hearing that he fixed a fence the day before the round-up and worked on the round-up as well.[19] He testified that he helped with the round-up, "making sure everything was going good." (RT 466: 3-6) John Gailey's testimony established that the round-up occurred on July 20, 2002. (RT 98: 465-466) Gailey's testified that he saw DeGroot fixing one of the fences the day of the round-up (RT 268: 1-7), which DeGroot corroborated. (RT 466:7-9)

The IHE noted that although the payroll record does not precisely match up with the hours claimed in the July 15-August 1 payroll period, she credited DeGroot's testimony that Milky Way employs him and that he actually worked during the eligibility period. The IHE concluded that DeGroot is engaged in secondary agriculture, as he is employed by a farmer on the farm and the patrolling and fixing of fences is in conjunction with and incident to Milky Way's beef cattle operation.

[19] The employer also operates a beef calf operation that raises to marketable age calves on land near the Visalia dairy. The cattle are rounded up annually. In 2002, the round up took place on July 20, which was during the eligibility period.

Union's exceptions:

The Union argues that DeGroot "lacks a sufficient employment relationship with Milky Way to be considered an employee because he is employed full time on another dairy."

Analysis and Conclusion:

We find that the Union's argument is not persuasive because there is no legal impediment to DeGroot's having employee status at more than one place of work. To the extent that the Union also urges a finding that DeGroot was not an employee but was an independent contractor, this argument also fails. The Union bases this argument primarily on the fact that DeGroot is employed at another dairy. There was no evidence that DeGroot had his own independent fence repair business. In addition, DeGroot was paid by the hour rather than for the job as a whole. We find that there is nothing in the record to indicate that DeGroot was anything other than an employee of Milky Way; therefore, we affirm the IHE's findings and conclusions as to DeGroot, and order the challenge to his ballot be overruled and that his vote be counted.

8. Jason DeJong

The IHE recommended that the challenge to Jason DeJong's ballot be sustained because she found that there was insufficient evidence as to whether he was employed during the eligibility period. She found his "lack of connection to the Milky Way agricultural workforce" a further basis for sustaining the challenge to his ballot.

Jason DeJong is a high school student and the son of John Gailey's cousin, Arie DeJong. (RT 96: 7-10) In the declaration submitted in support of Milky Way's

Exceptions to the Regional Director's Challenged Ballot Report, Jason stated that he worked during the round up "season" which lasts three-four weeks. He stated in that declaration that he worked three or four days during the week of July 25, 2002. He did not testify at the hearing. His check stub for $112.00 from Milky Way is dated August 1, 2002. It does not specify the days on which he worked.

John Gailey testified that Jason worked on the day of the round up, on July 20, 2002, and that he would have to "look back" to see for how many days he paid him. (RT 279: 7-8) Other testimony by Gailey indicates that Jason only worked the day of the round-up. (RT 101: 6-12) The IHE found Gailey's testimony was inconsistent with Jason's being paid $112.00, and with Jason's statement that he worked three or four days.

The IHE found that a further basis for sustaining the challenge to Jason's ballot was his "lack of connection" to the Milky Way agricultural workforce.

In drawing this conclusion, she emphasized that the round up was, for many of the participants, like a social event. She reasoned that his participation in the round up did not establish that Jason was treated as or understood himself to be an agricultural employee.

Employer's exceptions:

The Employer argues that Jason and the other individuals who worked the July 20, 2002 round up were agricultural employees. The Employer also notes that the fact that some of the round up participants were under 18 years old does not have any

bearing on their eligibility as the ALRA does not set forth any minimum age requirements.

Analysis and conclusion:

We disagree with the IHE's finding that there was insufficient evidence as to whether Jason DeJong was employed during the eligibility period. The record establishes that the roundup occurred on July 20, 2002, a date clearly during the eligibility period. Gailey testified that although the round up itself lasted only one day, sometimes the round up workers come the day before and plan for the actual event. (RT 279: 3-6) Because as previously discussed, the burden on the Employer was one of production, not persuasion, we believe that in this instance, the IHE placed too much emphasis on whether the amount on Jason's check matched his hourly rate and exact hours he claimed to have worked. In light of the irregular and unusual payment practices at Milky Way, it is not surprising that there be discrepancies between formal payments and the workers' recollection of their hours. The record supports the conclusion that Jason worked on July 20 and therefore worked, at the very least, one day during the eligibility period.

We also find the IHE's conclusion that Jason had a lack of connection to the Milky Way agricultural workforce problematic. The IHE cited *Simon Hakker* (1994) 20 ALRB No. 6, in support of her conclusion about Jason's status. In that case, the Board found as to the workers in question that there was a "[l]ack of sufficient connection with [the employer] to take on the status of employees." We find that the ruling in *Simon Hakker* does not accurately reflect the established principle that under the ALRA, there is

no exclusion for casual employees. The Board has long held that if a worker was an agricultural employee for any time during the eligibility period, this is sufficient to make them eligible voters. (See e.g. *Yoder Bros. Inc*., (1976) 2 ALRB No. 4, where the Board found that high school students who were considered by the employer to be temporary workers should have been on the eligibility list.) To the extent that *Simon Hakker* is inconsistent with the decision herein, it is hereby overruled.

While the NLRA circumscribes voter eligibility by giving the NLRB a large amount of flexibility in determining the appropriate bargaining unit (see NLRA section 9(b)), the ALRA contains no similar provisions for considering a community of interest of the workers in question in order to establish voter eligibility. (*Bunden Nursery, Inc.* (1988) 14 ALRB No. 18.) Rather, Labor Code section 1156.2 requires that the bargaining unit consist of all agricultural employees of the employer, unless they are employed in two or more noncontiguous geographical areas, a circumstance not existing in this case. Consequently, ALRA section 1157 merely states that "all agricultural employees whose names appear on the payroll applicable to the payroll period immediately preceding the filing of the petition…shall be eligible to vote." This difference reflects the unique character of the agricultural industry in which the work is often seasonal, subject to high labor turnover, and whose employees belong to a "fluid mobile labor pool…available wherever there is work to be done." *San Clemente Ranch, Ltd.* (1979) 5 ALRB No. 54.

It is also well-established that all workers who are entitled to be paid during the eligibility period are eligible to vote even if their names do not appear on the

employer's regular payroll list. (*Valdora Produce Co.* (1977) 3 ALRB No. 8.) Therefore, the fact that Jason worked only during the round-up and was not part of the regular Milky Way workforce does not render him ineligible to vote. We conclude that the challenge to Jason DeJong's ballot be overruled and that his vote be counted.

9. Gerrit Roeloffs

The IHE recommended that the challenge to the ballot of Gerrit Roeloffs be sustained. She found that although Roeloffs was present at the Dairy on July 20, 2002, for the round up, "he did not consider himself to be an employee, and he did not have a sufficient connection with Milky Way to take on the status on employee."

Roeloffs is a 13 year-old high school student and is the son of a neighbor. (RT 278: 24) He stated in his declaration that he brought his own horse to the roundup and rode that horse during the round up. He was paid $64.00. (EX #24A) In his declaration, Roeloffs stated that the Dairy needed help for one day, and his father made arrangements with John Gailey for Roeloffs to work in the round up.

Employer's exceptions:

As with Jason DeJong, above, the Employer argues that Roeloffs and the other individuals who worked the July 20, 2002 round up were agricultural employees.

Analysis and Conclusion:

For the reasons stated above with regard to Jason DeJong, the IHE's analysis that Roeloffs did not have a sufficient connection with Milky Way to take on employee status is flawed. We conclude that the challenge to Gerrit Roeloff's ballot be overruled and that his vote be counted.

10. Philip Heynen

The IHE recommended that the challenge to Philip Heynen's ballot be sustained. Philip Heynen testified that he worked at Milky Way caring for and exercising the horses. He performed general grooming, checked their hooves, and rode the horses. (RT 451: 15-23) He began work at Milky Way in February 2002. (RT 455: 1) He scheduled his own hours, usually working 6-10 hours each month, and was paid by check on Milky Way's business account or in cash. (RT 455: 232-25; 456: 1; 19-20) He testified that he worked in July 2002, spending more time that month because he was getting the horses ready for the round up. (RT 452: 4-8)

John Gailey testified that Milky Way had extra horses in the pasture before and after the round up and that Heynen took care of them. (RT 104: 10-12) Gailey also stated that Heynen worked "close to the whole month of July" (RT 107: 3-4), but particularly in the two weeks before the round up, when the Dairy had the extra horses in the pasture. (RT 107: 11-12) Gailey said that he told Heynen that "we have extra horses out here and I need someone to keep an eye on them for me…" (RT 285: 19-21) According to Gailey, Heynen checked the horses the two days before the round up and then every other day until the extra horses left. (RT 288: 1-10)

Gailey stated that Heynen no longer worked for him. (RT 290:1), but Heynen testified that he continues to spend some time caring for the Dairy horses. (RT 401: 17-18; 454: 1-3) Heynen said that he received a $32.00 check for his work during the round up (EX #21A) and $50.00 in cash. (RT 453: 20-21) Heynen said that he was not paid at "an exact hourly rate," but that part of his compensation was "just the fact that

[he] got to ride the horses." (RT 460: 12-18) Gailey testified that Heynen was paid $8.00 per hour. (RT 288: 20-21)

The IHE stated that there were a number of factors which led her to conclude that the evidence was insufficient to establish that Heynen was an agricultural employee during the eligibility period. First, she found a "glaring discrepancy" in the testimony about Heynen's rate of pay, and that the payroll records did not bear out Gailey's testimony either as to the rate of pay or the number of hours that he claims Heynen worked. Additionally, she found Heynen's declarations and testimony were contradictory.

The IHE further reasoned that Heynen did a job that was not incidental to Milky Way's dairy operations. She noted that to the extent that the Dairy boards horses as well as keeping its own horses, that boarding operation cannot be said to be a part of Miky Way's dairy operations. (RT 457: 3-4) She also noted that the non-dairy participants in the round up bring their own horses, which may be boarded at Milky Way for a few weeks. The IHE therefore found that Heynen's caring for those horses was not secondary agriculture because it was not a practice incident to the Milky Way's dairy operations.

The IHE went on to find, again relying on *Simon Hakker*, that there was lack of sufficient connection with Milky Way for Heynen to take on the status of an employee.

Employer's exceptions:

The Employer emphasizes that the dairy uses horses as part of its "cow-calf beef" operation, and that this was clearly incident to Milky Way's dairy operation.

Analysis and Conclusion:

In his challenged ballot declaration, Heynen stated that he worked on July 16, 17, 23, and 24, 2002 for approximately 1 1/2 hours per day. (EX #21B) This is consistent with his testimony that he rode the horses before the round up to help get them in shape and checked them closely after the round up to make sure there were no injuries. (RT 452: 16-25) Moreover, as the record establishes that the round up occurred on July 20, 2002, a date clearly during the eligibility period, if he was getting the horses ready for the round up, then it is highly likely that he worked during the eligibility period. Even if Gailey's testimony that Heynen worked close to the whole month of July and was paid $8.00 an hour cannot be credited, Heynen's declaration about the days and hours worked is consistent with his own testimony that his agreement with Milky Way was to work six hours per month at a flat rate of $32.00, and that if he worked more hours he was given more, in this instance, $50.00 in cash following the round up.

The IHE concluded that Heynen's caring for horses was not secondary agriculture because it was not a practice incident to the Milky Way's dairy operations, but instead was incident to a separate horse boarding operation. We disagree with this conclusion, as there is no indication that the Employer operated a distinct boarding business. In addition, the record supports the conclusion that while Heynen was involved

with boarded horses not used in the round up, he spent a significant time during the eligibility period specifically getting horses ready for the annual round up.

As for the IHE's additional conclusion that that there was lack of sufficient connection with Milky Way for Heynen to take on the status of an employee, for the reasons discussed above with regard to Jason DeJong and Gerrit Roeloffs, we do not adopt the IHE's analysis.

Therefore, we overturn the IHE's conclusion that the challenge to Heynen's ballot should be sustained, and order that his ballot be opened and counted.

11. Damian Chick

The IHE recommended sustaining the challenge to Chick's ballot because she was unable to say whether he was employed during the eligibility period.

According to Damian Chick's challenged ballot declaration, he is employed by Milky Way full-time as a welder. John Gailey testified that Chick does repair and fabrication and construction and building at the Dairy. The IHE found that based on Gailey's testimony regarding Chick's work, it appears that Chick is engaged in secondary agricultural activity. The IHE cited *California Coastal Farms* (1976) 2 ALRB No. 26 and *Salinas Marketing Cooperative* (1975) 1 ALRB No. 26 in support of this conclusion.

Chick stated in his declaration that he worked during the two-week eligibility period. (EX #12B) According to John Gailey, Chick is an Australian native who shows up periodically at Milky Way and works. He has done this for 5-6 years. (RT 88: 5-12) He is paid $100.00 per day. (RT 83: 8-9; 84: 9-12; 85: 3-5) Chick was paid out of Milky Way's business account.

The payment record that Milky Way submitted showed that Chick was paid $400.00 on August 1, 2002. There were no deductions (EX #12A). The IHE found that this was not consistent with the statement in Chick's challenged ballot declaration that he worked from July 15-19, 2002, 8 hours each day; July 20, 2002 for 71/2 hours; and July 22-25, 2002, for 8 hours each day. John Gailey testified that he gave Chick a check for only $400.00 "because he needed some cash to survive on, and then we settle up with him every six months." (RT 88: 1-3) The IHE found this testimony unreliable, and did not credit it. The Employer's Exhibits #12C and #12D are invoices for the delivery of parts at the Dairy for which Chick signed on July 17 and July 18, 2002.

The IHE reasoned that although the invoices submitted by the Dairy established that Chick was present at Milky Way during the eligibility period, due to the discrepancy in the payroll records and Chick's declaration, she was unable to say whether Chick was actually employed as an agricultural employee during the eligibility period.

Employer's exceptions:

The Employer argues that Chick worked during the eligibility period and was therefore eligible to vote.

Analysis and Conclusion:

We conclude that the IHE has placed too much emphasis on whether the amount on the check precisely matches Chick's hourly rate and exact hours he claimed to have worked. As noted earlier, the record indicates that the Employer's payroll practices and methods of remuneration for work performed were anything but ordinary. We find it reasonable to infer from Chick's presence at the dairy during the eligibility period, when

he signed delivery invoices (on July 17 and 18, 2002), that he was working on those days. We order that the challenge to Chick's ballot be overruled and that his vote be counted.

12. Brenda Leatherberry

The IHE found that Leatherberry was engaged in secondary agriculture under the same reasoning she used to discuss fellow hay hauler Aguirre's status; however, the IHE concluded that there was insufficient evidence to show that Leatherberry was employed during the eligibility period.

Like Aguirre, Leatherberry hauls hay to Milky Way from Arizona, the Sacramento area, and Nevada. (RT 54: 6-9) She also transports Dairy equipment and is responsible for cleaning and maintaining the Peterbilt truck and trailers that she uses, which are supplied by the Dairy. Leatherberry keeps a log of the miles that she drives and is paid by the mile. (RT 211: 24-25) In her challenged ballot declaration, Leatherberry stated that she believed that she worked during the two-week eligibility period, between 3-5 days each week, averaging 10 hours per day. (EX #22B) In July 2002, according to John Gailey, she was hauling alfalfa hay to the Dairy from Nevada. (RT 52: 21-23; 55: 2-5)

There were no payroll records submitted for Leatherberry, other than one check for $315.00, dated August 1, 2002. (RT 58: 22-23; 59: 3-6) The IHE found Gailey's testimony about the time covered by the check to be contradictory. He first stated that Aguirre hauled materials from Arizona in early July, and that he was hauling hay the second to last week of July. (RT 58: 20-25) Later, he testified that Aguirre and Leatherberry hauled materials together and it was the third week in July. (RT 213: 13-

15) The IHE did not credit that testimony, and Gailey in fact testified that he could not tell from Leatherberry's check the period of time that it covered. (RT 214: 6-9) Although Gailey suggested that he had other payroll records for Leatherberry (RT 211: 18-23), he did not produce them at the hearing, and the IHE drew an adverse inference from his failure to do so.

Employer's exceptions:

The Employer asserts that John Gailey testified that Leatherberry worked during the eligibility period and that this testimony was unrefuted, and that uncontradicted evidence (Leatherberry's declaration [EX #22A]) establishes that she worked during the eligibility period.

Analysis and Conclusion:

The IHE found Gailey's testimony as to Leatherberry to be unreliable. We find no reason to overrule the IHE's credibility determinations regarding Gailey's testimony as to when Leatherberry worked.[20]

We also find that it was proper for the IHE to draw an adverse inference from Milky Way's failure to provide additional documentary evidence establishing when Leatherberry worked.[21]

Based on the lack of testimony from Leatherberry, conflicts in her declarations and with the testimony of John Gailey, and the absence of any payroll

[20] It is well-established that the Board will not disturb credibility resolutions based on demeanor unless the clear preponderance of the evidence demonstrates that they are in error. (*P.H. Ranch* (1996) 22 ALRB No. 1; *Standard Drywall Products* (1950) 91 NLRB 544.) In instances where credibility determinations are based on things other than demeanor, such as reasonable inferences, consistency of witness testimony, or the presence of absence of corroboration, the Board will not overrule the ALJ's credibility determinations unless they conflict with well-supported inferences from the record considered as a whole.

[21] See California Evidence Code section 412.

records for the eligibility period, the IHE's conclusion that there is insufficient evidence from which to conclude that Leatherberry was employed during the eligibility period is well supported. We affirm the IHE's findings and conclusions as to Leatherberry, and order that the challenge to her ballot be sustained.

13. Deanna Helming

The IHE found that Helming was an agricultural employee but recommended sustaining the challenge to her ballot because there was insufficient evidence that she worked during the eligibility period.

As a relief breeder Helming fills in for Victor Gonzales, the primary breeder, on his days off. She works on a part-time basis and is paid a flat rate of $100.00 per day. (RT 256: 1-10) When working at Milky Way, she uses Milky Way's equipment. (RT 482: 21-25) Helming also works part-time for a company called Genex, where she does training in artificial insemination for various clients of the company. (RT 480: 13-21)

The IHE concluded that it appears from Helming's testimony that Milky Way keeps records of the days on which she works. She logs her work into the Milky Way computer before she leaves. (RT 500: 14-20) During her testimony, she stated that she was not positive which days in July she worked. (RT 512: 11-12) In her challenged ballot declaration, she stated that she worked two or three days during the eligibility period, about 6½ hours per day, although which days she worked are not specified. (EX #20B) Helming was paid through the Milky Way general account and no deductions were made from her check. The payroll record indicates that she was paid $200.00 on

August 1, 2002. (EX #20A) John Gailey said that Helming worked whatever two days Victor had off, although he did not recall which days. (RT 258: 7-8) He issued her a $200.00 check dated July 31, 2002, which he said would have been for the two-week period prior to the issuance of the check. (RT 74: 14-15) Based on Gailey's testimony, Helming could have worked July 26-31, 2002, days outside of the eligibility period.

The IHE drew an adverse inference from Milky Way's failure to provide computer records that would have established when she worked. Nor did it provide the time records of Victor Gonzales, which would have established which days he was off. Further, the IHE did not find Helming's declaration sufficiently specific to provide corroboration for when she worked given that her testimony at the hearing also failed to establish the dates on which she worked. In addition, Helming testified that she had a written record of her work days, but did not bring it to the hearing. (RT 512: 9-15)

Employer's exceptions:

The Employer merely asserts that John Gailey testified that he observed Helming working during the eligibility period and that this testimony was unrefuted.

Analysis and Conclusion:

As indicated previously, the IHE found Gailey's testimony to be unreliable. We find that it was proper for the IHE to draw an adverse inference from Milky Way's failure to provide documentation within its possession that would have established when Helming worked. Milky Way easily could have provided documentary evidence such as Gonzales's time records that would have identified his days off and consequently could have pinpointed Helming's workdays. The IHE's conclusion that there is insufficient

evidence from which to conclude that Helming was employed during the eligibility period is well supported; therefore, we affirm the IHE's findings and conclusions as to Helming, and order that the challenge to her ballot be sustained.

14. Bert DeJong

The IHE found that there was insufficient evidence that Bert DeJong worked during the eligibility period and recommended that the challenge to his ballot be sustained.

Bert is a cousin of Milky Way owner Arie DeJong. (RT 95: 22-25) He did not testify at the hearing. In his challenged ballot declaration, he stated that he worked July 15 and July 16, 2002, eight hours each day, as a fence checker fixing fences, and his wage rate was $7.00 per hour. Bert stated that it was also his job to participate in the actual round-up of cattle. (EX #16B)

The payroll record indicates that Bert DeJong was paid $32.00. The payroll record of Bert's August 1, 2002 check does not specify on which day he worked or how many hours he worked. No deductions were taken. The IHE reasoned that if Bert had worked 16 hours at $7.00 per hour as he claimed, he should have been paid $112.00.

John Gailey testified that Bert works every week or every other week, for a couple of hours, patrolling and maintaining the Dairy's fences, unless called by Gailey for a specific fence repair. (RT 274: 10-19; 275: 10-12; 276: 17-25) The IHE found that given (1) the inadequacy of the payroll records to support Bert DeJong's claim that he worked 8 hours each day on July 15, and July 16; (2) the discrepancy raised by his additional claim that he participated in the actual round-up of cattle, which would have

been on July 20, giving him an additional day of indeterminate hours of work, as well as (3) the absence of clarifying testimony from Bert DeJong, there was not enough evidence to support a finding that he worked during the eligibility period.

Employer's exceptions:

The Employer provides no additional support for its claim that Bert worked during the eligibility period, save claiming the testimony of John Gailey on this point to be unrefuted.

Analysis and Conclusion:

We agree with the IHE's finding that there is insufficient evidence to establish that Bert worked during the eligibility period. Gailey did not testify that Bert worked on July 20, 2002, the undisputed actual day of the round up. Neither Gailey's bare assertion that Bert worked during the eligibility period nor the check dated August 1 is sufficient, as nonhearsay evidence, to corroborate Bert's declaration. We therefore affirm the IHE's findings as to Bert DeJong and order the challenge to his ballot be sustained.

15. Steven Wells, 16. Ignacio (Nacho) Escovedo, 17. Mike Rodriguez, and 18. Frank Garcia:

The IHE recommended that the challenges to the ballots of Wells, Escovedo, Rodriguez and Garcia be sustained because they were construction workers and excluded from coverage of the Act by virtue of section 1140.4 (b) of the Act.[22] The

[22] Section 1140.4(b) of the ALRA states that:
"…nothing in this part shall apply, or be construed to apply, to include any employee who performs work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work (as these terms have been construed under Section 8(e) of the Labor Management Relations Act, 29 USC Section 158(e)."

IHE provided alternative analyses, recommending that if these workers were not excluded based on their construction worker status, NLRB precedent and the DOL guidelines interpreting the FLSA supported her finding that they were not agricultural workers. She also suggested that Wells could be excluded as a statutory supervisor.

Wells, Escovedo, Garcia, and Rodriguez worked together as a crew at Milky Way on construction projects. (RT 515; 19-24; 516; 1-12; RT 163; 11-19; 164; 3-6) Wells is a former licensed general contractor (RT 519; 13-21), and the IHE found that this indicated some training and special skill in construction. Other indications of these workers' specialized skills that the IHE found to be persuasive were: Wells' estimates were relied upon for materials like concrete, roofing, siding and other construction projects (RT 169; 4-20); they worked together on plumbing, foundation, and electrical projects while constructing "Juan's garage" (RT 425; 3-10); these workers were not integrated into the Dairy's workforce (RT 141-149); their wage scale was clearly different than those of other workers (RT 514-517); and that Wells and his crew were hired for specific projects, like concrete, roofing, siding, plumbing and other construction projects. (RT 164; 4-6, 16-19, RT 522-523)

Employer's exceptions:

The Employer argues that Wells and his crew are agricultural employees and not construction employees. The Employer contends that the work performed by the crew is agricultural based on the Industrial Welfare Commission's definition of an "agricultural occupation." (IWC Order No. 14-2001, §D, part (8), p. 2.) This definition includes "the conservation, improvement or maintenance of such farm and its tools and

equipment." The Employer also asserts that cases under the Fair Labor Standards Act (FLSA) have routinely held that workers engaged in the construction, maintenance and repair of buildings on a farm are agricultural employees within the meaning of the FLSA and as defined in the regulations issued by the Department of Labor. (29 C.F.R. section 780.136)

Analysis and Conclusion:

We affirm the IHE's conclusions that support her primary recommendation that the challenges to the ballots of Wells, Escovedo, Rodriguez and Garcia be sustained because they were construction workers and excluded from coverage of the Act by virtue of section 1140.4 (b) of the Act.[23]

We disagree with the Employer's contentions that the Industrial Welfare Commission's definition of an "agricultural occupation" is applicable under the ALRA, and find that the construction worker exclusion set forth in section 1140.4(b) of the Act controls here.

In *Dutch Brothers* (1977) 3 ALRB No. 80, the Board upheld the ALJ's determination that section 1140.4(b) was intended to exclude employees who were trained as construction workers and whose primary function was to work in tasks utilizing those specialized skills. In contrast, employees whose only construction tasks involved rudimentary structures and who were not trained as construction workers were not intended to be excluded from the Act because such workers would not have been

[23] We note that workers who are engaged in construction work, though seen by the NLRA as within the FLSA definition of agricultural workers when performing work on a farm, could none the less be excluded from coverage under the ALRA. (See e.g. Herman Levy, *The Agricultural Labor Relations Act of 1975 – La Esperanza de California Para El Futuro* (1975), 15 Santa Clara Lawyer 783 at 786.)

eligible for membership in construction unions. The ALJ determined that the workers in question in *Dutch Brothers* were agricultural workers, and not construction workers within the meaning of 1140.4(b), because they had no particular construction skills, their primary tasks did not involve specialized skills, they were integrated into the regular employee workforce, and other employees were sometimes called upon to do such work.

In contrast, the primary work of Wells, Escovedo, Garcia, and Rodriguez, did involve specialized skills beyond building rudimentary structures. Though Johnny Gailey stated that he supervised Wells and his crew, he appears to have relied on Wells' general contracting and specialized construction skills and assigned special value to the work performed by this crew, based on their unique wage scale and payment scheme. We affirm the IHE's conclusion that Wells and his crew were indeed the sort of workers intended to fall under the construction worker exclusion found in 1140.4 (b) of the Act, and order the challenges to their ballots be sustained.

19. Benjamin Cruz:

The IHE found that Cruz was a supervisor within the meaning of section 1140.4(j) of the ALRA, and therefore was ineligible to vote in the election.[24]

Cruz testified that he has worked for Arie DeJong for 13 years. He has worked at Milky Way for five years. (RT 349: 7-20) He testified that he works with a group of 5 other people. (RT 350: 10) He is paid $12.00 per hour, while the other

[24] Labor Code section 1140.4(j) provides that: " the term 'supervisor' means any individual having the authority, in the interest of the employer, to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward or discipline employees, or the responsibility to direct them, or to adjust their grievances, or effectively recommend such action, if, in connection with the foregoing, the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment."

members of the crew are paid between $7.00 and $10.00 per hour. He works six days a week. (RT 351: 21-22) He denied that he could hire, fire, lay-off, transfer, promote, demote, or discipline the employees with whom he worked. (RT 354: 1-25; 355: 1-3) He said that Johnny Gailey tells him what to do and then he explains to the others what they are to do. (RT 355: 4-5; 13-15) Despite this statement, he also testified that he directs the morning meeting where the crew learns the work for the day. He also makes the decision to move the animals from one corral to another. (RT 380: 4-6) Cruz described himself as a leadman, with more experience than the others, which is why the other members of the crew ask him where to start or ask him for advice regarding sick cows. (RT 378: 12-13; 379: 13-17)

John Gailey testified that Cruz's responsibilities include maintaining the health and organization of the heifers. (RT 81: 12-20) According to Gailey, Cruz does not direct the workers in his crew, and he does not hire or fire. The people who work with Cruz are trained by Gailey, Arie DeJong, or Cruz. (RT 293: 24-25) Gailey stated that Cruz does provide daily direction to the crew (RT 295: 3-4), and there was testimony from crew members that at least on some occasions, workers have called Cruz to ask for the day off or to report to him that they have an appointment. (RT 299: 1-4)

Eladio Moreno, who was one of the 5 individuals who worked with Cruz during the relevant period, insisted that Cruz was in charge of the group that took care of the heifers. According to Moreno, although John Gailey is the "real boss," Cruz was the one who gave them their orders. (RT 576: 21-25) He told the workers in the crew where to go and what to do. (RT 577: 4-5) Moreno said that the hours varied each day because

they worked until they finished the job, and it was Cruz who said when they were done. Some days, Cruz told some of the crew to leave earlier than the others, when they were not all needed to finish the work. (RT 578: 1-10) Moreno also said that the workers in the crew asked Cruz when they wanted to leave early. He testified that he asked Cruz for permission to leave work early one time due to family problems. (RT 611: 8-11)

According to Moreno, Cruz decided on the treatment for the cows and decided on which cows to move. (RT 588: 21-25; 596: 4-24) Moreno said that Cruz asked other outside workers who were not members of their crew to help when there were a lot of sick cows and when the crew needed help moving the cows from corral to corral. (RT 594: 3-15; 598: 4-10; 20-21)

Jose Rojas also testified. He is an outside worker at Milky Way. (RT 707: 12-22) Rojas testified that Cruz would ask him to help move the cows, often as much as once or twice each week. (RT 711: 7-13) According to Rojas, John Gailey told the outside workers that when Cruz needed help, the outside workers had to stop what they were doing and do what Cruz told them to do. (RT 715: 12-15; 732: 18-23; 753: 1-3)

Salvador Hernandez testified that he received orders from Cruz once or twice each week. Cruz told him to clean out dead cows from the maternity area; he also asked Hernandez to help move the cows. (RT 755: 14-25) According to Hernandez, John Gailey told the outside workers to follow Cruz's orders. (RT 759: 16-23; 760: 3-12)

IHE's analysis:

The IHE did not credit John Gailey's testimony that he met with Cruz every morning to give him directions for the crew. She also discredited Gailey's testimony that other crew members could direct outside workers, in favor of the testimony of Moreno, Rojas and Hernandez who were adamant that only Cruz could do so. The IHE found Moreno to be credible because he testified in a straightforward manner, and his testimony was corroborated by that of other witnesses. The IHE found that Hernandez's testimony about the activities of Cruz's crew to be not particularly reliable, but that his testimony about his own activities and about Gailey's telling the outside workers to follow Cruz's orders was consistent with the testimony of Rojas and Moreno. Finally, the IHE credited the corroborative testimony of Rojas and Hernandez.

The IHE found that Cruz was a supervisor because he directed the members of the crew in their work. She found it persuasive that when additional assistance was needed, other outside workers were told to do as Cruz instructed them to do. She cited *Carlisle Engineered Products, Inc*. (2000) 330 NLRB No. 1359 emphasizing that the "decisive factor [in determining supervisory status] is whether the employee possesses the authority to use independent judgment with respect to the exercise of one or more of the specific authorities listed in section 2(11)."[25]

The IHE found that Cruz used independent judgment in performing his duties even though Gailey characterized his work as repetitive. The IHE found that

[25] Section 2(11) of the NLRA is analogous to section 1140.4 (j) of the ALRA.

Cruz's meeting each morning with the crew, his decisions about when to move cows, treat sick cows, and his decisions about when the crew members were to leave at the end of the day and when they were to work overtime were all indicia that he used independent judgment.

The IHE noted that the question of whether Cruz is a supervisor within the meaning of section 1140.4(j) of the ALRA was a close one, due to the repetitive nature of the crew's work. She further noted that in a close case, secondary indicia of supervisory status may be considered, such as differences in wages and benefits, titles, and supervisor/employee ratios. (*Monotech of Mississippi v. NLRB* (5th Cir. 1989) 876 F2d 514, 517.)[26] The IHE found that an examination of such secondary indicia also supported classifying Cruz as a supervisor. Cruz was the only member of the crew given the title "herdsman," and he is the highest paid member of the crew, making $12.00 an hour while the rest of the crew made between $7.00 and $10.00 per hour.

Employer's exceptions:

The employer argues that at best, Cruz was an assistant to Gailey and not a supervisor, as he merely carried out Gailey's instructions. The Employer argues that Cruz did not exercise independent judgment in carrying out any of the duties listed in the statutory definition of supervisor. In support of its position, the Employer cites *Bright's Nursery* (1984)10 ALRB No. 18, in which the Board noted that "a mere 'straw boss' with no independent discretion will not be deemed a supervisor."

[26] The IHE assigned the burden of proof on this issue to the Union, citing NLRB precedent. (*NLRB v. Kentucky River Community Care, Inc*. (2001) 532 U.S. 706; 121 S. Ct. 1861; *King Broadcasting Co. dba KGW-TV* (1999) 329 NLRB No. 39.)

Analysis and Conclusion:

We are mindful that the NLRB has deemed it necessary to proceed cautiously in finding supervisor status (*Energy Gulf States, Inc. v. NLRB* (5th Cir. 2001) 253 F3d 203; *East Village Nursing & Rehabilitation Center v. NLRB* (DC Cir. 1999) 165 F3d 960, 962), and note that the question as to Cruz's status is indeed a close one.

We find no reason to disturb the credibility determinations of the IHE with respect to testimony by and about Cruz. Nor do we find the Employer's argument that Cruz did not exercise independent judgment in carrying out any of his duties persuasive. Unlike the foremen in *Bright's Nursery*, the record does not support a finding that Cruz was merely a conduit for the orders and direction given by Gailey. Nor did Cruz simply relay Gailey's instructions to the crew. (*Ukegawa Brothers, Inc*. (1983) 9 ALRB No. 26, ALJ Dec. at p. 9.) Credited testimony indicates that Cruz made decisions about when to move cows, treat sick cows, and when the crew members were to leave at the end of the day and when they were to work overtime. The record supports the conclusion that Cruz made work assignments to the crew members based on the requirements of the specific daily work activities and on his opinion of their work skills. Courts have held that this is a sufficient exercise of independent judgment. (*American Diversified Foods, Inc. v. NLRB* (7th Cir. 1981) 640 F2d 893, 896 citing *NLRB v. Pilot Freight Carriers, Inc.* (4th Cir. 1977) 558 F2d 205.)

It was also proper for the IHE to conclude that the fact that Cruz spent a significant amount of time doing the same work as the other members of he crew did not require a finding that he is not a supervisor. In *American Diversified Foods, Inc. v.*

NLRB, *supra*, 640 F2d 893, the court concluded that shift managers who were responsible for assigning work to counter employees, who met twice a month with the unit managers to discuss personnel problems and store procedures, and who had the authority to replace absent employees and to decide which employees were to leave early and to allocate breaks were supervisors, even though they spent 40-60% of their time doing exactly the same work as the other employees.

We also agree with the IHE's determination that an examination of secondary indicia of supervisory status also supports classifying Cruz as a supervisor.

We therefore affirm the IHE's conclusion that Benjamin Cruz was a supervisor and order that the challenge to his ballot be sustained.

Conclusion

In summary, pursuant to this decision, we have overruled the challenges to the ballots of:

1. Paulina Betancourt Lopez
2. Esteban Aguirre
3. Charles Millar
4. Karl Gailey
5. Douglas DeGroot
6. Jason DeJong
7. Gerrit Roeloffs
8. Philip Heynen
9. Damian Chick

We have sustained the challenges to the ballots of:

1. Peter DeJong
2. Natalie Walker
3. Brenda Leatherberry
4. Deanna Helming
5. Bert DeJong
6. Steven Wells
7. Ignacio (Nacho) Escovedo

8. Mike Rodriguez
9. Frank Garcia
10. Benjamin Cruz

ORDER

In accordance with the decision above, the Board overrules the challenges to voters Paulina Betancourt Lopez, Esteban Aguirre, Charles Millar, Karl Gailey, Douglas DeGroot, Jason DeJong, Gerrit Roeloffs, Philip Heynen, and Damian Chick and orders the Regional Director to open and count their ballots.

IT IS FURTHER ORDERED that the challenges to the ballots of voters Peter DeJong, Natalie Walker, Brenda Leatherberry, Deanna Helming, Bert DeJong, Steven Wells, Ignacio (Nacho) Escovedo, Mike Rodriguez, Frank Garcia and Benjamin Cruz be sustained and that their votes not be counted.

IT IS FURTHER ORDERED that the ballots of Manuel Cervantes Espinoza, David Rodriguez, Araceli Burleson, Eric Danzeisen, Matthew Gailey, and Johannes Vellema, the challenges to which were previously overruled in Administrative Order No. 2002-8, now be opened and counted.[27]

[27] The opening and counting of the ballots of these voters was held in abeyance until the final resolution of the challenged ballot process pursuant to Admin. Order No. 2002-8.

Once all ballots are opened and counted pursuant to this ORDER, the Regional Director shall issue a revised tally of ballots.

Dated: September 3, 2003

GENEVIEVE A. SHIROMA, Chair

GLORIA A. BARRIOS, Member

CATHRYN RIVERA, Member

CASE SUMMARY

ARIE DE JONG dba MILKY WAY DAIRY
(Fresh Fruit & Vegetable Workers, U.F.C.W., AFL-CIO, Local 1096, CLC)

Case No. 02-RC-2-VI
29 ALRB No. 4

Background

A representation election was conducted on August 15, 2002 to determine whether or not agricultural employees at Arie De Jong dbd Milky Way Dairy (Employer or Milky Way) wished to be represented by Fresh Fruit & Vegetable Workers, U.F.C.W., AFL-CIO, Local 1096, CLC (UFCW or Union). A total of 65 ballots were cast, with 24 votes for the Union, 16 votes for "no union," and 25 unresolved challenged ballots. The Regional Director (RD) conducted a post election investigation of the challenged ballots, and on October 2, 2002, issued a Challenged Ballot Report recommending that 3 ballots be opened and counted, that the challenges to 21 ballots be sustained, and that 1 ballot remain unresolved unless it became outcome determinative. Milky Way and the Union both filed exceptions to the RD's report.

On November 22, 2002, the Board issued an Administrative Order which affirmed in part and rejected in part the RD's Challenged Ballot Report. The Board affirmed the RD's recommendation to open and count 3 ballots, and ordered that the challenges to 3 additional voters be overruled. The Board set an investigative hearing to resolve the challenges to the ballots of the remaining 19 individuals.

The IHE Decision

On May 20, 2002, the Investigative Hearing Examiner (IHE) issued her decision. She recommended that the challenges to the ballots of 4 of the remaining 19 voters be overruled and that their votes be counted. She further recommended that the challenges to the ballots of 15 of the remaining 19 voters be sustained. Both the Union and Milky Way filed exceptions to the IHE's recommended decision.

Board Decision

The Board affirmed in part and overruled in part the rulings findings and conclusions of the IHE. Ultimately, the Board ruled that the challenges of 10 of the 19 voters in question be sustained, and that the challenges to 9 of the voters be overruled and that their ballots be counted.

The Board found that the IHE's analyses of several workers' employment relationships with Milky Way were incomplete as they turned solely on whether the workers were engaged in secondary agriculture. The determination whether a worker is engaged in secondary agriculture is not an analysis that can, in all circumstances, determine whether the worker is indeed an employee of the employer. The Board stated that where necessary to determine a person's employment status, it will apply the test set forth in *S.G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal. 3d 341,

and will consider the common law right of control test as informed by the policies underlying the ALRA. As to one worker in question, the Board affirmed the IHE's conclusion that he was not an eligible voter, but did so because the worker was the employee of an independent contractor.

The Board also rejected the IHE's conclusion that several workers were ineligible to vote because they lacked a sufficient connection with the employer to take on the status of employees. Instead, the Board emphasized that if workers were agricultural employees of the employer for any time during the eligibility period, this was sufficient to make them eligible voters. In its discussion of this issue, the Board noted that its previous decision in *Simon Hakker* (1994) 20 ALRB No. 6, did not accurately reflect the established principle that under the ALRA there is no exclusion for casual employees. The Board overruled *Simon Hakker* to the extent it is inconsistent with the present decision.

The Board found that with regard to some workers, the IHE placed too much emphasis on whether the amounts on paychecks exactly matched the number of hours during the eligibility period when several workers recalled they had worked. The payment practices at Milky Way were irregular and discrepancies between the amounts on formal paychecks and hours worked were not unusual. Where there was sufficient additional evidence to support an inference that the workers were employed at any time during the eligibility period, the Board ordered that the challenge to the workers' ballots be overruled despite such discrepancies.

The Board affirmed the IHE's conclusion that a crew of four men who worked on construction projects at the dairy were construction workers and therefore excluded from coverage of the ALRA under section 1140.4(b). The primary work of the crew members involved specialized skills beyond building rudimentary structures, the crew leader was a former licensed general contractor, the crew was not integrated into the dairy's regular workforce, and had a unique wage scale.

Finally, the Board affirmed the IHE's conclusion that an employee was a statutory supervisor because he used independent judgment in performing duties even where many of his duties could be characterized as repetitive. The employee directed daily meetings with his crew and assigned work for the day, made decisions about when to move and treat sick cows, and made decisions about when crew members were to leave for the day. In addition, secondary indicia of supervisory status supported classifying an the employee as a supervisor where his rate of pay was $2.00 to $5.00 per hour more than the rest of the crew and where he was the only individual in the crew with the title "herdsman."

***

STATE OF CALIFORNIA
AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of:	)	**Case No. 02-RC-2-VI**
	)	
ARIE DE JONG dba	)	
MILKY WAY DAIRY,	)	
	)	
Employer,	)	
	)	
and	)	
	)	
FRESH FRUIT & VEGETABLE	)	
WORKERS, U.F.C.W., AFL-CIO,	)	
LOCAL 1096, CLC,	)	
	)	
Petitioner.	)	

DECISION OF THE INVESTIGATIVE HEARING EXAMINER

NANCY C. SMITH, Investigative Hearing Examiner: I heard this case February 18, 2003 through February 21, 2003, in Visalia, California. It involved challenges to the ballots of 19 voters in a representation election conducted among the agricultural employees of Arie DeJong, dba Milky Way Dairy on August 15, 2002. The tally of ballots, served on the parties after the election, showed the following results:

Votes cast for Petitioner……..24

Votes for "No Union"……..16

Challenged Ballots……...25

The Agricultural Labor Relations Board agents conducting the election made the 25 challenges.[1] Petitioner Fresh Fruit & Vegetable Workers, UFCW, AFL-CIO, Local 1096 (hereinafter UFCW or Union) joined the Board agents in challenging three of the voters. One of the voters, Araceli Burleson, was challenged on the basis that she was a confidential employee. Another voter, Benjamin Garcia Cruz, was challenged on the basis that he was not on the eligibility list and was a supervisor. The remaining challenges were on the basis that the voters were not on the eligibility list and were not employed in the appropriate unit during the applicable payroll period. (See Challenge List)

Because the challenged ballots are sufficient to affect the outcome of the election, the Regional Director of the Visalia office of the Agricultural Labor Relations Board (ALRB or Board) conducted an investigation of the challenges and issued a Challenged

[1] The Employer's Post-Hearing Brief erroneously states that the Union made these challenges. (Brief, p. 4)

Ballot Report, dated October 2, 2002. The Regional Director recommended that the challenges to 21 of the ballots be sustained and that three ballots be opened and counted. He found that he did not have sufficient information to resolve the challenge to the ballot of Benjamin Garcia Cruz, and he recommended that if Cruz's vote was not outcome-determinative, it should not be opened and counted. If it were outcome-determinative, he recommended that the challenge to Cruz's ballot be set for hearing.

Arie DeJong dba Milky Way Dairy (hereinafter Milky Way or Dairy) and petitioner UFCW both filed timely exceptions to the Regional Director's Challenged Ballot Report.[2] On November 22, 2002, the Board issued Administrative Order 2002-8, rejecting in part and affirming in part the Regional Director's Challenged Ballot Report. The Board did not adopt the Regional Director's recommendation that the challenges to the ballots of Eric Danzeisen, Matthew Gailey, and Johannes Vellema be sustained, but instead ordered the challenges overruled.[3] The Board ruled that, with respect to 18 of the challenges, Milky Way had submitted adequate evidence to place in dispute issues of material fact as to whether the eighteen voters are agricultural employees who were employed in the appropriate unit during the eligibility period.

The Board set an investigative hearing to resolve the challenges to the ballots of the following: Esteban Aguirre, Paulina Betancourt Lopez, Damian Chick, Douglas DeGroot, Bert DeJong, Jason DeJong, Peter DeJong, Ignacio Escobedo, Karl Gailey,

[2] There were no exceptions to the Regional Director's recommendation that the challenges to the ballots of Manuel Cervantes Espinoza, David Rodriguez, and Araceli Burleson be overruled. Neither party excepted to the recommendation that the challenge to the ballot of Benjamin Garcia Cruz be set for hearing only if outcome determinative. However, since the Board set other challenges for hearing, the challenge to Cruz's ballot was also set for hearing.

[3] Contrary to the Employer's Brief, p. 8, Johann Vellema was challenged by Board agents. (See Challenge List)

Frank Garcia, Deanna Helming, Philip Heynen, Brenda Leatherberry, Charles Millar, Mike Rodriguez, Gerrit Roeloffs, Natalie Walker, and Steven Wells. The Board also set for hearing the challenge to the ballot of Benjamin Garcia Cruz, based on his supervisory status. In its order, the Board directed that the opening and counting of the ballots of Miguel Cervantes Espinoza, David Rodriguez, Araceli Burleson, Eric Danzeisen, Matthew Gailey, and Johann Vellema be held in abeyance until the final resolution of the challenged ballot process.

I. Background

Milky Way Dairy covers some 200 acres in Visalia. The Dairy raises approximately 15,000 heifers, which are used in the dairy operations at Milky Way and at dairies in Arizona. Milky Way has two milking barns, housing 4200 Holstein/dairy cows. The Dairy also raises beef cattle on 1200 acres of native pastureland. The farmland surrounding the Dairy and native pastureland is owned by Arie DeJong, but is leased and sharecropped with Replogle Farming. The Dairy was constructed in 1994. Arie DeJong also owns a Milky Way Dairy in Arizona. (RT: 17-18.)[4]

The UFCW filed the petition for certification on August 9, 2002. The petition alleged that Milky Way Dairy employed approximately 45 workers. In response to the Visalia Regional Office's request for information, the Dairy stated that it employed 64 workers. Milky Way provided payroll records from American Employers Group (AEG), a payroll service, identifying 43 employees paid through AEG during the eligibility

[4] All references to the Reporter's Transcript of the Investigative Hearing shall be as follows: RT page number: line. The three volumes of testimony are paginated in chronological order. The parties exhibits will be referenced as follows: EX # exhibit number or PX # exhibit number.

period and a separate list of employees, denominated "Employees Not on Regular Pay," whom the Dairy contended were also employed during the eligibility period. The records from AEG provided the name of the employee, the payroll period, the number of hours worked, the pay rate, the total earnings, the gross and net earnings, withholdings, and any adjustments. (See Employer's Response to Petition for Certification, found *inter alia*, at EX #2) AEG began doing the Dairy payroll in January 2002. (RT 141:21-23) The list of non-AEG employees included none of information provided in the AEG payroll listing. (EX #2)

The voters who were not challenged in the course of the election all perform a variety of agricultural tasks at the Dairy, ranging from milking to what is termed outside work, involving caring for the heifers, feeding the heifers, sorting the cows, and other tasks. These workers were paid through AEG. As noted *ante*, the records from AEG indicated that these employees' hours were reported and appropriate deductions were made. They were covered by the employer's workers' compensation insurance policy. (EX #2) All of these workers were on the ALRB eligibility list for the election. Because the information supplied by Milky Way regarding the employees not paid through AEG did not contain any information as to the days or hours these employees worked, the Regional Office requested additional information. The Regional Director ultimately concluded that the information supplied did not establish that these workers were employed during the eligibility period and thus eligible to vote. ALRB agents challenged all prospective voters from the non-AEG list.

Because the challenged ballots were sufficient to affect the election, the Regional Director conducted an investigation. He requested information and supporting documentation from the Union and the employer. He concluded that most of the challenges to the ballots cast by the non-AEG paid voters should be sustained because the Dairy had not provided sufficient and adequate information to establish that those on the non-AEG list were employed in the appropriate unit during the eligibility period. In setting the matter for hearing, the Board directed that the IHE take evidence on the issue of whether the 18 challenged voters are agricultural employees within the meaning of Labor Code section 1140.4 (b), and if so, whether they were employed during the payroll period July 11, 2002-July 25, 2002. The IHE was also directed to consider whether Benjamin Garcia Cruz is a supervisor.[5]

II. Eligibility to Vote as An Agricultural Employee

Eligibility to vote in the August 15, 2002 election at Milky Way Dairy obviously depends on each individual's status as an agricultural employee. That term is defined in Labor Code section 1140.4 (b):

> The term 'agricultural employee' or 'employee' shall mean one engaged in agriculture, as such term is defined in subdivision (a). However, nothing in this subdivsion shall be construed to include any person other than those employees excluded from the coverage of the National Labor Relations Act, as amended, as agricultural employees, pursuant to Sec. 2 (e) of the Labor Management Relations Act (Sec. 152 (3), Title 29, United States

[5] At the outset of the hearing, petitioner requested that I reconsider the Board's ruling in Administrative Order No. 2002-8, that Erik Danzeisen, Matthew Gailey, and Johan Vellema are agricultural employees. I ruled that I did not have the authority to do so or the authority to expand the issues that the Board set for hearing. The UFCW again requests reconsideration of this issue in its Post-Hearing Brief, p. 1. I again deny that request, as I believe that I am without authority to reconsider the Board's ruling.

> Code, and Sec. 3 (f) of the Fair Labor Standards Act (sec. 203 (f), Title 29, United States Code).

Labor Code section 1140.4 (a) which is incorporated into the definition of "agricultural employee" provides:

> The term 'agriculture' includes farming in all its branches, and, among other things, includes the cultivation, growing, and harvesting of any agricultural or horticultural commodities … the raising of livestock,… or any practices…performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market and delivery to storage or market or to carriers for transportation to market.

Section 1140.4 (a) tracks exactly section 3(f) of FLSA.

Under the ALRA, an employee is someone "engaged" in agriculture. The primary focus of the definition of employee is not on the conventional indicia defining the relationship between a farmer and someone who works for him/her, but on involvement in certain activities. However, even with that emphasis, the ALRB has adopted the analysis used by the NLRB and courts and the Department of Labor construing the FLSA in determining which employees are engaged in agriculture. Thus, the ALRB has concluded that mechanics employed by a farmer who do repair and maintenance work on the vehicles or equipment owned by the farmer and used in its farming operations are agricultural employees (*California Coastal Farms (1976) 2 ALRB No. 26; Salinas Marketing Cooperative* (1975) 1 ALRB No. 26). So too are cooks employed by a farmer, who live in the farmer's labor camp, and prepare food served to agricultural employees employed by the farmer (*Salinas Marketing Co-op* (1975) 1 ALRB No. 26), and clerical workers if employed by a farmer, as long as the bulk of their work

is in connection with or incident to the farming operations (*Tani Farms* (1984) 10 ALRB No. 5; *Point Sal Growers and Packers* (1983) 9 ALRB No. 57; *Dairy Fresh* (1976) 2 ALRB No. 55)

These seemingly non-agricultural employees are nonetheless found to be included in the scope of section 1140.4 (b) because the Board has held that the definition of employee under the ALRA is identical to that of section 3(b) of the FLSA. In interpreting that provision in conjunction with section 3(f), which defines agriculture, the Supreme Court has held that:

> First, there is the primary meaning [of agriculture]. Agriculture includes farming in all its branches. Certain specific practices such as cultivation and tillage of the soil, dairying, etc., are listed as being included in the primary meaning. Second, there is the broader meaning. Agriculture is defined to include things other than farming as so illustrated. It includes any practices, whether or not themselves farming practices, which are performed either by a farmer or on a farm, incidentally to or in conjunction with 'such' farming practices.

Farmers Reservoirs & Irrigation Co. v. McComb (1949) 337 U.S. 755, 762-63. Referring to the *McComb* definition of primary and secondary agriculture, it is clear that the mechanics, cooks, and clerical workers referred to above are not engaged in primary agriculture, rather, they are included in the definition of agricultural employee because their work comes within the definition of secondary agriculture, i.e. their work is incident to or in conjunction with primary agricultural practices.

In determining who is an agricultural employee, obviously the difficulties arise in the second class of workers, those engaged in secondary agriculture, and in identifying the kinds of work that are included in the phrase "incident to or in conjunction with"

farming practices. This inquiry is particularly important in this case because a number of the voters who voted challenged ballots are involved in labor that is certainly not within the definition of primary agriculture. For example, Natalie Walker did computer assisted drafting of building plans for the Dairy's Arizona office, and Karl Gailey drove equipment or parts to the Dairy from Southern California, most often using his own truck. *McComb* makes a further contribution to the discussion of that issue. The Court notes that:

> [w]hether a particular type of activity is agricultural depends, in large measure upon the way in which that activity is organized in a particular society….Thus the question of whether a particular type of activity is agricultural is not determined by the necessity of the activity to agriculture nor by the physical similarity of the activity to that done by farmers in other situations. The questions is whether the activity in the particular case is carried on as part of the agricultural function or is separately organized as an independent productive activity.

The Supreme Court has wrestled with this definitional problem in cases since *McComb*. In *Bayside Enterprises, Inc. v. National Labor Relations Board* (1977) 429 U.S. 298, the Court was called upon to decide whether truck drivers, who drive poultry feed from the feedmill to the 119 independent farms on which the corporation's chickens were being raised, are agricultural workers and therefore not covered by the NLRA. The employing entity in that case was a large vertically integrated poultry business that contracted with the farms to raise the chickens hatched in the company's hatcheries. The Court concluded that the employer's business included agricultural activities, relating to the breeding and hatching chicks, while other activities were nonagricultural in character, such as the feedmill and the processing plant in which it slaughtered and dressed poultry.

The Court ultimately concluded that the activity of storing poultry feed and then using it to feed the chicks is performed by the contract farmers, rather than by Bayside. The Court concluded:

> Since the status of the drivers is determined by the character of the work which they perform for their own employer, the work of the contract farmer cannot make the drivers agricultural laborers. And their employer's operation of the feedmill is a nonagricultural activity. 429 U.S. at 303.

The Court thus upheld the NLRB's decision that the drivers were not agricultural employees, finding it a reasonable interpretation of the statue and consistent with the Secretary of Labor's construction of section 3(f).

The Supreme Court again confronted the issue in *Holly Farms Corporation v. National Labor Relations Board* (1996) 517 U.S. 392. That case also involved a vertically integrated poultry producer. The NLRB had determined that the appropriate unit included the live haul crews, which included workers grouped in teams of chicken catchers, forklift operators, and truck drivers, who collected for slaughter chickens raised by independent contract growers. The Court noted that it was clear that the live haul crews were not engaged in primary agriculture, and that the more substantial question that they faced was whether the catching and loading of the chickens qualified as work performed "on a farm as an incident to or in conjunction with" the independent growers' farming operations. The NLRB ruled that, although the collection of the chickens for slaughter was performed "on a farm," it was not incident to the farming operations, but to Holly Farms' processing operations. The Court found the national board's interpretation

of the statute reasonable and supported by the Department of Labor's construction of section 3(f).

The Court's decision in *Holly Farms* illustrates the difficulties in construing the definition of "secondary agriculture." As the majority notes: "the statutory language—'incident to or in conjunction with'—does not place beyond rational debate the nature or extent of the required connection." The Court also referred to the Department of Labor guidelines interpreting FLSA, particularly 29 Code of Federal Regulations section 780.144, in which the DOL recognized that the "line between practices that are and those that are not performed 'as an incident to or in conjunction with' such farming operations is not susceptible of precise definition." However, section 780.144 also offers some guidance: a practice is incident to farming operations if it constitutes an established part of agriculture, is subordinate to farming operations, and does not amount to an independent business.

The ALRB in its early years had occasion to consider the precise questions confronted by the Supreme Court and the Department of Labor and has relied on NLRB precedent and the DOL guidelines. (See e.g. *Hemet Wholesale* (1976) 2 ALRB No. 24; *Salinas Marketing Cooperative* (1975) 1 ALRB No. 26.) In this case, in addition to the issue of whether certain of the challenged voters are agricultural employees, the Regional Director determined that there was not sufficient and adequate information to establish that certain of the challenged voters were employed during the eligibility period. He raised an additional consideration in concluding that four of the challenged voters were independent contractors and one of these, Steven Wells, was the employer of three

of the other challenged voters (Escobedo, Rodriguez, and Garcia). Each of the challenged voters presents a unique set of facts and each will be analyzed in light of the facts presented and the law discussed above.

III. Burden of Proof

Before discussing the individual voters, the issue of who bears the burden of proving the employee status of the challenged voters merits some discussion. In *Rod McLellan* (1978) 4 ALRB No. 22, p.2, fn.1, the Board said that because representation proceedings are investigatory in nature, the concept of "burden of proof" does not, strictly speaking, apply. The Board noted, "[n]evertheless, it is true that in all such hearings there is an underlying status quo as to each voter which one of the parties seeks to upset, that party initially has the burden of producing evidence regarding that voter." In *Rod McLellan*, the six voters who were challenged as supervisors appeared on the eligibility list and thus were presumptively eligible voters. The Board stated that absent any other evidence, that presumption would stand and determine the disposition of their ballots.[6]

In this case, the challenged voters were not on the eligibility list, and were presumptively not eligible voters. The Board determined that Milky Way's exceptions to the challenged ballot report raised issues of material fact as to whether the 18 challenged voters were agricultural employees employed in the appropriate unit during

[6] The Board's discussion in *Rod McLellan* mirrors Evidence Code section 550(a) that provides that "the burden of producing evidence as to a particular fact is on the party against whom a finding on that fact would be required in the absence of further evidence." (See also Evidence Code section 110, which provides that the burden of producing evidence means the obligation of a party to introduce evidence sufficient to avoid a ruling against him on the issue. (emphasis added)

the eligibility period and directed a hearing on that issue. Based on the Board's decision in *Rod McLellan,* the Dairy then had the burden of coming forward with evidence of the challenged voters' status as agricultural employees. Here, Milky Way did produce evidence of the agricultural status of the challenged voters.[7] Principally, that evidence was based on the testimony of John Gailey, although nine of the nineteen challenged voters also testified.[8]

According to Gailey, all of the challenged voters worked during the eligibility period. He specifically remembered seeing them at the Dairy during that period of time. Unfortunately, the documentary evidence does not bear out Gailey's testimony. The Dairy's practice of paying the bulk of its workforce through the AEG payroll service, while issuing paychecks to other workers, without noting the dates the checks covered makes it difficult to ascertain precisely when these individuals worked. Often the declarations offered by the Dairy in support of their position that the challenged voters were agricultural employees contradicted the payments made and Gailey's testimony. In those cases, it was virtually impossible to determine when the individual was employed and what his/her rate of pay was. Yet evidence of dates of employment should have been particularly within the knowledge of the Dairy, and in my opinion, the absence of any written records weakens Gailey's claims. I do not find John Gailey's statements

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[7] In its Post-Hearing Brief, the Dairy argues that the presumption in Labor Code section 3357 should apply in ALRB proceedings. However, that presumption applies only in workers' compensation proceedings. *See Anaheim General Hospital v. WCAB* (1970) 3 Cal. App.3d.468. Moreover, the issue in this case is whether the challenged voters are agricultural employees and employed in the applicable payroll period, a very different question than that presented in workers' compensation cases.

[8] The following challenged voters testified: Benjamin Cruz, Charles Millar, Karl Gailey, Paulina Lopez, Ignacio Escobedo, Frank Garcia, Phillip Heynen, Douglas DeGroot, Deanna Helming, and Steven Wells.

that he remembered seeing the various challenged voters working at the Dairy during the relevant time period persuasive evidence of their employment. He is the general manager of an enterprise that employs, at least according to Gailey, some 65 workers, spread out over a 200-acre area.

In the following discussion of the individual voters, I made my decision based in part on what I find to be the Dairy's obligation to come forward with evidence of the employment status of the challenged voters and of their employment during the relevant time period, due to the Dairy's particular knowledge of their employment situation and the availability of evidence on these points to Milky Way.[9]

IV. The Challenged Voters

1. Charles Millar

Charles Millar lives in Arizona. (RT 311: 17) He knows Arie DeJong and performs specialty work at the Dairy, consisting of electronic repair and calibration of engines. He began work at the Dairy in early January 2002. (RT 307: 12-14; 312: 3-7) In 2002, he went to the Dairy several times to perform repairs. He has family living in California and combines his trips to the Dairy with visits to his family. (RT 321: 8-10) When contacted by the general manager, Johnny Gailey, to work at Milky Way, he feels free to take the work or not, as he wishes. There are times when Millar turns Gailey

[9] A further consideration in allocating burden of proof is also the most desirable result in terms of public policy in the absence of proof of the particular fact. (Cal. Law Rev. Com. com. West's Ann. Evid. Code section 500.) In this case, the Dairy does not have the records that it is required to keep by state and federal law. No deductions were made from some individual's checks and there is no documentation as to the days or hours worked; there is testimony that individuals were paid in cash; and it does not appear that all employees were covered by workers' compensation insurance. In such circumstances, public policy might well favor placing upon the employer the burden of proof as to the status of each of the challenged voters, other than Benjamin Cruz. By placing the burden of proof on the employer, compliance with state labor laws would be encouraged.

down. Millar is retired; as he put it, "I do what I want when I want." (RT 321: 15-24; 324: 3-4, 14-16) He travels to the Dairy, an 8-hour trip, either using his own vehicle or occasionally riding with Arie DeJong in his private airplane. (RT 321: 4-7; 322: 2-6) When he drives, he is not compensated for his mileage. (RT 320: 22-24)

Millar worked at the Dairy for eight hours during the period July 17-19, 2002, doing carburetion work on a Dodge pickup. (RT 313: 9-15; see also EX #23C and 23D) Thus, he was present and working at Milky Way Dairy during the eligibility period. Millar was paid an hourly rate of $15.00. No deductions were made from the check he received. (RT 312: 15-17; EX# 23A) In addition to his work in July 2002, he traveled to the Dairy 3-5 other times to work in 2002. (RT 323: 5-24)

Miller is not engaged in primary agriculture. I find that he was engaged in secondary agricultural activities, and thus is an agricultural employee. (*California Coastal Farms* (1976) 2 ALRB No. 26, p. 2; *Carl Joseph Maggio* (1976) 2 ALRB No. 9, p. 10) Although Millar's employment connection to the Dairy is tenuous, given that his employment is so limited, he performs the same type work that Johan Vellema and Francisco Martinez perform, who have been found to be agricultural employees, and his testimony and the documentary evidence establish that he was employed during the eligibility period. He is thus eligible to vote.

I recommend that the challenge to Charles Millar's ballot be overruled.

2. Natalie Walker

Natalie Walker is now married to Dairy manager John Gailey. She does

computer assisted drafting for Milky Way. (RT 62: 11-23) Ninety to ninety–five percent of her work is done at home. (RT 66:6-12; 252: 11-17) She comes to the Dairy to bring the files of her plans to John Gailey so that he can print out plans she has drafted. (RT 66: 6-12)[10] She was paid through the Dairy's business account; there were no deductions from her checks. (See EX# 25A) She is paid $10.00 per hour; she did not testify at the hearing, although the Dairy submitted her challenged ballot declaration, in which she stated that she worked for 15 hours, drafting plans for the new offices for the Arizona dairy, during the eligibility period. In that declaration, she does not specify the days on which she worked. (See EX 25B) I find that Milky Way has not provided adequate information as to whether she in fact worked during the eligibility period.[11]

Moreover, Ms. Walker is certainly not engaged in primary agriculture, and I further find that she is not engaged in secondary agriculture as she is not a farmer, she did not do her work on a farm, and there is no evidence in the record to show that she performed any practice incident to Milky Way's dairy or cattle operations. She is not an agricultural employee.

I recommend that the challenge to Natalie Walker's ballot be sustained.

[10] Natalie Walker Gailey may also come to the Dairy to print out the plans herself, but that does not change the analysis (RT 302: 15-18)

[11] I do not credit Natalie Walker's declaration as to her working 15 hours during the period July 11-July 25, 2002. The documentary evidence submitted by the Dairy does not support that claim. She received a check dated August 1, 2002 for $225.00. If she had indeed worked 15 hours, then she should have been paid $150.00. It is impossible to tell on which days she worked. I note that she received another check dated August 13, 2002 for $2000.00, ostensibly for 200 hours in less than a two-week period yet, in her challenged ballot declaration, Walker stated that she usually worked 5-20 hours per pay period. Also in that declaration, she said she did her work in the Company's offices, which directly contradicts John Gailey's testimony at the hearing. However, even if she worked during the eligibility period, she is nonetheless, not an agricultural employee.

3. Steven T. Wells, Ignacio Escobedo, Frank Garcia, and Mike Rodriguez

I include Steven T. Wells, Ignacio Escobedo, Frank Garcia, and Mike Rodriguez together because they worked together as a crew. Steven T. Wells formerly had a general contracting business. Although his contractor's license is now inactive, his home still bears a sign advertising that business. (RT 532: 12-16; 520: 19-21, PX #7A, 7B) Wells recruits workers for the construction and construction-related work that he does at Milky Way Dairy and at two other dairies in the area. (RT 521: 18-25; 522: 10-13) He keeps track of the workers' hours and reports those hours to John Gailey. (RT 134: 15-18; 514: 15-17; EX# 4) Milky Way issues checks to Wells and his crew with no deductions taken. (EX# 5A, 6A, 7A, 8A) During the eligibility period, Wells and the other three were engaged in building a new storage facility for the Dairy, a project known as Juan's garage. (RT 515: 19-25; 516: 1-12)

Wells has worked for Milky Way since 1995. (RT 513: 20-22) Ignacio Escobedo has also worked for the Dairy since 1995. (RT 159: 12-13) Garcia and Rodriguez are newer recruits. Wells is hired by the Dairy for specific projects. (RT 163: 14-15) Once a particular project is complete, if there is no other work pending, the Wells' crew goes on to work at other dairies. (RT 163: 21-24)

Gailey contacts Wells when he has a construction or repair project and asks him to come to work with his crew. (RT 165: 4-5) Gailey indicated that Wells speaks on behalf of the whole crew when they work on projects for Milky Way. Gailey testified that he relied on Wells' estimates for materials for concrete, roofing, siding, and other construction projects. He also testified that it was not uncommon for Wells not to work

at Milky Way for a period of 1-2 months and that Wells always has the option of refusing to work on a project when Gailey calls to hire him. (RT 181: 13-15) When working on Milky Way projects, Wells uses some of his own tools and some Milky Way shop tools. (RT 137: 6-17) Gailey testified that he regarded Steve Wells as a "crew chief." (RT 158: 22-23)

It is not clear who hires the workers in the Wells crew. Wells testified that he and Escobedo started about the same time at Milky Way. Wells brought Frank Garcia and Mike Rodriguez to John Gailey and either Wells hired them himself or told John Gailey to hire them.[12] He told Gailey how much to pay Rodriguez. (RT 521: 20-21; 522: 12-13; 536: 8-9) Wells' arrangement with Gailey struck me more as a response to Wells' contractor's license being inactive, rather than a demonstration of any independent judgment on Gailey's part in the hiring of the crew members. Wells is in charge of the construction projects on which he works, and since he reports the workers' hours to Gailey, I am assuming that he sets the time during which work is performed. He supervises the work. Interestingly, the checks given to Wells, Escobedo, Garcia, and Rodriguez have the notation "contract labor" on them. Although an employer's categorization of an employee is not determinative, in this case, it does show how the Dairy management viewed the foursome.[13]

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[12] In his challenged ballot declaration, Frank Garcia stated that Wells hired him. (EX #8B) At the hearing, he testified that John Gailey hired him. (RT 445:2-3)

[13] Although Milky Way contends that Escobedo is covered by the Dairy's workers compensation insurance (Employer's Brief, p. 11), the reference to Escobedo's testimony does not support that assertion. Escobedo may have believed that he was covered by the Dairy's worker's compensation insurance, but his testimony indicates that he had no direct knowledge of whether he was covered. He just assumed it, since the Dairy was paying him. (RT 422-423) John Gailey testified that he did not know for which employees he paid premiums. (RT 194: 15-19) It appears that AEG paid the premiums for the workers for whom they did the payroll.

In its Administrative Order 2002-8, The Board directed the parties' attention to that part of section 1140.4(b) of the Act which specifically excludes from the definition of "agricultural employee" any employee who "performs work to be done at the site of the construction, alteration, painting, or repair of a building, structure or other work as these terms have been construed under Section 8(e) of the Labor Management Relations Act.

There is little legislative history regarding this exclusion. The transcript of the Hearing of the Senate Industrial Relations Committee of May 21, 1975 refers only to an amendment to the bill that is a specific definition relative to crafts, which has been presented by the building trades and accepted. The Legislative Analyst's May 23, 1975 analysis of Senate Bill No. 1 (which became the ALRA) states that the bill "excludes from coverage of the act employees engaged in construction, alteration or repair of a building…"

In Herman Levy's article, *The Agricultural Labor Relations Act of 1975—La Esperanza de California Para El Futuro* (1975) 15 Santa Clara Lawyer 783, he notes that "prior to the passage of the final draft of the law, the building and construction trade unions expressed concern that the ALRA definition appeared to encompass construction people working on farm land and to make them subject to the provisions of the ALRA." (Id. at 786) In order to meet that concern and, according to Levy, "probably because the new Agricultural Labor Relations Board would have minimal interest in these construction workers," the exclusion was added. Levy acknowledges that the exclusion may have created a "no-man's land" with respect to these workers, as the NLRA may see

them as falling within the FLSA definition of agricultural workers when performing work on a farm, and thus exempt from NLRA coverage. Yet, as he points out, the ALRA nonetheless specifically excludes them.

The Dairy's Post-Hearing Brief on this point in part focuses, erroneously in my opinion, on the reference to Section 8(e), but that reference in 1140.4(b) is only to the definitions for the terms "construction, alteration, or repair of a building, structure, or other work…" included in section 8(e). The Dairy also argues that construction workers who work on a farm would fall under the FLSA definition of an agricultural employee. However, even if that contention is correct, the California legislature clearly excluded them from the ALRA's definition of agricultural employees for the purposes of the ALRA. Although section 1140.4(b) states that subdivision (b) shall not be construed to include any person other than those employees excluded from the coverage of the NLRA and FLSA, it does not necessarily follow that every person excluded from the NLRA's coverage as agricultural workers is necessarily included within the ALRA's coverage. The legislative exclusion of construction workers employed on a farm represents a considered decision to exclude certain workers, even if they may also be excluded from the coverage of the national act.

I found only one Board decision construing the construction worker exclusion, *Dutch Brothers* (1977) 3 ALRB No. 80. There, the Board upheld the ALJ's determination that two workers were agricultural employees even though they engaged in construction projects at the employer's nursery. The Board specifically adopted the ALJ's reasoning on this issue. In finding the workers to be agricultural employees, the ALJ

found that the two employees were not required to have any particular construction skills, and they in fact did not have any such skills. The ALJ also found that the workers were hired as nursery employees, and the employer intended to keep them on as nursery employees once the construction was completed. He further found that the two were integrated into the nursery's operation and received the same wages, benefits, and protections as other nursery employees. In construing the construction worker exclusion, the ALJ stated, "the Legislature intended to exclude from the Act's protection employees who were trained as construction workers and whose primary function was to work in tasks utilizing those specialized skills." (ALJD, p. 33)

In this case Steven Wells and his crew are construction workers. Wells, as a licensed general contractor, has specialized skills in construction, as does Escobedo, with whom he has worked for the past eight years. Garcia and Rodriguez can be categorized as apprentices and/or helpers.[14] As noted *ante*, they are not integrated into the Dairy's workforce; their wage scale is clearly different; and they are not eligible for health insurance benefits, available to other full-time Dairy workers. I find that they are not agricultural employees, but rather, construction workers, and as such, they are not eligible to vote, pursuant to the exclusion in 1140.4(b).

Even if the construction worker exclusion were not applicable, I would still find that the four are not agricultural employees based on NLRB precedent and the DOL guidelines interpreting the FLSA. Steven Wells, Ignacio Escobedo, Mike Rodriguez, and

[14] See *American Potash & Chemical Corp.* (1954) 107 NLRB 1418, 1423, cited by the IHE in *Dutch Brothers,* which defines a "craft unit."

Frank Garcia are not engaged in primary agricultural work. I find that their construction activities are not carried on as a part of the agricultural function, but as a separately organized productive activity by workers who are not integrated into the Dairy's agricultural workforce, but who perform construction and other similar types of work both for Milky Way and for other employers. No Dairy workers other than the Wells' crew worked on Juan's garage. (RT 140: 21-34) The Wells crew does not do any work on the Dairy other than construction and repair.

NLRB v. Monterey Building & Construction Trades Council (9th Cir. 1964) 335 F2d 927, offers some guidance. There the court upheld the NLRB's finding that workers employed by a construction company to construct buildings for a poultry ranch were not agricultural employees. The court reasoned that the companies responsible for the construction were organized separately from any farming or poultry operation and were engaged in a productive activity, which was independent from any farming or poultry operation. The court distinguished between projects carried out by a farmer's own laborers and those carried out by persons who are separately organized as an independent productive activity. Based on the finding that the Wells' crew is engaged in a separately organized productive activity, I would also find that Wells, Escobedo, Rodriguez, and Garcia are not agricultural employees.

I recommend that the challenges to the ballots of Steven Wells, Ignacio Escobedo,

Mike Rodriguez, and Frank Garcia be sustained.[15]

4. Karl Gailey

Karl Gailey, the brother of manager John Gailey, periodically drives parts from Southern California to the Milky Way Dairy. Karl lives in Escondido. (RT 325: 17-18) Either John Gailey or Arie DeJong calls him when they need something delivered. He is a student and also maintains several part-time jobs in the Escondido area. At least one of those other jobs also includes making deliveries. (RT 331: 5-25) Gailey is paid by the mile for one way of the trip up to Visalia and then his truck is filled up with gas at the Dairy for the return trip. (RT 109: 18-22; 333: 22-24; 328: 1-2) He combines trips to the Dairy with visits to family in the area. (RT 334: 5-6) He particularly enjoys coming up during the round-up of the beef cattle because it is a social time. (RT 110: 14-18) Karl is paid with a check from the Milky Way business account from which no deductions are made. (EX #19A) Karl was present at the Dairy on July 12, 18 and 19, 2002. He drove up to the Dairy to bring milking barn equipment from Holandia Dairy on July 18, 2002. He also drove to Fresno on July 18, 2002, apparently on Dairy business. (RT 328: 10-22)

Karl Gailey is not engaged in primary agriculture nor is he engaged in any practice that can be viewed as incidental to or in conjunction with the Dairy's agricultural

[15] Another alternate view of Wells is as a statutory supervisor. He effectively recommends the hire of employees; he keeps time of his crews' hours, and he directly supervises their work. He is paid a premium to do so. He is paid $27.50; Escobedo $22.50; Garcia $11.00; and Rodriguez $8.00. (EX #4A and 4B) Although Wells' ballot was not challenged on the basis of supervisory status, if in the course of the challenged ballot investigation, he is found to possess the indicia of a statutory supervisor, then the Board is not constrained by the basis of the challenge to his ballot. (See *Jack T. Baille Co. Inc.* (1978) 4 ALRB No. 47, p. 3) See discussion of statutory supervisor infra, pp. 45-48. If in fact, Wells is found to be a statutory supervisor, the challenge to his ballot could also be sustained on that basis. I would still recommend that the challenge to the ballots of Escobedo, Garcia, and Rodriquez be sustained because they are not agricultural employees. However, I do not believe that the Board need reach the issue of Wells' supervisory status since he is not an agricultural employee.

practices, since his activities constitute an independent business. His sole work for the Dairy is the delivery of parts or equipment to the Dairy, which delivery service he performs for at least one other business. His work can best be seen as an independent productive activity, which is organized separately from the Dairy for his benefit. I find that he is not an agricultural employee of the Dairy.

I recommend that the challenge to Karl Gailey's ballot be sustained.

5. Peter DeJong

Peter DeJong along with his father, Arie DeJong,[16] works as a hoof trimmer on Milky Way Dairy. When working with his father, who has his own business, Peter and Arie use a special vehicle that holds the cow, while they check and trim the hooves. Arie usually came to the Dairy on Tuesdays and Fridays. (RT 545: 11-25; 546: 5-25; 547: 550: 15-18) According to one of the workers, Peter came less frequently than Arie and never came to the Dairy alone to do the hoof trimming until after the August election. (RT 778: 19-19: 779:4) John Gailey said that Peter started working for the Dairy in June 2002,

and worked on Tuesday and Fridays. He said that Peter was trying out the work, in a sort of apprenticeship, and was on the Dairy's payroll, not his father's. (RT 280: 19-25; 281: 1-20)

Peter was paid by check from the Milky Way account, with no deductions taken. (EX #18A) The payroll record that the Dairy submitted to show that Peter was employed to help with the hoof trimming does not match up with the hours Peter claimed to have

[16] This is not the same Arie DeJong who is the sole proprietor of Milky Way Dairy, but is a cousin of the owner.

worked in his challenged ballot declaration, also submitted by the Dairy. (EX # 18B) Peter claims to have worked three days during the eligibility period, six hours each day, with his pay rate $8.00 per hour. The payroll record reflects a check for $112.00, rather than $144.00, which would reflect what Peter claimed to have worked.

John Gailey testified that he knew that Peter was working during the eligibility period because he saw him trimming hooves during the period July 11-July 25, 2002, "for sure." In response to my question as to how he knew what days Peter was at the Dairy, Gailey replied that Peter was at the Dairy every Tuesday and Friday, every week. (RT 102: 11-20) I take judicial notice of the fact that in the last two weeks of July 2002, Tuesdays fell on the 16th, 23rd, and 30th, and Fridays fell on the 19th and 26th. John Gailey further testified that the check issued to Peter DeJong dated August 1, 2002 was for work performed by Peter between July 15 and August 1. If that indeed were the case, the check should have been for $240.00, assuming that Peter always worked six hours a day, as his declaration suggests. Thus, Peter's declaration does not match up with Gailey's testimony, which I regard as unreliable.

Although in his declaration, Peter denied that he owned or supplied the equipment that he used at the Dairy, John Gailey testified that Peter used a specialized truck, belonging to either Peter or his father, when Peter did the hoof trimming. (RT 566: 5-8)[17] Gailey also testified that Arie billed him for his work at the Dairy, which presumably would include the use of the specialized truck. (RT 549: 20-23) From the testimony of

[17] Although John Gailey testified that he did not know if Peter or Arie owned the two specialized trucks, I find that he was being less than candid. Arie DeJong is his cousin and Peter was just out of high school. It would seem unlikely that Peter would own one of the trucks. It is also unlikely that Gailey would not be aware of who precisely owned the trucks.

David Rodriguez and John Gailey, it appears that Peter DeJong was just out of high school, making it unlikely that the truck belonged to Peter. (RT 550: 11-14; 774: 10-15; 788: 14-15; 789: 14-15)

Peter DeJong is involved in practices that are primary agriculture. However, I find that he performs those activities for his father, rather than as an employee of Milky Way Dairy. It appears that he uses his father's equipment, and for the most part, works with his father, who has his own independent business in providing hoof trimming to different dairies in the area. Again, his activities are organized as part of an independent productive activity. Moreover, due to discrepancies between the hours claimed by Peter and the amount he was paid, I find that Milky Way failed to establish that Peter was employed during the eligibility period. It is unclear when Peter worked and the basis for his compensation. If John Gailey's testimony is credited, Peter should have received a check for $240.00 (5 days, 6 hours each day, at a rate of $8.00 per hour), yet he was only paid $112.00. Peter's declaration is unreliable because he denied supplying any equipment to the Dairy. Gailey's testimony contradicts Peter's declaration. Peter DeJong did not testify.

I recommend that the challenge to Peter DeJong's ballot be sustained.

6. Jason DeJong

Jason DeJong is a high school student and the son of John Gailey's cousin, Arie DeJong. (RT 96: 7-10) In the declaration submitted in support of Milky Way's Exceptions to the Regional Director's Challenged Ballot Report, Jason stated that he worked during the round-up "season" which lasts three-four weeks. He stated in that

declaration that he worked three or four days during the week of July 25, 2002. He did not testify at the hearing. His check stub from Milky Way is dated August 1, 2002. It does not specify the days on which he worked. It is for $112.00, which would cover 14 hours at his pay rate, which was $8.00 per hour. What Jason meant by the week of July 25, 2002 is unclear. If he meant the seven day period beginning on July 25, 2002, then there is no way to know whether he worked during the eligibility period. In his challenged ballot declaration, he stated that he worked during the last week of July, although he did not recall on which dates he worked. (EX #17B)

John Gailey testified that Jason worked on the day of the round-up, on July 20, 2002, and that he would have to "look back" to see for how many days he paid him. (RT 279: 7-8) Other testimony by Gailey indicates that Jason only worked the day of the round-up. (RT 101: 6-12) Gailey's testimony is inconsistent with Jason's being paid $112.00, and with Jason's statement that he worked three or four days.

I find based on the conflicts in the testimony, the declarations, and the payroll records that there is insufficient evidence as to whether Jason DeJong was employed during the eligibility period. For that reason, I recommend that the challenge to his ballot be sustained. However, a further basis for sustaining the challenge to Jason's ballot is his lack of connection to the Milky Way agricultural workforce.

Jason is a high school student, who according to John Gailey worked one or possibly two days of the round-up, which although a necessary practice in conjunction with the beef cattle, sounds, for many of the participants, like a social event. John Gailey

described it as a time when neighbors and friends come out and help with the round-up. (RT 278: 14-16) After the work is done, there is a party and barbecue. Karl Gailey stayed on at the Dairy for the round-up because he likes the social aspect of the event. Although Jason says that he worked three-to-four days in the round-up (which is not borne out by John Gailey's testimony or the payroll records), his participation in the round-up does not establish that Jason was treated as or understood himself to be an agricultural employee. As in *Simon Hakker* (1994) 20 ALRB No. 6, there is a "[l] ack of sufficient connection with [the employer] to take on the status of employees."[18]

7. Bert DeJong

Bert DeJong is a cousin of Milky Way owner Arie DeJong. (RT 95: 22-25) He too was involved in the semi-annual round-up. He did not testify at the hearing. In his challenged ballot declaration, he says that he worked July 15 and July 16, 2002, eight hours each day, as a fence checker fixing fences, and his wage rate was $7.00 per hour. (EX #16B) In his declaration submitted in support of Milky Way's Exceptions, Bert states that it was his job during the round-up season to check and repair fences and to participate in the actual round-up of cattle.

The payroll record indicates that Bert DeJong was paid $32.00. The payroll record of Bert's August 1, 2002 check does not specify on which day he worked or how many hours he worked. No deductions were taken. If Bert had worked 16 hours at $7.00 per hour, he should have been paid $112.00.

[18] The UFCW argues in its post-hearing brief that Jason DeJong should be treated as a casual employee, as that term is used under the NLRA, and thus not be permitted to vote. Although that analogy seems apt, I do not think that such a distinction is permitted under the ALRA, which permits an employee who has been employed on only one day of the eligibility period to vote.

John Gailey testified that Bert works every week or every other week, for a couple of hours, patrolling and maintaining the Dairy's fences, unless called by Gailey for a specific fence repair. (RT 274: 10-19; 275: 10-12; 276: 17-25) Given (1) the inadequacy of the payroll records to support Bert DeJong's claim that he worked 8 hours each day on July 15, and July 16; (2) the discrepancy raised by his additional claim that he participated in the actual round-up of cattle, which would have been on July 20, giving him an additional day of indeterminate hours of work, as well as (3) the absence of clarifying testimony from Bert DeJong, I find the evidence insufficient to establish that Bert DeJong worked during the eligibility period. I therefore recommend that the challenge to his ballot be sustained.

8. Gerrit Roeloffs

Gerrit Roeloffs is a high school student, aged 13 years, who was present at the Dairy on July 20, 2002, for the round-up. Gerrit is the son of a neighbor. (RT 278: 24)[19] He brought his own horse to the roundup and rode that horse during the round-up. He was paid $64.00. (EX #24A) In his declaration, Gerrit stated that the Dairy needed help for one day, and his father made arrangements with John Gailey for Gerrit to work in the round-up. For the reasons set forth above in my discussion of Jason DeJong, I find that Gerrit Roeloffs did not consider himself an employee of Milky Way and that he did not have a sufficient connection with Milky Way Dairy to take on the status of employee.

I recommend that the challenge to the ballot of Gerrit Roeloffs be sustained.

[19] John Gailey's testimony on this point is unclear, but I believe that he misspoke since his earlier testimony clearly established that Jason, not Garret, is the son of a cousin.

9. Douglas DeGroot

Douglas DeGroot works at Milky Way fixing fences and patrolling the pasture fences. There are 16 miles of pasture fence. (RT: 464: 15-16; 93.) He patrols the fences usually on the weekends, either every week or every other weekend, usually working eight hours each month. He began work at the Dairy at the beginning of 2002. (RT 464: 20-21) He testified that he is paid $8.00 per hour and was sometimes paid in cash and was allowed to pasture his three horses at the Dairy for a time. Currently he is paid by check. (RT 465: 9-15) DeGroot testified that he fixed a fence the day before the round-up and worked on the round-up as well. He testified that he helped with the round-up, "making sure everything was going good." (RT 466: 3-6) John Gailey's testimony established that the round-up occurred on July 20, 2002. (RT 98: 465-466) John Gailey's testified that he saw DeGroot fixing one of the fences the day of the round-up (RT 268: 1-7), which DeGroot corroborated. (RT 466:7-9)

The payroll records show that DeGroot was paid $40.00 on August 1, 2002, for the period July 15, 2002-August 1, and 2002. His declaration in support of Milky Way's exceptions states that he worked a few hours each day on July 12 and July 13, and all day on July 20 and July 21. In his challenged ballot declaration, he states that he worked July 12 and July 13 for a couple of hours and July 20 and 21 each day fixing a fence. The payroll record does not match up with the hours claimed in the July 15-August 1 payroll period. Assuming that DeGroot worked 16 hours at $8.00 per hour, he should have earned $128.00, rather than $40.00. Despite that discrepancy, I will credit DeGroot's

testimony that Milky Way employs him and that he actually worked during the eligibility period

I find that Douglas DeGroot is an agricultural employee of Milky Way. Although DeGroot is not engaged in primary agriculture, he is employed by a farmer on the farm and the patrolling and fixing of fences is in conjunction with and incident to Milky Way's beef cattle operation.

I recommend that the challenge to Douglas DeGroot's ballot be overruled.

10. Paulina Betancourt

Paulina Betancourt is employed by Milky Way to clean the Dairy offices, the restrooms, and the lunchrooms. (RT 42: 3-6; 389: 7-25) She also cleans an apartment over the office of John Gailey; the apartment has two bedrooms, a bathroom, a kitchen and dining room. (RT 390: 1-3; 395: 17-18) In response to a question as to whether anyone lives in the apartment, Betancourt said that Arie De Jong and his family use it when they come to the Dairy. (RT 395: 12-14) John Gailey testified that Arie DeJong uses it when he is at the Dairy and his family uses it when they visit. (RT 541: 18-20) According to John Gailey, Matthew Gailey, whom the Board has already found to be an agricultural employee, lives in the apartment, as do Charles Millar and Damian Chick when they are working at the Dairy. (RT 541: 18-20) Gailey also said that the apartment dining room is used for meetings with grain salesmen, bankers, and other businesspersons when a space larger than John Gailey's office is needed. (RT 541: 22-25; 541: 1-17) Additionally, the Dairy has a DTN-news computer in the apartment. (RT 540: 16-25)

Betancourt has worked at Milky Way for just over two years. She punches a timecard, and her timecard indicates that she worked on July 11, 17, and 18. (RT 390: 7-8; 10-25; 391: 1-5; EX 9A) She is paid $12.00 per hour and works regularly on Wednesday, Thursday, and Saturday. (RT 392: 8-24)

It appears that Betancourt spends nearly half of her time cleaning the apartment, as she testified that she spends eight hours cleaning the apartment each week. (RT 396: 8-10) The use of the apartment is not clear, since it is difficult to understand how Matthew Gailey, Chick Damian, and Charles Millar could live there, with at least Matthew there on a full-time basis, when Arie DeJong and his family use it when they come to visit and it is also used as an extension to John Gailey's office. However, Paulina Betancourt spends a regular and substantial amount of her time in work that is clearly incident to Milky Way's farming operations. She cleans the restrooms, lunchrooms, and offices that are used by the Dairy employees. (See *Anderson Farms Co.* (1977) 3 ALRB No. 48) Therefore, I find that she is engaged in secondary agricultural activity since she carries out her duties on the Dairy.

I recommend that the challenge to Paulina Betancourt's ballot be overruled.

11. Esteban Aguirre and Brenda Leatherberry

Esteban Aguirre and Brenda Leatherberry are both hay truck drivers for Milky Way. (RT 49: 19-20)[20] According to Brenda Leatherberry's declaration in support of

[20] In its Post-Hearing Brief, Milky Way asserts that the inclusion of some truck drivers and exclusion of others for voting purposes was totally arbitrary on the Regional Director's part. (Brief, p. 4) However, Jose Guadalupe Hernandez and Enrique Gonzales (aka Enrique Cortez) were paid through AEG (see EX #2), while Aguirre and Leatherberry were not. Thus, it was not an arbitrary decision to challenge Aguirre and Leatherberry in light of the lack of information about their employment status.

Milky Way's Exceptions, she began work at the Dairy in September 2001.[21] According to that declaration, she has a Class "A" driver's license. She hauls hay to Milky Way from Arizona, the Sacramento area, and Nevada. (RT 54: 6-9) She also transports Dairy equipment and is responsible for cleaning and maintaining the Peterbilt truck and trailers that she uses, which are supplied by the Dairy. Leatherberry keeps a log of the miles that she drives and is paid by the mile. (RT 211: 24-25) In her challenged ballot declaration, Leatherberry stated that she believed that she worked during the two-week eligibility period, between 3-5 days each week, averaging 10 hours per day. (EX #22B) In July 2002, according to John Gailey, she was hauling alfalfa hay to the Dairy from Nevada. (RT 52: 21-23; 55: 2-5)

Gailey testified that Leatherberry was employed in May 2002 on a part-time basis originally, but eventually, in July, she became a full-time employee, although on a seasonal basis. (RT 61: 11-18) He also testified that by September 2002, Leatherberry had satisfied the Dairy's requirements for eligibility for health insurance coverage, which he described as full-time employment for three months and the completion of the application for health insurance. (RT 53:6-12; 47: 14-17) However in her challenged ballot declaration, Leatherberry stated that she was employed part-time, working 5-40 hours per week. (EX #22B)

There were no payroll records submitted for Leatherberry, other than one

[21] Her declaration also states that she began work in January 2002. Gailey testified that there is no work hauling hay from December until either April or June, depending on where the hay is coming from. Thus, it is doubtful that she began work in January 2002. In her challenged ballot declaration, Leatherberry says she began working for the Dairy in September or October 2001.

check for $315.00, dated August 1, 2002, which was for driving materials from Arizona (EX #22A), which I find occurred in early July 2002. (RT 58: 22-23; 59: 3-6) Gailey's testimony on that point is contradictory. He stated that Aguirre did the run with materials from Arizona in early July, and that he was hauling hay the second to last week of July. (RT 58: 20-25) Later, he testified that Aguirre and Leatherberry did the run together and it was the third week in July. (RT 213: 13-15) I do not credit that testimony, and Gailey in fact testified that he could not tell from the check the period of time that it covered. (RT 214: 6-9)

Although Gailey suggested that he had other payroll records for Leatherberry (RT 211: 18-23), he did not produce them at the hearing, and I draw an adverse inference from his failure to do so. (See *Richard A. Glass Co. Inc.,* (1988) 14 ALRB No. 11, pp. 15-16; *The Garin Co.* (1985) 11 ALRB No. 18, p. 3) Based on the lack of testimony from Leatherberry, conflicts in her declarations and with the testimony of John Gailey, and the absence of <u>any</u> payroll records for the eligibility period, I find that there is insufficient evidence from which to conclude that Leatherberry was employed during the eligibility period. I recommend that the challenge to the ballot of Brenda Leatherberry be sustained.

Esteban (Steve) Aguirre, like Leatherberry, hauls alfalfa hay from Arizona, the Sacramento area, and Nevada to the Dairy as feed for the cows. He works seasonally, but is employed full-time during the season, which runs from June through November in Nevada, but begins in April in Arizona. Milky Way has employed Aguirre since 1998. Aguirre was covered by the Milky Way medical insurance plan in July 2002. (EX # 10B)

Aguirre is paid $.50 per mile. (RT 53: 20-21) Milky Way submitted payroll records for Aguirre indicating that he was paid $1192.18 on July 29, 2002, and $1324.22 on August 3, 2002. Gailey testified that the July 29th check would most likely have been for work during the penultimate week of July and the August 3, 2002 check would have been for work done during the last week of July. (RT 56)

Department of Labor guidelines provide that "transportation to the farm by the farmer of materials and supplies for use in his farming operations, such as animal…feed would be incidental to the farmer's actual farming operations." (29 CFR section 780.157) Also, according to ALRB precedent, truck drivers whose duties are incidental to farmwork are agricultural employees. Thus in *Simon Hakker* (1994) 20 ALRB No. 6, the Board found that the part-time trucker who hauled feed, manure, and cotton seed to various locations at the employer's operations, with all equipment supplied by the employer, who was compensated based on a percentage of the loads he hauled, and did not work for any other companies was an agricultural employee. Under that same analysis, Esteban Aguirre is an agricultural employee, and in light of the payroll records, I recommend that the challenge to his ballot be overruled.[22]

12. Philip Heynen

Philip Heynen testified that he worked at Milky Way caring for and

[22] A contrary finding based on an adverse inference from the Dairy's failure to submit Aguirre's mileage logs, the weight certificates, and the bills from the hay dealers is certainly possible. The exact nature of Aguirre's relationship to Milky Way is unclear. John Gailey testified that both Aguirre and Leatherberry are permitted to bring their trucks and tractors home with them and even permitted to keep the trucks and trailers at home with them during the off-season, from November until sometime in the period March-May. (RT 208: 16-20; 209: 16-25; 210: 20-25) Gailey also testified that Aguirre might do other hauling with the truck during the off-season, although Aguirre only worked for Milky Way during the season. The insurance and liability issues raised by this arrangement are interesting to say the least.

exercising the horses. He performed general grooming, checked their hooves, and rode the horses. (RT 451: 15-23) He began work at the Dairy in February 2002. (RT 455: 1) He scheduled his own hours, usually working 6-10 hours each month, and was paid by check on the Diary's business account or in cash. (RT 455: 232-25; 456: 1; 19-20) He testified that he worked in July 2002, spending more time that month, since he was getting the horses ready for the round-up. (RT 452: 4-8) He testified that he did not know exactly how many horses Milky Way owns; he thought that they owned at least three. (RT 458: 16-18)

John Gailey testified that the Dairy had extra horses in the pasture before and after the round-up and that Heynen took care of them. (RT 104: 10-12) Gailey also stated the Heynen worked "close to the whole month of July" (RT 107: 3-4), but particularly in the two weeks before the round-up, when the Dairy had the extra horses in the pasture. (RT 107: 11-12) Gailey said that he told Heynen that "we have extra horses out here and I need someone to keep an eye on them for me…" (RT 285: 19-21) According to Gailey, the Dairy usually just has a couple of horses in the pasture and either he or the "guys that are checking the fences" check those horses. (RT 285: 25, 286: 1-60.) Again, according to Gailey, Heynen checked the horses the two days before the round-up and then every other day until the extra horses left. (RT 288: 1-10) This contradicts Heynen's challenged ballot declaration and his declaration in support of Milky Way's Exceptions in which Heynen stated that he worked July 16, 17, 23 and 24, 2002.

Gailey stated that Heynen no longer worked for him. (RT 290:1) Heynen

testified that he continues to spend some time caring for the Dairy horses. (RT 401: 17-18; 454: 1-3) Heynen said that he received a $32.00 check for his work during the round-up (EX #21A) and $50.00 in cash. (RT 453: 20-21) Heynen said that he was not paid at "an exact hourly rate," but that part of his compensation was "just the fact that [he] got to ride the horses." (RT 460: 12-18) Gailey testified that Heynen was paid $8.00 per hour. (RT 288: 20-21) In his challenged ballot declaration, Heynen stated that he agreed to work for $32.00 for six hours. (EX #21B)

There are a number of factors, which lead me to conclude that the evidence is insufficient to establish that Heynen was an agricultural employee during the eligibility period. First of all, there is a glaring discrepancy in the testimony about Heynen's rate of pay. Moreover, the payroll records do not bear out Gailey's testimony either as to the rate of pay or the number of hours that he claims Heynen worked. Additionally, Heynen's declarations and testimony are contradictory, and all three conflict with John Gailey's testimony.

Second, it appears that Heynen did a job that is not incidental to the Dairy's operations. The Dairy employees usually take care of the Dairy's horses, according to Gailey. To the extent that the Dairy boards horses as well as keeping its own horses, that boarding operation cannot be said to be a part of the Dairy's operations. (RT 457: 3-4) From Gailey's testimony, it does not appear that the Dairy's horses are used regularly for the business of the Dairy. They may be used during the round-up, although there is no testimony establishing that fact. It appears also that the non-Dairy participants in the round-up bring their own horses, which may be boarded at the Dairy for a few weeks. I

find that caring for those horses is not secondary agriculture because it is not a practice incident to the Dairy's operations.

Heynen has a full-time job selling ranch feed. I find that Heynen helped Gailey out by doing something that Heynen enjoyed doing—riding and caring for the horses at the Dairy. Gailey said that Heynen is no longer an employee, but Heynen says that he continues to care for the horses, raising the question of whether Heynen was ever an employee. In addition to the discrepancies in the evidence, I additionally find that Heynen does not have the connection to Milky Way that would lead either Heynen himself or Milky Way to understand Heynen to be an employee. (*Simon Hakker, supra*, 20 ALRB No. 6) Moreover, there is a lack of sufficient connection with Milky Way for Heynen to take on the status of an employee. In short, I find that Heynen is not an agricultural employee and the evidence is insufficient to establish when he worked at the Dairy.

I recommend that the challenge to Philip Heynen's ballot be sustained.

13. Deanna Helming

Deanna Helming is employed by Milky Way as a relief breeder. She fills in for Victor Gonzales who is the primary breeder. She began at Milky Way in June or July 2001. As a relief breeder, she works on a part-time basis and is paid a flat rate of $100.00 per day. (RT 256: 1-10) When working at Milky Way, she uses the Dairy's equipment. (RT 482: 21-25) Helming also works part-time for Genex, where she does training in artificial insemination for various clients of the company. (RT 480: 13-21)

It appears from Helming's testimony that the Dairy keeps records of the days on which she works. She logs her work into the Milky Way computer before she leaves. (RT 500: 14-20) During her testimony, she did not specify on which days during July she worked. She stated that she was not positive on what days in July she worked. (RT 512: 11-12) In her challenged ballot declaration, she stated that she worked two or three days during the eligibility period, about 6½ hours per day, although which days she worked are not specified. (EX #20B) Helming was paid through the Milky Way general account and no deductions were made from her check. The payroll record indicates that she was paid $200.00 on August 1, 2002. (EX #20A) John Gailey said that Helming worked whatever two days Victor had off, although he did not recall which days. (RT 258: 7-8) He issued her a $200.00 check dated July 31, 2002, which he said would have been for the two-week period prior to the issuance of the check. (RT 74: 14-15) Based on Gailey's testimony, Helming could have worked July 26-31, 2002, days outside of the eligibility period.

Although I find that Helming is an agricultural employee, I do not believe that the evidence establishes whether she in fact worked during the eligibility period. I draw an adverse inference from the Dairy's failure to provide computer records that would have established when she worked or the time records of Victor Gonzales, which would have established which days he was off. I do not find that her declaration is specific enough to provide a basis for concluding that she worked during the eligibility period given that her testimony at the hearing also failed to establish the dates on which she worked. In response to counsel's question, she stated that she was not positive what day(s) of

the week she might have worked during the pay period or what date(s) she might have worked. She said that she had a written record, but did not bring it to the hearing. (RT 512: 9-15)

I therefore recommend that the challenge to Deanna Helming's ballot be sustained.

14. Damian Chick

According to Damian Chick's challenged ballot declaration, he is employed by Milky Way full-time as a welder. He stated that he worked during the two-week eligibility period. (EX # 12B) According to John Gailey, Chick is an Australian native who shows up periodically at the Dairy and works. He has done this for 5-6 years. (RT 88: 5-12) Chick did not testify; according to counsel for the Dairy, he had an accident at the Dairy on the day on which he was to testify. The Employer's Exhibits 12C and D are invoices for the delivery of parts at the Dairy for which Chick signed on July 17 and July 18, 2002. John Gailey testified that Chick does repair and fabrication and construction and building at the Dairy. He is paid $100.00 per day. (RT 83: 8-9; 84: 9-12; 85: 3-5) Chick was paid out of the Dairy's business account.

The payment record that Milky Way submitted showed that Chick was paid $400.00 on August 1, 2002. There were no deductions (EX # 12A). This is not consistent with the statement in Chick's challenged ballot declaration that he worked from July 15-19, 2002, 8 hours each day; July 20, 2002 for 71/2 hours; and July 22-25, 2002, for 8 hours each day. John Gailey testified that he gave Chick a check for only $400.00 "because he needed some cash to survive on, and then we settle up with him every six months." (RT 88: 1-3) I find this testimony unreliable, and I do not credit it.

Generally speaking, Gailey seems to have some explanation for each instance that the payroll records do not match the employee declarations. Absent specific testimony in support of his statements from the various employees, they seem to be after-the-fact, ad hoc rationalizations.

Based on Gailey's testimony, it appears that Chick is engaged in secondary agricultural activity. (See e.g. *California Coastal Farms* (1976) 2 ALRB No. 26 and *Salinas Marketing Cooperative* (1975) 1 ALRB No. 26) Although the invoices submitted by the Dairy establish that Chick was present at Milky Way during the eligibility period, I find that due to the discrepancy in the payroll records and Chick's declaration, I am unable to say whether Chick was actually employed as an agricultural employee during the eligibility period.

I therefore recommend that the challenge to Damian Chick's ballot be sustained.

15. <u>The Supervisory Status of Benjamin Cruz</u>

I was directed by the Board to determine whether Benjamin Garcia Cruz is a supervisor within the meaning of the ALRA, section 1140.4 (j). John Gailey testified that Cruz is a herdsman for the heifers, and that his responsibilities include maintaining the health and organization of the heifers. (RT 81: 12-20) According to Gailey, Cruz works alongside the other workers who care for the heifers. He does not direct those workers, and he does not hire or fire. Gailey said that Cruz might recommend persons for employment, but that many of the other workers do also, implying that Cruz's recommendations would not carry any more weight than those of any other employee at the Dairy. (RT 82: 2-12)

In describing Milky Way employees, Gailey noted: "Then we have Benjamin Cruz, and then we have—he has four to five people…" (RT 293: 7-8) Cruz is the only one of his crew who is called a herdsman. Gailey does not consider the other member of the Cruz crew to be herdsmen. (RT 293: 17-22) His crew is trained by Gailey, Arie DeJong, or Cruz. (RT 293: 24-25) Gailey stated that Cruz does provide daily direction to the crew (RT 295: 3-4), and that at least on occasion, workers in the crew have called Cruz to ask for the day off or to report to him that they have an appointment. (RT 299: 1-4)

Cruz testified that he has worked for Arie DeJong for 13 years. He has worked at Milky Way for five years. (RT 349: 7-20) He testified that he works with a group of 5 other persons. (RT 350: 10) He is paid $12.00 per hour, while the others are paid between $7.00 and $10.00 per hour. He works six days a week. (RT 351: 21-22) He denied that he could hire, fire, lay-off, transfer, promote, demote, or discipline the employees with whom he worked. (RT 354: 1-25; 355: 1-3) He said that Johnny Gailey tells him what to do and then he explains to the others what they are to do. (RT 355: 4-5; 13-15) He did state that he directs the morning meeting where the crew learns the work for the day. He also said that he divides up the crew for their work checking cows and directed them to which corrals they should go. (RT 369: 6-8; 376: 1-7) He stated every day, "they just ask me, 'where do we start.'" He also makes the decision to move the animals from one corral to another. (RT 380: 4-6) Cruz described himself as a leadman, with more experience than the others, which is why the other members

of the crew ask him where to start or ask him for advice regarding sick cows. (RT 378: 12-13; 379: 13-17) Cruz absolutely denied ever giving a worker permission to leave early. (RT 372: 22-25) He also stated, contrary to John Gailey, that Gailey does not meet with the crew every day. (RT 375: 13-16).

Cruz seemed reluctant to admit that he had any authority at the Dairy. For example, he stated that the night worker from their crew did not report specifically to him. (RT 362: 18-20) Yet John Gailey stated that Cruz would meet with Eladio Moreno, the night worker in July 2002, at the end of Moreno's shift and they would discuss the new born calves. (RT 263: 16-19) Cruz testified that in the five years that he has been at Milky Way, he only recommended one person to Gailey for employment (RT 356: 8-12). Again Gailey's testimony differs; he says that Cruz has "recommended people to me to hire, and some of them I've hired and some I haven't. " (RT 299: 10-11)

Eladio Moreno, on the other hand, was quite insistent that Cruz was in charge of the group that took care of the heifers. Moreno worked with Cruz and his crew from January through either April or June 2002. (RT 575: 21-22; but see 796: 16-25; 797: 1-16; 799: 18-25; 800: 1-3; 808: 12-13) According to Moreno, although John Gailey is the real boss, Cruz was the one who gave them their orders. (RT 576: 21-25) He told the workers in the crew where to go and what to do. (RT 577: 4-5) Moreno said that the hours varied each day because they worked until they finished the job, and it was Cruz who said when they were done. Some days, Cruz told some of the crew to leave earlier than the others, when they were not all needed to finish the work. (RT 578: 1-10)

Moreno also said that the workers in the crew asked Cruz when they wanted to leave early. He testified that he asked Cruz for permission to leave work early one time due to family problems. (RT 611: 8-11) Cruz also told them to let him know a few days in advance if they needed to take a day off. (RT 612: 6-7) Moreno said that Cruz gave crewmember Salvador Macias permission to leave work early once a week for a six-month period. (RT 613: 6-25; 614: 1-4) Moreno's testimony on this point regarding Cruz' authority is corroborated at least to some extent by that of Gailey.

Moreno said that he and his partner, Salvador Macias, stayed in communication with Cruz as they worked and reported to him about sick cows. (RT 585:18-22; 587: 8-16; 591: 1-7): According to Moreno, Cruz decided on the treatment for the cows and decided on which cows to move. (RT 588: 21-25; 596: 4-24) Moreno said that Cruz asked other outside workers who were not members of their crew to help when there were a lot of sick cows and when the crew needed help moving the cows from corral to corral. (RT 594: 3-15; 598: 4-10; 20-21) Moreno said that he was transferred to the night shift because Cruz told him that he did not like the job that Rafael was doing on the night shift. (RT 617: 3-8)

Jose Rojas also testified. He is an outside worker at Milky Way. (RT 707: 12-22) Rojas testified that Cruz told him when he would be moving the cows, so that Rojas could move the feed and water. Cruz would also ask him to help move the cows, often as much as once or twice each week. (RT 711: 7-13) According to Rojas, John Gailey told the outside workers that when Cruz needed help, the outside workers had to stop what they were doing and do what Cruz told them to do. (RT 715: 12-15; 732: 18-23; 753: 1-3)

Salvador Hernandez also testified.[23] He worked as a cleaner. (RT 753: 1-3) He testified that he received orders from Cruz once or twice each week. Cruz told him to clean out dead cows from the maternity area; he also asked Hernandez to help move the cows. (RT 755: 14-25) According to Hernandez, John Gailey told the outside workers to follow Cruz's orders. (RT 759: 16-23; 760: 3-12)

Labor Code section 1140.4(j) provides:

> The term "supervisor" means any individual having the authority, in the interest of the employer, to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward, or discipline employees, or the responsibility to direct them, or to adjust their grievances, or effectively recommend such action, if, in connection with the foregoing, the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

It is not necessary that an individual engage in all of the 12 supervisory functions listed in the statute in order to be considered a statutory supervisor; it is sufficient that he/she engages in any one of those functions. (*NLRB v. Kentucky River Community Care, Inc.* (2001) 532 U.S. 706; 121 S. Ct. 1861; *Tsukiji Farms* (1998) 24 ALRB No. 3) According to NLRB precedent, the "decisive factor is whether the employee possesses the authority to use independent judgment with respect to the exercise of one or more of the specific authorities listed in Section 2 (11).[24] (*Carlisle Engineered Products, Inc.* (2000) 330 NLRB No. 1359.)

[23] Hernandez's testimony regarding the activities of Benjamin Cruz' crew is not particularly reliable, nor is it very clear. However, his testimony about his own activities and what John Gailey told the outside workers is clear and consistent with Rojas' and Moreno's testimony.

[24] Section 2(11) of the NLRA is the analog of Section 1140.4(j) of the ALRA.

Courts considering the NLRB's interpretation of the section 2(11) have observed that such questions are deeply fact intensive. *(Brusco Tug & Barge Co. v. NLRB* (D.C. Cir. 2001) 247 F3d 273) In determining supervisory status, the Board's obligation is to inquire into actual duties, not merely job titles or classifications. (*Longshoremen v. Davis* (1986) 476 U.S. 380, 106 S. Ct. 1904, 1915, fn. 13; *Carlisle Engineered Products, Inc., supra, 330 NLRB No. 1359*) The national board and the federal courts give little weight to job descriptions that attribute supervisory authority 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 pert. part (7th Cir. 1982) 692 F2d 470) Supervision of work that is not complex may still require the use of independent judgment. (*American Diversified Food, Inc., v. NLRB, supra,* 640 F2d 893, 897)

The question of whether Benjamin Cruz is a supervisor within the meaning of section 1140.4(j) of the ALRA is a close one, due to the repetitive nature of the crew's work. In a close case, secondary indicia of supervisory status may be considered, such as differences in wages and benefits, titles, and supervisor/employee ratios. (*Monotech of Mississippi v. NLRB* (5th Cir. 1989) 876 F2d 514, 517) The UFCW has the burden of proof on this issue. (*NLRB v. Kentucky River Community Care, Inc*. (2001) 532 U.S. 706; 121 S. Ct. 1861; *King Broadcasting Co. dba KGW-TV* (1999) 329 NLRB No. 39)

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 (the analog of section 1152 of the ALRA). (*Energy Gulf States, Inc. v. NLRB* (5th Cir. 2001) 253 F3d 203; *East Village Nursing & Rehabilitation Center v. NLRB* (DC Cir. 1999) 165 F3d 960, 962.)

Based on the testimony of Moreno, Rojas, and Salvador Hernandez,[25] I find that Cruz is a supervisor because he directed the members of his crew in their work and assigned their work. He also directed at least some of the other outside workers to assist his crew in performing their jobs as needed. The outside workers were told to stop their other work to do as instructed by Cruz. Despite Cruz' and Gailey's characterization of the work of Benjamin Cruz and his crew as repetitive, and essentially involving no independent judgment, I find that Cruz used his independent judgment in performing his supervisory functions. Cruz met with his crew every morning to give them their assignments. He made the decisions when to move the cows from corral to corral; he made at least some of the decisions as to the treatment of sick cows when there were multiple sick or diseased cows in the corrals; he decided when crewmembers could leave at the end of the day. If not all crewmembers were necessary to complete the day's work, he decided which workers should leave. I credit Moreno's testimony that Cruz

[25] I credit the corroborative testimony of Rojas and Salvador Hernandez since they are still employed by Milky Way Dairy and are not discriminatees with a direct financial interest in the outcome of the proceedings. (*Stanford Realty Associates, Inc.* (1992) 306 NLRB 1061, 1064) Additionally, I find the testimony of Moreno to be credible. He testified in a straightforward manner and other witnesses corroborated his testimony. Although he may have exaggerated the extent of the contacts between Cruz and Macias and himself, that does not take away from salient points of his descriptions of Cruz' role in the crew. It is unclear from the testimony of Moreno and Gailey how long Moreno spent on Cruz's crew, but even if he spent only two weeks with the crew, rather than the longer period that he believed, he was still in a position to observe the manner in which the work was performed. I note that John Gailey was unable to conclude from the time cards when exactly Moreno worked with Cruz' crew. (RT 799: 18-20)

authorized him to leave early one day when he needed to attend to a family problem. Apparently Cruz could authorize the workers to work overtime, although Cruz stated that, in effect, John Gailey had authorized in advance any overtime necessary to complete the crew's chief task of checking all of the 15,000 heifers under their care.

Looking at secondary indicia of supervisory status, Cruz was the only member of the crew designated as "herdsman." He is the highest paid member of the crew, making $12.00 per hour, while the rest of the crew made between $7.00 and $10.00 per hour. Although John Gailey supposedly supervised the crew, rather than Cruz, this would leave Gailey in the position of supervising virtually all dairy employees, other than the milkers, as well as handling all administrative matters for the Dairy. I find it more probable that Cruz directed the work of his crew. He had thirteen years' experience with Arie DeJong dairies, which experience John Gailey undoubtedly utilized in leaving Cruz in charge of the crew. None of the other members of the crew could direct the outside workers and none of the other crew members could make the decisions about moving the cows from one corral to another.[26] I find that Cruz directs his crew in their work and that his exercise of authority is not merely of a routine or clerical nature, but requires the use of independent judgment. (*MidState Horticulture Company* (1978) 4 ALRB No. 101, p. 6)

[26] I do not credit John Gailey's testimony that he met with Cruz every morning, ostensibly to give him directions for the crew. (RT 811: 8-10) Nor do I credit Gailey's testimony that the other crewmembers could direct the other outside workers. (RT 262: 14) Moreno, Rojas, and Salvador Hernandez were all adamant that only Cruz could do so. Cruz stated that Gailey met with him some mornings. (RT 375: 13-16) He also stated that he was the one who divided up the crew and told them where to work. (RT 376: 1-7) Cruz further stated that he decided where to send the crew because he was a "lead man" with "more experience." (RT 378: 11-13. Cruz also testified that he, not John Gailey, made the decision to move the animals from one corral to another corral. (RT 380: 4-6)

I recommend that the challenge to the vote of Benjamin Cruz be sustained based on his status as a statutory supervisor.

Summary of Recommendations

I recommend that the challenges to the following voters be, and hereby are, sustained:

1. Benjamin Cruz
2. Steven Wells
3. Ignacio Escobedo
4. Frank Garcia
5. Mike Rodriguez
6. Brenda Leatherberry
7. Deanna Helming
8. Jason DeJong
9. Gerrit Roeloffs
10. Natalie Walker
11. Peter DeJong
12. Karl Gailey
13. Damian Chick
14. Philip Heynen
15. Bert DeJong

I recommend that the challenges to the following ballots be, and hereby are, overruled:

1. Paulina Betancourt Lopez
2. Douglas DeGroot
3. Esteban Aguirre
4. Charles Millar

Dated: May 20, 2003

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NANCY C. SMITH
Investigative Hearing Examiner, ALRB