Dinuba, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

GH & G ZYSLING DAIRY, a General Partnership,	)	Case No. 05-RC-4-VI
Employer,	)	32 ALRB No. 2
and	)	(June 14, 2006)
FRESH FRUIT AND VEGETABLE WORKERS, UFCW, LOCAL 1096, CLC,	)	
Petitioner.	)	

DECISION AND ORDER

United Food and Commercial Workers International Union, AFL-CIO, & CLC, Local 1096, petitioned for an election on April 20, 2005.[1] The election was conducted by the Agricultural Labor Relations Board (Board) on April 27, 2005. The Tally of Ballots showed the following:

UFCW Local 1096.....…….	8
Teamsters Local 517……	1
No Union.....……..	4
Unresolved Challenged Ballots...	13
Total.....…….	26

[1] Teamsters Local 517 was included on the ballot as the certified union.

A hearing on the determinative challenged ballots took place before Investigative Hearing Examiner (IHE) Douglas Gallop on October 26 through 28, 2005. The IHE's decision issued on February 2, 2006. The IHE recommended that challenges to nine ballots be overruled, that challenges to three ballots be sustained and that one challenge be held in abeyance and resolved should it be outcome determinative.

This case is before the Board on exceptions filed by Petitioner[2] and the Employer.

SUMMARY OF IHE'S CHALLENGED BALLOT RECOMMENDATIONS:

Challenges Sustained:
1. Rosemary Enriquez
2. Larry Fletcher
3. Ennis Moe McKinney

Challenges Overruled
1. Arthur Burleigh
2. Gregg Machado
3. Edi Alvarez Mercado

[2] The exceptions filed on behalf of the Regional Director, which are co-extensive with those filed by Petitioner, have not been considered by the Board. Regulation 20370, subdivision (c) (Cal. Code Regs., tit. 8, § 20370, subd. (c)), provides that the Regional Director may participate in a representation hearing "to the extent necessary to ensure that the evidentiary record is fully developed and that the basis for the Board's action is fully substantiated." This regulation is a codification of the holding in *Kubota Nurseries, Inc.* (1989) 15 ALRB No. 12, wherein the Board overruled cases suggesting that the Regional Director may participate as a "full party" in such hearings (in contrast to the General Counsel's appropriate prosecutorial role in unfair labor practice proceedings). While it was appropriate in this case for the Regional Director to submit at hearing relevant evidence he had gathered in his challenged ballot investigation in order to ensure that the evidentiary record was fully developed, we find that the additional participation as an advocate filing exceptions to the IHE's decision cannot be squared with Regulation 20370 or *Kubota Nurseries, Inc.*

4. Jose Eduardo Mercado
5. David Mercado Solis
6. Jack Pedro
7. Abraham John Smit
8. Ron Thiessen
9. Georgia Watkins

Challenged Ballot Held in Abeyance

1. Mario Marques

ANALYSIS AND DISCUSSION

A. Supervisory and Stipulated Challenges:

The IHE found that Jack Pedro was not a supervisor and recommended that the challenge to his ballot be overruled. The IHE indicated he was inclined to sustain the challenge to the ballot cast by Mario Marques but recommended that Marques' ballot be held in abeyance unless and until a revised tally of ballots issued showed it was still determinative. He stated that final resolution of the challenge to Marques' ballot would require difficult credibility resolutions. The IHE found Larry Fletcher ineligible based on a stipulation by the parties.

Pedro had been a supervisor until about two years before the election, when he asked to "slow down," and became a feeder. Petitioner contends that Pedro is a supervisor because during the election he resumed his supervisory role and was at a relatively high pay level. As the IHE found, there is no evidence in the record that Pedro exercised any supervisory authority in the year or more preceding the election, beyond ensuring that the milkers did not all go vote at the same time on the day of the election.

Pedro's pay level is at most a secondary indicium of supervisory status and insufficient by itself to support a conclusion that he was a supervisor.

We affirm the IHE's finding that Jack Pedro was not a supervisor at the time of the election and adopt the IHE's recommendation that the challenge to Pedro's ballot be overruled.

We further direct that the issue of Mario Marques' supervisory status be determined by the IHE should Marques' ballot be determinative after all other valid ballots have been counted.

We adopt the IHE's recommendation, based on a stipulation of the parties, to sustain the challenge to the ballot cast by Larry Fletcher. The Employer has requested that it be relieved from this stipulation, but has not provided any basis for such relief. We have treated such stipulations binding in circumstances similar to those present in this case. (*Sequoia Orange Co.* (1985) 11 ALRB No. 21.) We therefore affirm the IHE's recommendation that the challenge to Fletcher's ballot be sustained.

B. Voters Challenged as Not Employed During the Eligibility Period:

We affirm the IHE's finding that Edi Alvarez Mercado, Jose Eduardo Alvarez Mercado and David Mercado Solis were employed[3] during the eligibility period.

[3] The record in this case revealed that Edi Alvarez Mercado, Jose Eduardo Alvarez Mercado and David Mercado Solis, who no longer worked for the Employer at the time of the election, were paid $100 each to return to Employer's premises to vote in the election. As the IHE noted, while this does not raise a question of their eligibility to vote appropriate for resolution in a challenged ballot proceeding, it does raise an issue of potential coercive misconduct that could constitute an election objection. Depending on the circumstances, including, inter alia, whether the amount paid exceeds the actual

Footnote continued----

Petitioner contended that they did not work during the eligibility period. The IHE found that they had worked on the basis of a weighing of the evidence which turned largely on his having credited the testimony of Edi Alvarez Mercado that Edi Mercado, Jose Eduardo Mercado and David Mercado Solis had worked for Zysling during the eligibility period.[4] We therefore adopt his recommendation that the challenges to their ballots be overruled.

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Footnote continued----

expenses of coming to the polling site and whether the offer was made to all similarly situated employees, such payments may be objectionable. (See *Sunrise Rehabilitation Hospital* (1995) 320 NLRB 212.) Because this issue has not been fully litigated and the limited record evidence raises the inference of objectionable conduct, we have decided to exercise our inherent authority to raise issues sua sponte in extraordinary circumstances to protect the integrity of the election process. (See *Conagra Turkey Company* (1993) 19 ALRB No. 11.) Therefore, we hereby direct the Executive Secretary to set this issue for an evidentiary hearing, along with any additional election objections he finds warrant hearing. However, this direction shall be subject to a request by Petitioner to withdraw its election objections.

[4] We find no merit in the exceptions to the IHE's credibility resolution. 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.) Further, in instances where credibility determinations are based on things other than demeanor, such as reasonable inferences, consistency of witness testimony, or the presence or 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. Our review of the record in the instant case indicates that the ALJ's credibility determinations are well supported by the record as a whole.

C. Voters Challenged as Independent Contractors:

1. Voters Ineligible as Independent Contractors:

The IHE found that Ennis Moe McKinney and Rosemary Enriquez were independent contractors and therefore recommended that the challenges to their ballots be sustained.

The Employer's exceptions contend that all challenges should be overruled and the challenged ballots counted. The Employer contends that all persons performing primary or secondary agricultural work during the eligibility period must be included because section 1157 of the Agricultural Labor Relations Act (Act) (Lab. Code § 1140, et seq.) provides that all persons performing agricultural work as defined in section 1140.4(b) of the Act are eligible to vote. [5] The Employer also contends that Labor Code sections 2750.5 and 3357 favor a finding of employee as opposed to independent contractor status in other parts of the Labor Code.

We find that, except as indicated below, the IHE correctly applied the Board's *Milky Way Dairy*[6] decision as to voters challenged as independent contractors in this case. We therefore adopt his findings and recommendations sustaining the challenges to the ballots of Rosemary Enriquez and Ennis Moe McKinney. Both operated businesses distinct in character from the Employer's dairy business with a

[5] In addition, the Employer argues that under section 1140.4(c) of the Act the employees of independent contractors are deemed the farmer's employees. In fact, that provision applies only to workers provided by labor contractors.

[6] (2003) 29 ALRB No. 4.

substantial part of their work coming from customers other than the Employer. Both provided at least some of their own equipment. As the IHE notes, both McKinney and Enriquez' businesses had government-issued licenses. We find they were well within the *Milky Way* tests for independent contractors and therefore deny the Employer's exceptions as to these challenged voters.

We find merit in the Petitioner's exception to the IHE's finding that Ron Thiessen was not an independent contractor under *Milky Way*.

The IHE recommended that the challenge to Ron Thiessen's ballot be overruled. He reasoned that although there were some indicia of independent contractor status, Thiessen's handyman work did not amount to an independent business and he speculated that the Board would consider Thiessen an employee.

We find that there are sufficient primary indicia of Thiessen's being an independent contractor and find that the challenge to his ballot should be sustained. Thiessen performed work outside the normal range of that performed by the Employer's employees and provided some of his own tools. Thiessen reports all of his income as self-employment income. More importantly, during the eligibility period, Thiessen provided a helper not compensated by the Employer. Thiessen's handyman work appears to involve construction skills and to be clearly distinct from the Employer's agricultural work force.

We disagree with the IHE's finding that Thiessen cannot be found to have a sufficiently distinct business to be an independent contractor under *Milky Way* because he does not have a contractor's license. While a business license covering the work in

question is a strong indication of independent contractor status, possession of such a license has not been required to find independent contractor status under the National Labor Relations Act (NLRA, 29 U.S.C. § 140, et seq.). In *Milky Way, supra,* we found individuals to be independent contractors with no reference to whether or not they had licenses. Therefore, possession of a license is not a controlling factor in determining independent contractor status under *Milky Way*. As is the case here, examination of the remaining factors in the common law right of control test, as modified in *S.G. Borello & Sons, Inc.* v. *Department of Industrial Relations* (1989) 48 Cal.3d 341, may nonetheless indicate independent contractor status.

Moreover, we find that Thiessen is not an agricultural employee subject to the Act because his work falls under the exclusion of construction work from the definition of "agricultural employee" found in 1140.4(b) of the Act. In *Milky Way, supra*, the Board found workers fell within the construction exception where a crew leader had specialized construction skills, was a former licensed contractor, and where the crew was not integrated into the agricultural work force or paid on the same wage scale as other employees. The Board cited *Dutch Brothers* (1977) 3 ALRB No. 80, which pointed out that the construction work exclusion from the Act's coverage in section 1140.4(b) incorporates the definition of construction work set forth in section 8(e) of the National Labor Relations Act. This excludes from the Act's 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, 29 USC Sec. 158 (e).) . . ."

The Board applied the NLRA definition of construction work in *Dutch Brothers, supra,* to determine whether employees who erected rudimentary structures were agricultural employees under the Act or were excluded as construction workers. The Board looked at two considerations: first, whether the employees displayed construction skills and second, whether they were integrated into Dutch Brothers' agricultural work force.

The only part of Thiessen's work during the eligibility period claimed to have been agricultural consisted of "lining out" a section of fence and procuring materials, a process which required two hours. The work was done solely by Thiessen and his helper; the record shows no involvement of Employer's regular agricultural work force. The record shows no involvement by Thiessen and his helper in the care of cattle or any other agricultural work during the eligibility period.[7] Thiessen and his helper's work was distinct from the work performed by the Employer's agricultural work force.

The Employer contends that the building of fences for pastured animals is agricultural work, citing Industrial Welfare Commission Order 14-2001. Because that Order does not turn on or deal with the Act's specific incorporation of NLRA section 8(e)

[7] While Thiessen performed work such as repairing a light in a corral that could be characterized as not falling within the definition of construction work, the record indicates that this work took place outside the April 1 to 15, 2005 eligibility period.

construction definition and does not specifically address fence building, we find that its provisions are not persuasive support for finding Thiessen to be an agricultural employee.

We find that Thiessen was an independent contractor and moreover that he was not an agricultural employee during the eligibility period; therefore, he was not eligible to vote. We sustain the challenge to his ballot.

2. Challenged Voters Found Not to Be Independent Contractors:

The IHE found that Arthur Burleigh, Gregg Machado, Abraham John Smit and Georgia Watkins were not independent contractors as contended by Petitioner and recommended that their ballots be counted.

Petitioner excepted to these findings and recommendations. In all cases it relies on evidence suggesting that these individuals were paid a gross amount per hour with no indication on their paychecks or other payroll documents that taxes were being withheld by Zysling on their behalves.

The evidence shows that, at least during the eligibility period, the Employer was paying tax withholdings in accordance with established IRS procedures. We find that the bare fact that an agricultural employer, who is complying with tax agency withholding requirements, states its workers' pay rates in gross amounts per hour does not provide significant support for a contention that the workers were independent contractors.

We consider the common law indicia of independent contractor status referred to in *Milky Way* to determine if a worker is in fact an independent contractor. As discussed below, the record did not show sufficient indicia of independent contractor

status during the eligibility period to exclude Burleigh, Machado, Smit and Watkins from voting as employees.

Burleigh was hired to pull stumps from a field where Petitioner was growing feed and cleared weeds from around irrigation valves and risers. He was paid by the hour and provided none of the equipment used. His normal work was as a salesman at one of the Employer's suppliers. There is no indication that he maintained an independent contracting business providing services to the Employer or others as discussed in *Milky Way*. We find that the IHE correctly determined that the record showed insufficient indicia to find Burleigh was an independent contractor.

Machado vaccinated and moved cattle for the Employer. Machado was shown which cattle to vaccinate and he used Employer-provided syringes for his eligibility-period work for the Employer. Machado's work was similar to his work at two other stockyards in the area where he performed various tasks including vaccinating cattle. Machado is paid an hourly wage by one of the stockyards, half of which is withheld as payment for the living quarters the stockyard furnishes him. We find in agreement with the IHE that the evidence shows Machado is a part-time employee of several employers rather than an independent contractor and overrule the challenge to his ballot.

Abraham John Smit is a cattle broker and semen salesman who had done business with the Employer in the years preceding the election. Smit testified that he has approximately 60 to 70 customers in his business. In the course of his cattle trading Smit would on occasion sort and load cattle being removed from the Employer's operations.

Smit testified that he performed cattle loading or sorting services for customers other than Zysling. Smit testified that Zysling gave him tickets to a NASCAR event in Las Vegas in return for similar services he had performed for Zysling in early 2005. During the eligibility period, Smit was paid an hourly wage upon which the Employer paid tax withholdings for four hours of cattle loading. The record discloses Smit did not have a buyer or broker's interest in the cattle he was loading. There is no evidence that Smit was in any way acting in his role as a cattle broker during the eligibility period. Since he was paid an hourly wage, we conclude that during the eligibility period Smit was working as an agricultural employee and not an independent contractor.

Georgia Watkins had performed work for the Employer as an employee of her husband's former mechanic shop. Her husband's former business last operated on December 29, 2004. Between December 29, 2004 and April 12, 2005, Watkins performed no work for the Employer.

She worked two days during the eligibility period and became a full-time mechanic for the Employer after the eligibility payroll period. Since beginning to work directly for the Employer on April 12, 2005, Watkins has shown almost no indicia of independent contractor status, other than having the knowledge to perform specialized work. While she did submit invoices for parts during this period, there is no evidence that her billing involved an opportunity for profit by charging the Employer more than the part supplier charged her as a mechanic procuring the parts. (*Glens Falls Newspaper, Inc*. (1991) 303 NLRB 614.) We find no evidence that she had the status of an independent contractor during the eligibility period.

We deny Petitioner's exceptions to the IHE's finding that Burleigh, Machado, Smit and Watkins were not independent contractors during the eligibility period and overrule the challenges to their ballots.

CONCLUSION

The Agricultural Labor Relations Board (ALRB or Board) has considered the record and the Investigative Hearing Examiner (IHE) Decision in light of the exceptions and briefs of the parties, and has decided to affirm the IHE's rulings, findings and conclusions, unless otherwise noted in this Decision, and to adopt his proposed Order as modified.

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

1. Rosemary Enriquez
2. Jack Fletcher
3. Ennis Moe McKinney
4. Ron Thiessen

We have overruled the challenges to the ballots of:

1. Arthur Burleigh
2. Gregg Machado
3. Edi Alvarez Mercado
4. Jose Eduardo Mercado
5. David Mercado Solis
6. Jack Pedro
7. Abraham John Smit
8. Georgia Watkins

Their ballots shall be opened and counted and a revised tally issued. Should Mario Marques' challenged ballot still be determinative at that point, the IHE shall issue a decision recommending a resolution of the challenge to his ballot.

ORDER

IT IS ORDERED that the challenges to the ballots of Rosemary Enriquez, Larry Fletcher, Ennis Moe McKinney and Ron Thiessen be sustained and that their votes not be counted.

IT IS FURTHER ORDERED that the challenges to the ballots of Arthur Burleigh, Gregg Machado, Edi Alvarez Mercado, Jose Eduardo Mercado, David Mercado Solis, Jack Pedro, Abraham John Smit and Georgia Watkins be overruled and that their ballots be opened and counted.

Once the overruled challenged ballots have been opened and counted pursuant to this ORDER, the Regional Director shall issue a revised tally of ballots. If the ballot cast by Mario Marques is determinative following the tally, the IHE shall make his determination of Marques' supervisory status as soon as reasonably practicable. Should the challenge to Marques' ballot be overruled, the Regional Director shall count his ballot and issue a revised tally of ballots. If the final tally of ballots is not outcome determinative under section 1157.2 of the Act, the Regional Director shall, consistent with that section, proceed to conduct a runoff election.

Should a runoff election be required, a new eligibility period will be established based on the payroll period closing immediately preceding the date of the issuance of the notice of a runoff election. (*Jack T. Baillie Co.* (1978) 4 ALRB No. 47.)

Should Petitioner be found to have lost the election following the final tally of ballots or any runoff election, the Executive Secretary may consider Petitioner's objections. The IHE shall hear and consider in conjunction with the objections evidence as to the payments to the three employees (Edi Alvarez Mercado, Jose Eduardo Alvarez and David Mercado Solis) referred to in footnote 3 above, and examine whether the payments amounted to coercive misconduct which interfered with the integrity of the election process.

Dated: June 14, 2006

IRENE RAYMUNDO, Chair

GENEVIEVE A. SHIROMA, Member

CATHRYN RIVERA-HERNANDEZ, Member

CASE SUMMARY

G.H. & G. Zysling Dairy
(FFVW, UFCW, Local 1096)

32 ALRB No. 2
Case No. 05-RC-04-VI

Independent Hearing Officer's Decision

The IHE found that five challenged voters were not independent contractors under *Milky Way Dairy* (2003) 29 ALRB No. 4 and recommended that the challenges to their ballots be overruled. He sustained challenges to two ballots finding that those voters were independent contractors under *Milky Way*. He recommended overruling four other challenges, including three challenges contending that the challenged voters had not worked during the eligibility period and one alleging supervisory status.

Board Decision

The Board adopted the rulings, findings and conclusions of the ALJ with one exception. The Board found that a handyman performing construction work during the eligibility period was an independent contractor because he sufficiently satisfied the common law right of control criteria applied in *Milky Way*. The Board found that his lack of a contractor's license did not preclude him from being found an independent contractor. The Board further found that he performed only construction work during the eligibility period and was therefore not an agricultural employee as defined in section 1140.4(b) of the Agricultural Labor Relations Act. The Board declined to consider the exceptions filed by the Regional Office based on its decision in *Kubota Nurseries, Inc.* (1989) 15 ALRB No. 12. The Board also sua sponte directed that the Employer's payment of $100 to three voters who no longer worked for the Employer for traveling to the dairy to vote in the election to be considered in conjunction with the Union's election objections should the revised tally result in those objections coming before the Executive Secretary.

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STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of:	)	**Case No.** 05-RC-4-VI
	)	
FRESH FRUIT & VEGETABLE WORKERS, U.F.C.W., LOCAL 1096, CLC,	)	
	)	
Petitioner**,**	)	
	)	
and	)	
	)	
GH & G ZYSLING DAIRY, A California General Partnership,	)	
	)	
Employer**.**	)	

Appearances:

Peter F. Samuel
Law Offices of Samuel & Samuel
Fair Oaks, California
For the Employer

Juan Cervantes
Delano, California
For Petitioner

Francisco T. Aceron, Jr.
ALRB Visalia Regional Office
For General Counsel

DECISION OF THE INVESTIGATIVE HEARING EXAMINER

DOUGLAS GALLOP: On April 20, 2005, Fresh Fruit & Vegetable Workers, U.F.C.W., Local 1096, CLC (hereinafter Petitioner) filed a petition in the above-captioned matter to represent the agricultural employees of GH & G Zysling Dairy, A California General Partnership[1] (hereinafter Employer or Dairy). At the time the petition was filed, Teamsters Local 517 was the certified representative of these employees.[2] An election was conducted on April 27, 2005, with the Tally of Ballots showing eight votes for Petitioner, one vote for Teamsters Local 517 and four for no union. The Board Agent conducting the election challenged 13 voters, 11 on the basis they were not on the voting list,[3] and two on the basis that they are supervisors. After an investigation, the Visalia Regional Director of the Agricultural Labor Relations Board (hereinafter ALRB or Board) set the challenges for hearing, which was conducted on October 24, 25 and 26, 2005, at Visalia, California.[4] Subsequent to the hearing, the parties filed briefs, which have been duly considered. Upon the testimony of the witnesses, the documentary evidence received at the hearing, the parties' briefs and the record as a whole, the undersigned submits the following findings of fact and conclusions of law.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Employer's Operations

The Employer is a California partnership between Gary C. Zysling and his mother,

[1] The pleadings have been amended to reflect the Employer's partnership status and Petitioner's current affiliations.
[2] See (1994) 20 ALRB No. 3. No representative for Local 517 appeared at the hearing.
[3] These individuals were on the voting list submitted by the Employer, but were stricken by the Visalia Regional Office.
[4] Petitioner filed objections to the election, which are being held in abeyance pending the outcome of these challenged ballots.

Helen. The business consists of a dairy, heifer ranch and farm, where crops to feed the livestock are grown. The dairy, located in Dinuba, has about 2,000 milking cows, and contains a milking barn, corrals, two homes (occupied by Zysling and his mother), a mobile home (occupied by an employee) and birthing and hospital areas. The Employer owns machinery, tools and vehicles used in its operations. The heifer ranch, located about two miles from the dairy, has between 1,500 and 1,600 head of cattle. The farm, known as Weed Patch Ranch,[5] is located about four miles from the dairy. The Employer purchased it about two years ago. At least part of the land was used as an orchard, and the Employer had the trees cut down in late 2004, so it could plant wheat.

Most of the Employer's regular employees are milkers. The Employer also has employees to move cows in and out of the milking barn (pushers), a feeder, and an employee responsible for herd health. Until about three years ago, the Employer paid all of its employees on a "net" basis, meaning the Employer made payroll deductions after the employees were paid, and did not take the deductions from their paychecks. More recently, the Employer has paid some of its employees on a "net" basis, and taken payroll deductions from others out of their checks. The Employer provides few, if any, fringe benefits, although some employees may be granted unpaid leaves. Zysling is an on-site manager, who works with the employees on a daily basis. He is not fluent in Spanish, and uses bilingual employees to translate for him.

[5] The name of the farm is corrected from the misspelling contained in the transcript.

Governing Legal Principles

As noted above, most of the challenges were on the basis that the voters were not on the voting list. General Counsel and Petitioner contend that these individuals were not employed by the Employer as of the payroll eligibility period, April 1 through 15, 2005. The Board's most recent pronouncements in this area are contained in *Arie De Jong dba Milky Way Dairy* (2003) 29 ALRB No. 9. In that case, the Board established a two-pronged test to determine the eligibility of individuals working at an agricultural employer's facilities during the payroll eligibility period. First of all, the work must constitute primary or secondary agriculture as defined in section 1140.4(a) of the Agricultural Labor Relations Act (hereinafter Act). General Counsel does not dispute that the challenged voters performed agricultural work during the payroll eligibility period, with the exception of three employees, who he contends did not work for the Employer at all.

Secondly, the individual must be an employee of the employer. In determining this, the Board first looks to whether the person satisfies the common law "right to control" test for employment. The right to discharge is compelling evidence of employee status. Other tests include whether the individual has a distinct occupation or business, the need for supervision, the skill required, whether the principal provides tools or the place of work, the length of time needed to perform the services, the method of payment (time vs. by the job), whether the work is part of the employer's regular business and whether the parties believe they have established an employment relationship.

The Board, citing *S.G Bordello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d 341 [256 Cal. Rptr. 371], went on to hold that even where the common law test for employment is not satisfied, the protections of the Act may be extended to workers who otherwise might be found to be independent contractors. Factors to be considered are the remedial purposes of the legislation, whether the individuals are within the intended reach of the legislation and the bargaining strengths and weaknesses or each party. The Board, in *Milky Way Dairy*, rejected considerations of community of interest, sporadic, infrequent or multiple employment as factors to consider for unit inclusion under the Act. General Counsel contends that all of the nonsupervisory challenged voters were independent contractors, or did not work for the Employer at all.

With respect to the voters challenged as supervisors, section 1140.4(j) states:

> The term "supervisor" means any individual having the authority, in the interest of the employer, to hire transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or the responsibility to direct them, or to adjust their grievances, or effectively to recommend such action, if, 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.

The above language, adopted from the National Labor Relations Act, has been the subject of extensive litigation.

The Challenged Ballots

Arthur Lowell Burleigh

Burleigh worked at the Employer's Weed Patch Ranch on April 9 and 10, 2005.[6] He dug up the tree stumps and roots from the orchard so wheat could be planted, using the Employer's loader, which he drove from the Dairy to the ranch. Burleigh is experienced at operating these machines, although Zysling showed him how to operate the controls of this particular loader. Otherwise, Burleigh worked without supervision.

Burleigh also cleared weeds from around the valves and risers at the ranch. While the record is not clear on this point, it appears they are part of the irrigation system. The weeds needed to be cleared because the wheat crop was about to be harvested, and the Employer did not want the harvesters to run over the valves and lifters with their machines.[7] Burleigh worked a total of 12 hours on April 9 and 10, at $8.00 per hour, and was paid by check, with no deductions. Zysling testified he told Burleigh he would make the required payments, but Burleigh testified he told Zysling he would pay the taxes himself.

Burleigh is employed as a fulltime salesman for a different employer, selling feed additives and seed. The Employer is a customer of his, and he has known Zysling for many years. The only prior work Burleigh performed for the Employer was several years ago, when he branded some heifers and sorted cattle on a barter basis. Although Burleigh and Zysling testified he has performed no other work for the Employer in 2005, the

[6] All dates hereinafter refer to 2005 unless otherwise indicated.
[7] The record does not disclose who harvests the crops at Weed Patch Ranch, although it does not appear to be the Employer's regular employees.

Employer's April 1 to June 30 quarterly report to the Employment Development Department (EDD), dated August 1, shows an additional $44.00 in earnings. Zysling had Burleigh complete a W-4 form, dated April 8.[8]

As noted above, agricultural work is defined under section 1140.4(a) of the Act, which reads:

> The term "agriculture" includes farming in all its branches, and, among other things, includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities (including commodities defined as agricultural commodities in Section 1141j(g) of Title 12 of the United States Code), the raising of livestock, bees, furbearing animals, or poultry, and any practices (including any forestry or lumbering operations) 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 to market or to carriers for transportation to market.

While not a farmer himself, and not directly engaged in producing the crops at Weed Patch Ranch, Burleigh's work was on a farm and involved preparing the land for cultivation and harvesting. Therefore, his work was in conjunction with the farming operations and constituted secondary agriculture.

The record discloses some aspects of Burleigh's work considered indicia of independent contractor status, such as the lack of supervision, some skills to perform the work and the work not being part of the Employer's regular business. Overall, however, and in particular noting that Burleigh does not operate an independent business related to the work he performed at the ranch, the record does not establish him as an independent

[8] As with most of the W-4 forms, Zysling provided a form for the wrong tax year, and the form was not completely filled out.

contractor. Inasmuch as the undersigned believes the Board would consider Burleigh an employee of the Dairy, it is recommended that the challenge to his ballot be overruled.

Rosemary Enriquez

Enriquez began working at the Dairy in late 2004. She performed cleaning services, primarily in the Employer's facilities, but also in the home of Zysling's mother. Without notice, Enriquez ceased working at the Dairy about two to three months prior to the hearing. Zysling testified at the hearing concerning Enriquez's work. Although Enriquez did not testify, her challenged ballot declaration was received into evidence without objection. As such, the contents thereof may be used to form the basis of factual findings. *Frudden Enterprises, Inc. v. ALRB* (1984) 153 Cal.App.3d 262 [201 Cal.Rptr. 371].[9] The undersigned considers Enriquez's declaration, taken on the day she wished to vote in the election, to be reliable.

Enriquez performed cleaning duties at the Dairy on April 7 and 14, at an hourly rate of $10.00. According to Zysling, she used the Employer's supplies to perform her work. Enriquez signed a W-4 form on April 25 but, contrary to Zysling's testimony, her second quarter earnings, at least, were not reported to the EDD.

Enriquez stated, in her declaration, that she operates a cleaning business, which is licensed by the city of Visalia. She has several other clients, including at least one other commercial account. At least one of these clients issues her a Form 1099 statement, and

[9] In *Frudden Enterprises*, the Court noted that under the Administrative Procedures Act (APA), making findings based on unobjected-to hearsay might be prohibited, noting the then-existing language of that Act, but stated since the ALRB is not governed by APA, the Evidence Code, as interpreted by the courts, governs the use of hearsay in its proceedings. It is noted that in 1995, Government Code (APA) section 1153(a) was amended to add the requirement of a timely objection in order to bar the use of uncorroborated hearsay in fact finding.

Enriquez pays her own taxes. She submitted written invoices to the Employer for her work, and was paid cash. Enriquez stated that she considers herself a self-employed person.

It appears that a substantial portion of Enriquez's work at the Dairy was cleaning Dairy facilities. In the *Milky Way Dairy* decision, such duties were found secondarily agricultural in nature. Unlike the janitorial employee in that case, Enriquez operates her own cleaning business, submits invoices for her work, and does not consider herself an employee. Thus, she appears to be an independent contractor. There does not appear to be any statutory purpose in including her in the bargaining unit, since she has little economic interest in whether Petitioner will represent her, if she ever resumes her work at the Dairy. Therefore, it is recommended that the challenge to Enriquez's ballot be sustained.

Larry A. Fletcher

At the hearing, the parties stipulated that Fletcher's vote should not be counted. In its brief, the Employer, without even mentioning this stipulation, urges Fletcher's unit inclusion. Inasmuch as the Employer has failed to show any reason why the stipulation should be set aside, and to do so would seriously prejudice General Counsel and Petitioner, the stipulation will be enforced. Accordingly, it is recommended that the challenge to Fletcher's ballot be sustained.

Gregg Andrew Machado

Machado worked at the Employer's facilities on April 9 and 11, for a total of 11 hours. Machado worked for the Employer again on May 2. On April 9 and 11, Machado

vaccinated the Employer's livestock at the heifer ranch, using the Employer's medicine and both the Employer's and one of his syringes. Once shown the cattle to be vaccinated, Machado worked without supervision. Machado also moved some livestock from pen to pen at the Dairy, on April 9, before going to the heifer ranch. On May 2, he hauled some of the Employer's livestock between the Dairy, heifer ranch and an off-premises stockyard, using the Employer's vehicle. He was paid $8.00 per hour by check, with no deductions. The Employer reported a total of $120.00 for Machado in its quarterly report to the EDD. Machado completed a W-4 form, dated April 15.

Machado is a regular part-time employee for two stockyards. Zysling met Machado while buying and selling cattle at one of these employers, and asked him if he would like to vaccinate his livestock. Machado also sometimes performs work, including vaccinating livestock, for other individuals and businesses. Machado is not a licensed veterinarian and does not possess a business license.

Machado's work in vaccinating and hauling cattle, much of which occurred at the Employer's premises, was in conjunction with the Employer's agricultural operations, and agricultural in nature. Although Machado's work shows some indicia of independent contractor status, such as the lack of supervision, some skills required, the use of one of his own syringes, and the distinct nature of the services he provided, the record fails to establish that his work was part of a distinct business he operates. The undersigned believes the Board would consider Machado to have several employers, including the Dairy and, for this reason, recommends the challenge to his ballot be overruled.

Mario M. Marques

Marques is the Employer's Ranch Foreman. His ballot was challenged on the basis that he is a supervisory employee. Substantial and conflicting testimony was presented concerning his supervisory authority and the exercise thereof. Even with the conflicts in testimony, it appears that Marques' job duties are somewhat similar to those of a challenged voter in *Milky Way Dairy*. The Board sustained the challenge to that voter, noting it was a close case. The undersigned believes the issue of Marques' supervisory status is also close, and would require difficult credibility resolutions. For this reason, it is recommended that the determination of his eligibility be held in abeyance pending resolution of the other challenged ballots. If, after any overruled challenged ballots are opened and counted, Marques' vote is outcome determinative, a supplemental decision will issue concerning his voter eligibility, unless the Board chooses to resolve the issue prior thereto.

Ennis Moe McKinney

McKinney worked at the Dairy on April 7 for four hours, performing electrical installation and repair work on the Employer's facilities.[10] McKinney performed additional electrical work at the Dairy after the payroll eligibility period, and the Employer reported $285.00 in wages for him to the EDD for the second quarter. Other than being shown what needed to be done, McKinney worked without supervision. McKinney has been disabled since May 15. McKinney was paid $15.00 per hour,

[10] In its brief, the Employer contends McKinney also fed cattle. The record does not show this.

with Zysling to pay the taxes and other payroll deductions. He signed a W-4 form, dated April 7.

McKinney is a licensed electrical contractor, and has run his electrical business for 30 years. He has been a member of a union representing electricians. According to McKinney, when business is slow, he hires himself out as an employee. As an employee, he accepts a lower hourly rate from the $55.00 per hour he charges as a contractor. In addition, for the most part, he uses the employer's tools and materials on these jobs, as was the case for his work at the Dairy, whereas he supplies these as a contractor. McKinney is a longtime friend of Zysling's mother.

The undersigned sees these differences in the terms of McKinney's work as being driven by economics, rather than any real difference in the nature of his business relationship with the principal. McKinney satisfies many of the criteria for independent contractors, including the running of a related business, special skills, lack of supervision, and work on specific projects, unrelated to the Employer's normal business, for limited periods of time. Therefore, while McKinney's work on the Employer's facilities, at the Dairy, constituted secondary agriculture, it is concluded that he was not an employee. The undersigned sees no statutory intent to include employees like him in the unit, and he has, at best, a negligible economic interest in whether Petitioner represents him should he ever work at the Dairy again. Accordingly, it is recommended that the challenge to his ballot be sustained.

Edi Alvarez Mercado
Jose Eduardo Alvarez Mercado
David Mercado Solis

Edi Alvarez Mercado, Zysling and Mario Marques testified that the above three individuals worked at the Dairy on April 1 and 2.[11] The winter of 2004-2005 was unusually wet, and left the Dairy with substantial cleanup requirements. The Employer engaged an independent contractor to help its employees perform the cleanup, but eventually, the contractor was unable to provide workers. Zysling testified he asked an employee, Jose Mondragon Castro, if he could obtain workers to complete the cleanup. Castro called Solis, a relative who, along with the Mercado brothers (his nephews) were on a seasonal layoff from their jobs picking oranges.

The above witnesses testified that the three cleared weeds, cleaned up cow manure and cleaned the water troughs used by the livestock on their two days of work. They were paid cash, at $7.00 per hour, for a total of 20 hours. The Employer produced W-4 forms for the three, dated April 1. Edi Mercado, who later was hired as a milker, testified that he signed the W-4 form in July, but it is clear that he was wrong on this point. These workers (along with all of the other challenged voters) appeared on the voter list submitted for the election by the Employer, and the W-4 forms were submitted during the

[11] Jose Alvarez, David Mercado and Jose Mondragon Castro, the nonsupervisory employee who obtained these workers for the Employer, did not testify at the hearing. General Counsel and Petitioner contend that the challenges to all three ballots should be sustained for this reason. Jose Alvarez and David Mercado no longer work at the Dairy. Jose Castro was present in the hearing room and could have been called as a witness by General Counsel or Petitioner if either had so desired. As nonsupervisory workers, all three were equally available to General Counsel and Petitioner, as to the Employer. General Counsel's representative was advised by the Employer, at the prehearing conference, that it would be unlikely that Alvarez or Mercado could be produced by it at the hearing. General Counsel was notified, at that time, that he would be responsible for procuring the attendance of all nonsupervisory witnesses he wished to call, by subpoenaing them.

challenged ballots investigation, in May.

The Employer reported $109.68 in wages for each of these workers to the EDD, but it was not for work performed at the Dairy. Rather, the Employer paid them for lost wages from their jobs picking oranges, on the day of the election. The record does not show whether, in fact, they lost an entire day of work due to voting.[12]

General Counsel and Petitioner contend that the above testimony and documentary evidence should be discredited, and it be found that the three challenged voters, in fact, never worked at the Dairy. This is because, as two of Petitioner's representatives testified, all of them verbally admitted, and then signed statements, which are in evidence, stating they never worked for the Employer or applied for work there. Edi Mercado testified that the three of them told the representatives they worked at the Dairy for only a couple of days, and the representatives told them this did not qualify them to vote. According to Mercado, the piece of paper they signed was blank, and the admissions were added later.

Assuming, as is probably the case, that the version of these events by Petitioner's representatives is correct, Mercado, Zysling and Marques are still credited in their testimony that these three worked at the Dairy during the payroll eligibility period. While such admissions certainly cast doubt on whether this took place, they are not dispositive. The undersigned simply does not believe that the Employer made up this

[12] At the hearing and in its brief, Petitioner vigorously protested this payment. While the Employer's conduct might constitute a valid, timely filed objection, it does not appear to form the basis for sustaining challenges to the voters' ballots. *Broward County Health Corporation d/b/a Sunrise Rehabilitation Hospital* (1995) 320 NLRB 212 [151 LRRM 1234] cf. *NLRB v. Good Shepherd Home, Inc.* (1998) 145 F.3d 814 [158 LRRM 2398]; *Allen's Electric Company, Inc.* (2003) 340 NLRB No. 119 [173 LRRM 1425].

employment and falsified the W-4 forms, which are strong corroborating evidence that the work was performed. In addition, while Mercado was anything other than a dependable witness, he did candidly admit that the Employer paid them for the work time lost voting in the election. Whatever led these workers to sign the statements, it is highly unlikely they would have then showed up to vote, if they had not, in fact, worked at the Dairy. Furthermore, General Counsel did not call any witnesses who worked at the Dairy on those dates to dispute that these workers were present.

Although not directly part of the Employer's regular business, the cleanup work was an incident thereto, performed at the Dairy, and thus, secondary agriculture. Inasmuch as the record does not show that these workers operated a related independent business, the undersigned believes the Board would consider them employees. For this reason, it is recommended that the challenges to these ballots be overruled.

Jack Joseph Pedro

Pedro's ballot was challenged on the basis that he is a supervisory employee. He has been employed for about 12 years, and is one of the Employer's highest paid employees. He is salaried, and payroll deductions are taken from his check. (When first hired, he was also paid a salary, with no payroll deductions.) Pedro was originally hired as a feeder, and after about two years, was made Ranch Manager. As such, he became Zysling's "right hand man," and assumed and exercised supervisory authority.

In about August 2004, Pedro, who is in his 60's, told Zysling he wanted to "slow down," and for this reason, was reclassified as a feeder. Pedro's salary was reduced by $100 per month, and he has since mostly worked alone. Pedro's and Zysling's

uncontradicted testimony establishes that, at least until just before the election, Pedro ceased exercising or possessing any supervisory authority. In fact, one of General Counsel's witnesses corroborated Pedro's testimony, that after resuming his feeder position, Pedro told employees who asked him to resolve work-related problems that he no longer performed this function.

General Counsel's witnesses testified, and Pedro acknowledged, that shortly before the election, apparently the day before, Zysling, using Pedro as an interpreter, told the milkers that Pedro would be "in charge" of the milking barn.[13] Pedro testified that the purpose of his reassignment was to make sure that all of the milkers did not vote at once, because the Employer cannot stop its milking operations. Beyond claiming that Pedro, on the day before the election, told the milkers to call him if there were any problems during the night shift, none of General Counsel's witnesses contended Pedro manifested any other new authority during this period. Once the election was over, Pedro returned to his feeder duties, and one of General Counsel's witnesses acknowledged that the milkers were told Pedro was no longer in charge of the milking barn.

It is very questionable that the above facts establish that Pedro possessed or exercised any non-routine supervisory authority during his brief reassignment. Even if he were to be considered a supervisor for that time, the Board evaluates the supervisory status of part-time supervisors in the context of all their work. *Karahadian & Sons, Inc.* (1979) 5 ALRB No. 19. Given the brief, temporary nature of this assignment, and the

[13] On leading questions from General Counsel, Pedro initially testified that his reassignment took place a few days before the election. He subsequently corrected this, and General Counsel's witnesses were less than specific as to when the announcement was made. Zysling, on the other hand, denied making any such announcement.

lack of any major decision-making by Pedro, such as hiring, discharging or disciplining workers, it is concluded he is not a supervisory employee. It is recommended that the challenge to his ballot be overruled.

Abraham John Smit

Smit worked at the Dairy for four hours on April 6, loading cattle on one of the Employer's trucks, with a regular employee. He was paid $10.00 per hour by check, with no deductions. Smit completed a W-4 form, dated April 26. His $40.00 in wages was reported to the EDD. Smit moved some cows on the Dairy to the maternity area in early 2005, in exchange for tickets to a NASCAR event. Smit testified that he also worked at the Dairy on April 27, moving cows to the maternity area, but those wages do not appear in the EDD quarterly report.

Smit runs his own business, as a cattle broker and bull semen salesman. He has bought and sold livestock to and from the Employer in the past, which is how he met Zysling. The cattle he loaded on April 6 were not the subject of a purchase or sale between Smit and the Employer. At one point, Smit testified he considers himself self-employed and not an employee of anyone else. Smit then testified he is an employee of the Dairy on an as-needed basis.

Smit's work at the Dairy was in conjunction with the Employer's agricultural operations, and constitutes secondary agriculture. Although Smit operates his own business, his work at the Dairy was not in conjunction with that business. Inasmuch as the undersigned believes the Board would consider Smit an employee under the *Milky Way Dairy* decision, it is recommended that the challenge to his ballot be overruled.

Ron Thiessen

Thiessen first worked for the Employer in 1992, renovating a mobile home for use as an office. He worked at the Dairy for six hours on April 12, 2005, performing carpentry work in Zysling's Dairy office. Thiessen's declaration states that he brought a worker with him to help perform this work. He returned the next day, doing measuring work on a fence to be constructed, but was not paid for this. Thiessen was paid $15.00 per hour, by check, with no deductions. Since his work on April 12, Thiessen has performed repair work on toilets used by Dairy employees, additional carpentry work on the Employer's facilities, fence construction, fabrication of hoof pads for livestock needing such protection, and antique restoration, the last not related to the Employer's business. Other than being shown what needs to be done, Thiessen works without supervision. Thiessen uses both his own and the Employer's tools when he works at the Dairy, and the Employer provides any materials used. The Employer reported $3,584.70 in wages for Thiessen for the second quarter of 2005. Thiessen completed a W-4 form, dated April 12.

Thiessen is a handyman, but is not a licensed carpentry contractor, and does not advertise his services. He has known Zysling for many years. It appears his work for the Employer was his first paid employment in 2005, but he earned over $11,000 as a handyman in 2004, from other sources. He reported these earnings as self-employment income.

Other than the antique restoration, Thiessen's work at the Dairy was in conjunction with the Employer's agricultural operations. Thus, his work was

substantially agricultural in nature. With respect to his employee status, Thiessen is a handyman, and the work he performed at the Dairy is related to his occupation. On the other hand, it is questionable whether his trade amounts to an independent business, and while his work on April 12 shows some indicia of independent contractor status, it does not appear that a high skill level was required. The undersigned believes the Board would consider Thiessen an employee, rather than an independent contractor, and for this reason recommends the challenge to his ballot be overruled.

Georgia Nadine Watkins

Watkins worked at the Dairy on April 11 and 14, performing maintenance and repair work on the Employer's vehicles. She was paid by check for her work of April 11, on April 16. Watkins submitted an "invoice" for mechanical parts she purchased for her work on April 14, and was not paid for this or her hours that day until the next paycheck. Her pay rate is $15.00 per hour, without deductions. Watkins used her own vehicle to obtain the parts and did not bill the Employer for her mileage. She completed a W-4 form on April 15. Watkins was made a fulltime employee about a week before the election, and the Employer reported second quarter wages of $4,634.10 for her to the EDD. Watkins performs her mechanical work without supervision, but is not a licensed mechanic. She primarily uses the Employer's tools, but sometimes uses her own wrenches. On one occasion in 2005, she performed mechanical repair work for the Employer at the place of her husband's former business.

Watkins' husband was the sole proprietor of an agricultural mechanical repair shop and wrecking yard. Watkins worked at the business, driving a truck and performing

repairs. Her husband frequently, and she rarely performed repairs for the Employer at the Dairy. Due to her husband's incarceration, the business ceased operations in about September 2004. Watkins, who has known Zysling for many years, discussed becoming a Dairy employee at that time, but her employment was delayed by an illness, and the selling off of inventory from the defunct business.

Mechanics who spend a regular and substantial portion of their time on activities related to agriculture perform agricultural work. *Milky Way Dairy*, supra; *Sam Andrews' Sons* (1983) 9 ALRB No. 24; *Carl Joseph Maggio, Inc.* (1976) 2 ALRB No. 9.
A substantial portion of Watkins' mechanical work during and after the payroll eligibility period was performed at the Dairy, and all of her work was on the Employer's agricultural equipment. Therefore, she was engaged in secondary agriculture.

The record does not establish whether Watkins was ever actually an employee of her husband or owned part of the business. Even if she was so engaged, that ended with the business. Although Watkins works without supervision, uses some of her own tools and possesses some mechanical skills, the evidence fails to show that, as of the payroll eligibility period, she was an independent contractor. Based on the foregoing, the undersigned believes the Board would consider Watkins a Dairy employee, and it is recommended that the challenge to her ballot be overruled.

Summary of Recommendations

It is recommended that the challenges to the following ballots be sustained:

Rosemary Enriquez

Larry A. Fletcher

Ennis Moe McKinney

It is recommended that the challenges to the following ballots be overruled:

Arthur Lowell Burleigh

Gregg Andrew Machado

Edi Alvarez Mercado

Jose Eduardo Alvarez Mercado

David Mercado Solis

Jack Joseph Pedro

Abraham John Smit

Ron Thiessen

Georgia Nadine Watkins

It is recommended that determination of Mario Manuel Marques' eligibility to vote be held in abeyance, pending resolution of the other challenged ballots.

Dated: February 2, 2006

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DOUGLAS GALLOP
Investigative Hearing Examiner, ALRB