STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

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| ARTESIA DAIRY, A Sole Proprietorship, | ) | |
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| Employer, | ) | Case No. 06-RC-01-VI |
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| and | ) | 33 ALRB No. 3 |
| | ) | (32 ALRB No. 3) |
| UNITED FARM WORKERS OF AMERICA, | ) | |
| | ) | (April 20, 2007) |
| Petitioner. | ) | |
| | ) | |

## DECISION AND ORDER

A petition for certification in the above-entitled case was filed on February 28, 2006, and the election was held on March 7, 2006. The initial tally of ballots showed 25 votes for the Petitioner, United Farm Workers of America (UFW), 24 votes for "No Union," and 15 unresolved challenged ballots. As the number of challenged ballots was outcome determinative, the Regional Director (RD) conducted an investigation, which resulted in a challenged ballot report issued on June 12, 2006. The Employer, Artesia Dairy (Employer), filed exceptions to the report. On August 2, 2006, the Agricultural Labor Relations Board (Board or ALRB) issued a decision (*Artesia Dairy* (2006) 32 ALRB No. 3) sustaining two challenges, overruling one, and setting twelve for hearing.

During the hearing, the parties stipulated that David Rose and Victor Vera are supervisors whose challenges should be sustained. On January 10, 2007, the Investigative

Hearing Examiner (IHE) issued the attached decision. In addition to the two stipulated sustained challenges noted above, the IHE recommended that the challenge to John Verkaik be sustained. He recommended that the remaining nine challenges be overruled. [1] The Employer filed an exception to the overruling of the challenge to Jesus Mesa Martinez. The UFW filed exceptions regarding the other eight challenges overruled by the IHE. No exceptions were filed regarding John Verkaik.

## DISCUSSION[2]

Jesus Mesa Martinez

Mesa worked as a milker, commencing in about August 2005. He injured his knee on the job on October 27, 2005. Mesa was off work until November 5, 2005 when he was released to return for light duties. The Employer gave him light-duty work driving a tractor, but after about two hours, Mesa further injured his knee and had to leave. Mesa had knee surgery on January 26, 2006. At the time of the election, Mesa had not been released to return to work. Indeed, as of the time of the hearing, he

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[1] The Board earlier affirmed the Regional Director's recommendation to overrule the challenge to the ballot of Alfredo Rodriguez , as there was no exception filed to that recommendation in the Regional Director's Challenged Ballot Report. (See *Artesia Dairy* (2006) 32 ALRB No. 3.)

[2] The Board's regulations are codified at Title 8, California Code of Regulations, section 20100, et seq. During the hearing, issues arose concerning the representative of the regional office improperly taking on an advocacy role in this proceeding, in possible violation of Regulation 20370, subdivision (c). There is also reference to an off the record ex parte communication with the IHE initiated by the Regional Director, in possible violation of Regulation 20700. Nothing in the record indicates that this conduct had any effect upon the IHE's decision, nor has any party claimed such effect. Consequently, this conduct need not be addressed any further in the context of this Decision.

remained unable to perform the duties of a milker and had taken a job with another dairy giving cows medicine, rather than working as a milker, due to his physical limitations.

The IHE concluded that Mesa would have been working during the voter eligibility period but for his injury, and therefore, should be eligible to vote. The IHE noted an apparent discrepancy between the standards utilized by the National Labor Relations Board (NLRB) and the ALRB in these cases. He pointed out that the NLRB requires a showing that the injured worker was discharged or resigned in order to not be eligible, while the ALRB stated in *Cocopah Nurseries, Inc.* (2001) 27 ALRB No. 3 that eligibility also depends on a showing that there was a reasonable expectation of returning to work. He concluded that under either standard Mesa was eligible to vote, as there was no convincing evidence that he had been replaced and the eligibility period was too soon after his knee surgery for anyone to know whether he would have any lingering impairment that would prevent returning to work.

The Employer argues in its exception that, due to the extent of his injury, Mesa could not have had a reasonable expectation of recall, and suggests that the IHE relied unduly on NLRB, rather than ALRB, precedent. In *Cocopah Nurseries, Inc.*, the Board cited *Valdora Produce Co.* (1977) 3 ALRB No. 8 for the proposition that an injured or sick worker must have had a reasonable expectation of returning to work in order to be eligible to vote. However, a review of *Valdora Produce Co.* reflects no such requirement. On page 6 of that decision, the paragraph setting forth the standard to be applied begins with a sentence that notes the challenged voter's view that she had a reasonable expectation of returning to work. However, the actual standard articulated

focused solely on whether she would have worked during the eligibility period but for her absence due to illness. In *Cocopah Nurseries, Inc.*, the reference to a reasonable expectation to return to work was mistakenly included in the summary of the analysis of *Valdora Produce Co.*

Therefore, we take this opportunity to clarify that the standard to be applied does not differ from that applied by the NLRB. To the extent *Cocopah Nurseries, Inc.* indicates otherwise, it is hereby overruled. In this case, the IHE concluded that the evidence did not show that Mesa's employment status had been severed and, therefore, he would have worked during the eligibility period but for his injury. Whether he had a reasonable expectation to return to work at that time is irrelevant. Consequently, the challenge to his ballot shall be overruled.[3]

Hector Vera and Sergio Rey

The UFW excepts to the IHE's conclusion that there was insufficient evidence to indicate that Hector Vera and Sergio Rey were supervisors and, thus, ineligible to vote. As a preliminary matter, the UFW objects to the IHE's apparent placing of the burden of proof on the UFW, as the party supporting the challenges to

[3] While the Employer does not expressly argue in its exceptions that the IHE should have found that Mesa had been replaced by the beginning of the eligibility period, it should be noted that the evidence supports the IHE's conclusion. The record reflects no evidence that Mesa, who checked in with the dairy office on a regular basis, was ever told that he had been replaced. On the contrary, the testimony of Employer witnesses General Manager Marvin Machado and Office Manager Carolyn Hanstad reflects that Mesa was never told he could not return, but rather, was told that he would be contacted if there was a light duty opening and that he should let them know when he was able to be a milker again.

these voters. On page 18 of his decision, the IHE cites NLRB precedent for the proposition that the burden of proof is on the party arguing for supervisory status. Further, the IHE cited NLRB precedent that the burden of proof in all instances falls on the party contending an individual is not entitled to vote. The UFW points out that the Board, as recently as the underlying decision in this case, *Artesia Dairy* (2006) 32 ALRB No. 3, has adhered to the view that in investigative hearings it is not appropriate to assign a burden of proof.

Contrary to NLRB precedent, this Board has long questioned the propriety of assigning a burden of proof in what is technically an investigatory proceeding. (See *Rod McLellan Company* (1978) 4 ALRB No. 22.)[4] In *Milky Way Dairy* (2003) 29 ALRB No. 4 and in *Artesia Dairy* (2006) 32 ALRB No. 3, the Board attempted to clarify the evidentiary burdens upon the parties in representation proceedings. In those cases, the Board stated that the party supporting the challenge to the voter carries a burden of production, but not one of persuasion. The IHE's analysis as applied, however, does not overtly rely on the assignment of a burden of proof. Nevertheless, we emphasize that we have conducted a de novo review of the record without assigning either party a burden of proof.

As a preliminary matter, we also address the IHE's decision to give little weight to challenged ballot declarations that were contradicted by the declarants at hearing.

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[4] Labor Code section 1148 does not require the Board to follow procedural rules of the NLRB. (*Tex-Cal Land Mgmt., Inc.* v. *ALRB* (1979) 24 Cal.3d 335.)

During the hearing, the IHE was very vocal regarding his concerns about the challenged ballot process. He took exception to the fact that Spanish speaking voters' declarations were written by Board agents in English, then read to the voters in Spanish to check for accuracy. He suggested the regions should write the declarations in Spanish so that the voters could read the declarations and correct any errors. Further, he expressed the view that some voters would be reticent to correct an oral recitation from a government official. The IHE also expressed the view that the taking of a declaration prior to the casting of the challenged ballots might intimidate the voters and, thus, affect their votes. Several witnesses testified contrary to their challenged ballot declarations and asserted that the content of the declarations was incorrect, even though they admit they signed the declarations after having them read in Spanish. As a result, the IHE gave little weight to the challenged ballot declarations and expressed the view that he tended to believe the testimony over the declarations.

While the IHE's concerns are not without foundation, we find it was error to dismiss the challenged ballot declarations out of hand. Though it may have been preferable to write the declarations in Spanish and show them to the voters, we find no convincing evidence to support a finding that the Board agents wrote anything other than what the declarants told them. Moreover, given the reality that literacy levels can be quite low among the farm worker population, providing the declaration in Spanish for the declarant to read would not necessarily provide a greater level of accuracy. A worker also may be reticent to admit that he or she cannot read well.

Indeed, there would be greater cause for concern if the facts were the opposite, i.e., if the declarations were presented in writing in Spanish but not read to the declarants. In addition, we find that challenged ballot declarations taken by a Board agent with no interest in the outcome of the election are inherently more credible than those later taken by an interested party. We find the witnesses' flat denials that they made the statements reflected in the declarations to be unconvincing, particularly where it constituted a wholesale denial rather than a disagreement over details or nuances. Therefore, the declarations do have value in impeaching contrary testimony at hearing.[5]

a. Hector Vera

Hector Vera is paid an annual salary of $60,000. Others who inseminate cows make much less and are paid hourly. However, Vera also is skilled at checking cows for pregnancy, which is an important function that otherwise would be performed at greater cost by veterinarians. In his challenged ballot declaration, Vera stated that he makes recommendations to General Manager Machado regarding hiring and discipline. At hearing, he denied those statements and generally denied having any supervisory authority. Machado and Hans Reitsma, an owner of the dairy, also denied that Vera had supervisory duties. There was hearsay testimony from two employee witnesses that they learned of an instance (from the recipient) of an employee being given a warning letter by Vera. While that evidence stood unrebutted, the IHE pointed out that the letter was not in

[5] Pursuant to Evidence Code section 1235, prior inconsistent statements also are admissible for the truth of the matter asserted as long as the declarant has an opportunity at hearing to explain or deny the earlier statement.

evidence and there was insufficient information to determine if Vera or Machado signed the letter or whether Vera utilized independent judgment. Moreover, as the IHE pointed out, an isolated instance of supervisory authority is insufficient to make someone a supervisor. The IHE also questioned whether the directives given by Vera, as described by UFW witnesses, constituted responsibly directing work, the most pertinent of the indicia of supervisory status.[6]

The IHE concluded that the evidence was insufficient to indicate that Vera was a full-time supervisor. However, several witnesses stated that Hector Vera regularly fills in as supervisor when his brother Victor (stipulated to be a supervisor) has his day off, which usually was on Sundays during the time in question. Machado admitted telling employees that Hector was in charge on Victor's day off. The IHE found this to be the case, but found that Hector's supervisory duties, while regular, were not substantial.[7] He reasoned that, even if all of the employee testimony concerning Hector giving orders is accepted as supervisory in nature, the actual percentage of the total work time Hector spent in such activities would be minute. In other words, the IHE considered only that part of each day might be spent actually asserting supervisory authority.

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[6] In addition, there was a list of "managers" phone numbers listed in the dairy that included Hector Vera, along with Machado, Victor Vera, Hans Reitsma, Sergio Rey, and Frank Costa. However, Frank Costa is an electrician who indisputably is not a supervisor.

[7] An employee who works part of the time as a supervisor is considered a statutory supervisor if the supervisory duties are "regular and substantial." (See, e.g., *Oakwood Healthcare, Inc.* (2006) 348 NLRB No. 37.)

The UFW asserts that the evidence does establish that Vera was a full-time supervisor and, if not, the IHE erred in not finding his fill-in status to be sufficient to make him ineligible to vote. Because we find that the latter contention has merit, there is no need to examine further whether Vera was a full-time supervisor. A review of case law has revealed no cases where the work day of a fill-in supervisor was parceled out in order to determine how much of each day is spent actually supervising others. Rather, the relevant inquiry is how often the individual holds supervisory authority. For example, someone who acted as a supervisor one day out of a 5-day week would be viewed as being a supervisor 20 percent of the time. (See, e.g., *N & T Associates, Inc. dba Aladdin Hotel* (1984) 270 NLRB 838.)

Therefore, to complete the inquiry, we must determine whether the percentage of time Hector Vera has supervisory authority, which is one day out of his 6-day workweek or 16.7 percent of the time, is "substantial." The NLRB has not adopted a strict numerical rule in defining "substantial," but has found supervisory status for those who serve in a supervisory role at least 10-15 percent of their total work time. (*Oakwood Healthcare, Inc., supra,* at p. 9.) As Vera serves in a supervisory role 16.7 percent of the time, we find that he is a supervisor and ineligible to vote. Therefore, the challenge to his ballot shall be sustained.

b. Sergio Rey

The evidence regarding Sergio Rey poses a much closer issue, as he has no fill-in role and must be evaluated as an alleged full-time supervisor. Rey was hired by the Employer on January 15, 2006 as a maintenance worker. He is paid an annual salary of

$50,000 and works with five other maintenance employees who are paid hourly. He, along with Machado and the Vera brothers had worked together in Kansas, with the Veras and then Rey eventually joining Machado at Artesia Dairy. Machado testified that Rey's salaried status was part of the arrangement that brought him from Kansas. The testimony established that Rey is the primary individual who maintains machinery, while the other maintenance employees generally perform less mechanical duties, such as spreading manure.

In his challenged ballot declaration, Rey stated that he is in charge of the other maintenance workers, he is their supervisor, he sometimes reviews their work, and that Machado told him he would be a supervisor when he was hired. He also stated that he would show new employees what to do. At hearing, he denied saying any of the content of his challenged ballot declaration to the Board agent and denied having any supervisory authority. In the declaration submitted by the Employer in support of its exceptions to the challenged ballot report (which also was written in English), Rey stated that each day, he spends a few minutes explaining to other employees what maintenance work they are responsible for. However, this statement was immediately preceded by a statement that he receives instructions from Machado and relays them to the other maintenance workers. In that declaration, he denied having the ability to hire, fire or discipline workers. At the hearing, he denied being told what the Employer's declaration said or that it was read to him in Spanish. He stated that he signed it because Machado told him to.

Reitsma and Machado also denied Rey had any supervisory authority and stated that the duties of the other maintenance employees are routine and do not require regular direction. However, at one point in his testimony, Machado stated that Rey "is basically my Victor on the outside." He also admitted that employees go to Rey for certain assignments, but not "day in and day out." In addition, Machado stated that Hector (Vera), Victor (Vera), and Sergio (Rey) "had more authority than others assigned radios." John Verkaik, the maintenance supervisor at the time of the election, stated that he believed Rey was a supervisor, though he did not attend meetings with others Verkaik also believed to be supervisors. Employee witnesses testified that Rey told them and/or other employees what to do, for example, what corrals to scrape, to remove a dead cow, or move pumps and trailers.

The IHE concluded that the evidence failed to establish that Rey was a supervisor. While he credited testimony that on one occasion Rey made a change in Gerardo Barraza's overall job duties by initiating his transfer, he found that it was unclear from the testimony what role Machado played and noted that an isolated exercise of supervisory authority is insufficient.[8] Further, he viewed the evidence of directing others' work to reflect routine orders that do not constitute assigning or responsibly directing work.

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[8] Barraza testified that Rey asked him if he would like to work with him as a pusher (he was a milker at the time), to which he responded in the affirmative. They went to see Marvin about it and Marvin told him he would be working with Rey and that Rey would show him how to do the job.

The UFW asserts that the challenged ballot declaration is more credible than Rey's contrary testimony and that it establishes supervisory status. The UFW further argues that the testimony of Gerardo Barraza, who worked with Rey in maintenance at the time of the election, established that Rey made job assignments and responsibly directed work. The UFW also cites secondary indicia of supervisory status, such as Rey's salary, his attendance at some meetings with supervisors, the provision of a cell phone and radio that he took home with him each day, and his listing on a notice as a "manager."[9]

As noted above, Rey's status presents a close question. While on the record the IHE suggested that, in light of the deficiencies he perceived in the challenge ballot process, he was more apt to believe the denials of witnesses than their challenged ballot declarations, in his decision the IHE did not expressly credit Rey's denials. Rather, he stated that he found the statements in the declaration to be too generalized to establish supervisory status. Indeed, for the most part the declaration merely reflects Rey's belief that he was a supervisor without giving specific examples of the type of authority he possessed, with the exception of the statement that he reviews the work of the people he supervises.[10] We do not find credible Rey's blanket denial of the content of his

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[9] While some witnesses spoke of a separate notice that listed "supervisors," no such notice was introduced and it is highly likely that they were referring to the notice that listed "managers."

[10] The declaration also includes the statement that he has not had to discipline any of the workers he supervises, which is not surprising since he had worked for the Employer only a couple of

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challenged ballot declaration and accordingly consider the declaration as evidence for the truth of the matter asserted.

Whether an individual is considered a supervisor by others or in his or her own view are relevant considerations; however, like salary level, they are considered "secondary indicia" of supervisory status which are not considered in the absence of evidence of the exercise of one of the listed statutory (primary) indicia, such has hiring, firing, assigning work, etc. (*Pacific Beach Corp.* (2005) 344 NLRB No. 140.) Therefore, despite ample evidence of secondary indicia indicating Rey is a supervisor, ultimately the issue turns on whether there is evidence that he has the authority to exercise one of the statutory criteria. If so, the secondary indicia would bolster that conclusion.

The evidence does show one instance where Rey initiated the transfer of Barraza from milker to pusher. As the IHE pointed out, it is not clear whether Rey had the authority to make the decision himself or that Machado had to approve. However, it does reflect that Rey at a minimum effectively recommended the transfer. While, as the IHE noted, an isolated exercise of supervisory authority is not sufficient, this instance is evidence of supervisory authority that may be weighed with other evidence.

In *Oakwood Healthcare, Inc., supra*, at page 4, the NLRB clarified the meaning of "assigning" work as follows:

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Footnote continued----

months when the declaration was taken. But the statement does reflect Rey's belief that he possessed the authority to discipline.

> [W]e construe the term "assign" to refer to the act of designating an employee to a place (such as a location, department, or wing), appointing an employee to a time (such as a shift or overtime period), or giving significant overall duties, i.e., tasks, to an employee. That is, the place, time, and work of an employee are part of his/her terms and conditions of employment. . . . The assignment of an employee to a certain department (e.g., housewares) or to a certain shift (e.g., night) or to certain significant overall tasks (e.g., restocking shelves) would generally qualify as "assign" within our construction. However, choosing the order in which the employee will perform discrete tasks within those assignments (e.g., restocking toasters before coffeemakers) would not be indicative of exercising the authority to "assign."

In light of this definition, it does not appear that Rey assigned work, as there is no evidence that he chose the general work assignments of the other "outside" workers. Rather, the evidence is that he had some authority to determine who among the assigned outside workers would perform certain tasks and the order of work tasks. This instead could constitute responsibly directing work.

The evidence reflects that Rey instructs the outside workers, at least to the extent of directing the order of the tasks to be accomplished and by whom among the assigned outside employees. In addition, we credit Rey's statement in his challenged ballot declaration that he sometimes reviewed the work of the other outside workers. While Machado testified that everybody knows their jobs and does them routinely, he did admit that they go to Rey regarding some assignments. Based on these findings, coupled with the credited testimony that on one occasion Rey effectively recommended the transfer of an employee, we conclude that there is sufficient evidence of primary indicia

of supervisory authority, bolstered by strong secondary indicia, to conclude that Rey is a statutory supervisor and, thus, ineligible to vote.[11]

The Three Avila Brothers—Kevin, Kasey, and Kannen

The Avila brothers are nephews of the Reitmas, the owners of the dairy. During the time period encompassing the eligibility period and the election, the brothers were foster children of the Reitmas, having been placed there by Child Protective Services. The record indicates that they periodically helped out around the dairy after school and on weekends. The two younger brothers, Kasey and Kannen, primarily cut twine on bales of hay so that the hay could then be fed to the cows, while the older brother, Kevin, did a variety of tasks. The IHE stated that their testimony appeared to be coached, that the petty cash vouchers submitted by the Employer were of dubious validity, and that one of the brothers exaggerated in his challenged ballot declaration the nature and extent of his work. He also noted that there were several discrepancies between the oldest brother Kevin's testimony and his declaration and notes that he took in preparation for the hearing.

However, the IHE credited their testimony to the extent that it reflected that they worked during the eligibility period, corroborated by the credited testimony of

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[11] Given his short tenure at the dairy as of the time of the election, it is not surprising that there was not evidence of numerous additional instances of Rey actually exerting supervisory authority. We also note that the fact that the work supervised is not complex and does not require close attention does not preclude a finding of supervisory status. (*Sourdough Sales, Inc.* (1979) 246 NLRB 106; *Colorflo Decorator Products, Inc.* (1977) 228 NLRB 408.)

employee Raul Ornelas. The IHE found the youngest brother, Kannen, to be a credible witness and found persuasive a calendar of Kevin's that contained notations of hours worked at the dairy during the eligibility period. The IHE noted that there was no dispute that their work was "agricultural" and found no indication that their arrangement with their uncle did not technically constitute an employment relationship. Lastly, in declining to create any additional familial exclusions, the IHE cited the Board's statement in *Bunden Nursery, Inc.* (1988) 14 ALRB No. 18 that it would not expand upon the familial exclusions set forth in Regulation 20352, subdivision (b)(5), which excludes parents, children and spouses of the employer.[12] He therefore directed that any request for additional exclusions be addressed to the Board.

The UFW argues that the Board should adopt a community of interest analysis for close family members to augment the automatic exclusions under Regulation 20352, and suggests that a consideration of community of interest criteria[13] would warrant the exclusion of the Avila brothers. The UFW also takes issue with the IHE's findings that the brothers worked during the eligibility period, citing, inter alia, inconsistencies in their testimony, the appearance of coached testimony, discrepancies

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[12] In *Bunden Nursery, Inc.*, the Board declined to exclude a daughter-in-law and five grandchildren.

[13] "Community of Interest" is not susceptible to a precise definition, but it refers generally to whether a grouping of employees share a common interest in wages, hours, and other terms and conditions of employment, including factors such as common skills, training, job functions, and supervision, etc.

between testimony and the petty cash vouchers, and the testimony of UFW witnesses who stated they never saw the brothers work at the dairy during the eligibility period.

While the testimony of the Avila brothers suffered from inconsistencies and the petty cash vouchers are of little probative value, we find no reason to discount the IHE's crediting of the essential facets of the brothers' testimony and that of Raul Ornelas regarding their working during the eligibility period. Furthermore, the suggestion that the Board utilize community of interest criteria with regard to all close family members must be rejected. *Bunden Nursery, Inc.*, supra, clearly reflects the Board's historical view that the Agricultural Labor Relation Act's prescription for wall to wall bargaining units (absent operations in non-contiguous geographical areas) precludes the consideration of community of interest criteria. This was reiterated more recently in *Milky Way Dairy* (2003) 29 ALRB No. 4. The familial exclusions set forth in Regulation 20352 stand as narrow exceptions that the Board has consistently refused to expand.

However, no expansion of the exclusions of Regulation 20352 is necessary in order to find the Avila brothers ineligible to vote. The evidence indicates that while placed with the Reitmas as foster children they were integrated into the family and treated no differently than the Reitmas' natural children. They were completely dependent on the Reitsmas for food, shelter, and clothing and were aware that their uncle did not want the union to win the election. Indeed, there was evidence that the organizing campaign and upcoming election were common topics at the Reitsmas' dinner table. As stated in *Pete Vanderham Dairy, Inc.* (2002) 28 ALRB No. 1, the exclusion of children of the employer is grounded in "the unremarkable proposition that the children of the employer

are so closely and inherently aligned with the interests of management, like managers and supervisors, that they cannot be considered employees for collective bargaining purposes." As the Avila brothers were the functional equivalent of children of the employer at the time in question, they fall within the existing exclusions in Regulation 20352. Therefore, the challenges to their ballots shall be sustained.

Angelita Pacheco and Rosa Pacheco

The record reflects that Angelita and Rosa Pacheco worked for the Reitsmas as domestic employees, but also spent some of their time cleaning the offices, restrooms, and break room at the dairy. In Angelita's case, she primarily worked at the home assisting with the care of the many children in the household, some whom were home schooled. The record reflects that Rosa's time was more evenly split between the two functions. The IHE credited the Pachecos' testimony, corroborated by Caroline Hanstad, that they worked during the eligibility period. Both testified that during February 2006 they worked at the dairy on Tuesdays and Thursdays. Hanstad testified that from her office she could observe some of the cleaning activity. It is not disputed that the cleaning work in the dairy constituted secondary agriculture.

Having found that they did perform agricultural work during the eligibility period, the IHE concluded that the Pachecos were eligible to vote. He dismissed the notion that they might be viewed as dual function employees subject to an examination of whether the agricultural portion of their work was "substantial," finding that analysis applicable only in instances involving issues of federal preemption, relying on the fact that domestic employees are not covered by the NLRA.

The UFW argues 1) that the record did not establish that the Pachecos worked during the eligibility period, and 2) if they did, the dual function analysis should be applied and result in finding that their agricultural work was not "substantial." In support of the first contention, the UFW relies on discrepancies between the cash vouchers in evidence and the testimony as to the pay received by the Pachecos and their hours worked.

However, as is clear from the record, the payroll practices as to many of the employees other than those working in the primary dairy functions were at best haphazard. Indeed, it appears that employees such as the Pachecos, Flores, and the Avila brothers were sometimes paid in cash with no record made of their payment. Moreover, it appears the cash vouchers in evidence either provide an incomplete record of payment or represent a crude effort to generate documents reflecting payment to certain individuals whose eligibility the Employer urges. It was reasonable for the IHE to rely instead on testimony he found credible. The UFW also cites the testimony of numerous witnesses who could not specifically recall seeing the Pachecos working in the dairy, but those witnesses either worked the night shift or worked in areas of the dairy where the Pachecos were unlikely to be observed. Therefore, we affirm the IHE's finding that Rosa and Angelita Pacheco performed agricultural work during the eligibility period.

The UFW's second contention, concerning dual function analysis, has more validity. It is true that the "substantiality" test as it developed in "dual function" cases under the NLRB is based on whether the employee works a sufficient amount of time in the unit to share the interests of the other employees in the unit. However, the "dual

function" cases generally deal with situations involving non-exempt work, some of which is within the bargaining unit and some of which is outside the unit. The "substantiality" test is also found in "mixed work" cases, involving employees who perform for their employer both non-exempt work and exempt agricultural work. Those cases turn more on practical considerations in asserting jurisdiction over just a portion of the work. In such situations, the NLRB will assert jurisdiction over the nonagricultural work, if it is "substantial". (See *Olaa Sugar Co.* (1957) 118 NLRB 1442; *Camsco Produce Co.* (1990) 297 NLRB 905.)

The ALRB, when faced with the situation where an employee spends only a portion of their work time for a single employer engaged in agriculture, consistently has applied the substantiality test found in "mixed work" cases. (See *Royal Packing Company* (1995) 20 ALRB No. 14; *Warmerdam Packing Company* (1998) 24 ALRB No. 2; *Associated-Tagline, Inc.* (1999) 25 ALRB No. 6; *Sutter Mutual Water Company* (2005) 31 ALRB No. 4.) While *Royal Packing Company*, *Associated-Tagline*, and *Warmerdam Packing Company* involved agricultural work and work subject to NLRB jurisdiction, *Sutter Mutual Water Company*, like the instant case, involved agricultural work and work subject to neither ALRB nor NLRB jurisdiction. As the Employer is a sole proprietorship, there is no legal distinction between the dairy and owners of the dairy, the Reitsmas. Consequently, the agricultural and nonagricultural work of the Pachecos may be considered to be for the same employer. Thus, we must determine whether their agricultural work was "substantial."

This Board, like the NLRB, has refrained from specifying a minimum percentage required to find work substantial; however, the NLRB has held that workers who spend less than 15 percent of their time doing the tasks in question could not be said to be engaged in the work a substantial amount of the time. (*NLRB v. Kelly Bros. Nurseries*, (2d Cir. 1965) 341 F.2d 433, 438; *Light's Tree Co.*, (1971) 194 NLRB 229.) Previous ALRB cases, cited above, involved percentages of work 33 percent and higher, so there was no question that the threshold was met.

In her challenged ballot declaration, Rosa Pacheco stated that she worked at the dairy for two hours one day a week, and six to eight hours a week at the Reitsmas' home. At hearing, she testified that she normally worked eight hours total at the home and dairy, four hours of which were at the dairy. She also testified that she worked on Tuesdays and Thursday. Therefore, her work at the dairy constituted 25-50 percent of her total work time for the Reitsmas. In accordance with the authorities cited above, we find it to be "substantial." Therefore, the challenge to her ballot shall be overruled.

Angelita's percentage of agricultural work is much more difficult to discern from the evidence in the record. She testified that she worked a total of 25 hours a week. She refused to sign her challenged ballot declaration, which reflected that she told the Board agent that she cleaned at the dairy for about one hour every two weeks. Since she did not sign her challenged ballot declaration, we give it little weight. At hearing, she made it clear that her main job was caring for the six children at the Reitsmas' home. It is unclear from her testimony how many hours per week she spent cleaning the dairy. At

one point she testified that in February 2006 she spent 4-6 hours every Tuesday and Thursday at the dairy, but never clarified if she meant 4-6 hours each day or each week.

Angelita admitted generally that she did not clean every Tuesday and Thursday, and specifically that she only went with Rosa and not every time in February. Further, Angelita admitted to being unsure and having difficulty remembering how often she worked at the dairy in February 2006, initially stating 4 times and later stating between 4 and 8 times. She was clear in testifying that she always went with Rosa when cleaning the dairy, and that sometimes Rosa went alone. Rosa testified that she worked a maximum of four hours each week at the dairy. The testimony of the two women is most easily reconciled by concluding that either on Tuesday or Thursday each week, the days Rosa worked, the two women cleaned at the dairy.

Therefore, Angelita worked at the dairy a maximum of 4 hours of her 25 hours per week total, at least during the month including the eligibility period. Therefore, her percentage of agricultural work would be approximately 16 percent. As she testified that she did not always accompany Rosa to clean at the dairy, the true percentage is somewhat lower.

Moreover, Angelita testified that she does not work at the dairy every month, but rather some months she does and some months she does not. Specifically, she stated "Like this summer, I went quite a bit, you know, like twice the month, for like three, four months. And then I would stop for a month. And then maybe go back another two months or so." This reflects that her work at the dairy was not week in and week out, but more sporadic, most likely depending on whether she is needed to assist Rosa. When

viewed in this light, her percentage clearly would drop well below that which would be considered "substantial."[14] Therefore, whether Angelita's work is viewed in the context of the time period just prior to the election or is viewed over a longer period of time, we find that the record evidence does not establish that Angelita's agricultural work was "substantial." Consequently, the challenge to her ballot shall be sustained.

John Flores

Flores was hired in December 2005 by Roxanne Reitsma to maintain the lawn areas around the dairy and the Reitsmas' home. He mowed the lawns, removed weeds, and maintained the sprinklers. Occasionally, he would re-set trees knocked down by the wind on the dairy property and do other types of gardening around the Reitsmas' home. He received $250 in cash each week. The lawn area in front of the dairy was much larger than that in front of the home, consequently that took the vast majority of his work time. There is no evidence in the record indicating that the lawn area served any operational purpose relative to the actual dairy operations. Rather, the record indicates that the lawn area was purely for decorative purposes. Flores worked 28-30 hours per week. He left the Reitmas' employ about two weeks after the election. During his employment by the Reitmas he had no other employment, except that he received a stipend to care for his mother. While he sometimes used some of his own tools, he did

[14] A focus solely on the eligibility period in these situations could provide a severely skewed perspective. For example, under such an approach an employee who performed agricultural work only on rare occasions would be considered eligible if he or she just happened to perform that work for a substantial portion of the eligibility period.

not have a business license or perform similar work anywhere else. Flores testified, corroborated by Machado and Reitsma, that he worked every week during his employment.

The IHE found that Flores worked during the eligibility period and concluded that he was an employee, rather than an independent contractor. In addition, relying on a statement in *George Lucas & Sons* (1977) 3 ALRB No. 5 that gardeners working on the operations portions of an agricultural employer's property are "maintenance" employees falling within the definition of "secondary" agriculture, the IHE found that Flores's work was agricultural in nature.

Relying on discrepancies in witnesses' testimony about the amount of Flores' wages and testimony inconsistent with a cash voucher for $100 dated February 27, 2006, the UFW claims that the IHE erred in finding that Flores worked during the eligibility period. Like most of the other cash vouchers in evidence, they do not match testimony about the amount of hours worked or hourly rates paid. But while that warrants giving the vouchers little or no weight, it is not a basis for a wholesale discrediting of testimony concerning Flores' wage rates and hours of work. It should be noted that Reitsma was unsure about the amount of money paid to Flores, so the failure of his estimated amounts to match those asserted by Flores is of little significance. The consistent testimony, credited by the IHE, that Flores worked at the dairy every week during his employment is sufficient to establish that he worked during the eligibility period.

The UFW also asserts that gardeners such as Flores are covered by the NLRA and, thus, the ALRB cannot exercise jurisdiction. However, as the IHE observed, the NLRB cases cited are inapposite because they did not involve work related in any way to agricultural operations. Thus, in those cases there was no issue as to whether the work was agricultural. The UFW also argues that in fact Flores' work did not constitute agriculture. We regard this as the true issue regarding Flores' eligibility.

Though without citation to authority, the UFW correctly points out that Flores' work was not primary agriculture. The mowing of lawns is considered agricultural only when it is incidental to farming operations or, in other words, constitutes secondary agriculture. (See 29 C.F.R. § 780.206, subdivision (c).)[15] The ultimate issue, therefore, is whether Flores' work, by virtue of being performed on the dairy property, is "incidental to or in conjunction with" the dairy operations.[16]

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[15] ALRA section 1140.4 defines agriculture (identically to § 3(f) of the Fair Labor Standards Act) as follows:

> (a) 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.

The "secondary" portion of the definition is that beginning with "and any practices."

[16] The UFW cites language from an early Board decision, *Mann Packing Co., Inc.* (1976) 2 ALRB No. 15, for the proposition that the work must be "integrated with and indispensable" to

----footnote continued

There is no case law specifically addressing the situation faced here, where the work is on a farm but is restricted to a portion of the farm not utilized in the farming operations. In *George Lucas & Sons*, the case cited by the IHE, the Board indeed suggested that a gardener could be a "maintenance" worker engaged in secondary agriculture. However, no definitive finding was made, as the Board referred the issue for further investigation or hearing because a declaration was submitted that indicated that the individual was solely a domestic gardener, thus creating a material factual dispute. There was no specific holding that gardening work constituted secondary agriculture solely by virtue of being performed on a farm, and there was no subsequent decision addressing the issue.

The only helpful guidance may be found in the Code of Federal Regulations. Title 29, Code of Federal Regulations, section 780.144 states, in pertinent part:

> In order for practices other than actual farming operations to constitute "agriculture" within the meaning of section 3(f) of the Act, it is not enough that they be performed by a farmer or on a farm in connection with the farming operations conducted by such farmer or on such farm, as explained in §§ 780.129 through 780.143. They must also be performed "as an incident to or in conjunction with" these farming operations. The line

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Footnote continued----

the farming operation. While the Board indeed used that language to describe the relationship of the activity in question to the primary agricultural operation in that particular case, it can not be read as a synonym for the pertinent statutory language "incidental to or in conjunction with." Indeed, in numerous cases since that time the Board has found employees such as janitors and clericals to be engaged in secondary agriculture, without regard to whether their work was "indispensable" to the farming operation.

> 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. Generally, a practice performed in connection with farming operations is within the statutory language only if it constitutes an established part of agriculture, is subordinate to the farming operations involved, and does not amount to an independent business.

(Emphasis added.) Title 29, Code of Federal Regulations, section 780.158 states, in pertinent part:

> Section 3(f) includes, for example, secretaries, clerks, bookkeepers, night watchmen, maintenance workers, engineers, and others who are employed by a farmer or on a farm if their work is part of the agricultural activity and is subordinate to the farming operations of such farmer or on such farm.

The underlined portion of section 780.144 and the cited portion of section 780.158 indicate that simply being performed on a farm is not enough to make a practice secondary agriculture. We find that the case at hand constitutes just such an instance where it does not. The record reflects that Flores worked solely on the decorative landscaping in front of the dairy that was not utilized in any fashion in the dairy operations. Nor did it constitute a support function for the operations, as would clericals performing bookkeeping functions or maintenance workers cleaning and maintaining buildings utilized in the dairy operations. Therefore, though Flores' work technically was on a farm, it otherwise had no connection to the farming operation. Under these unique circumstances, we find that the work was not "incidental to or in conjunction with" the dairy operations. Therefore, the challenge to his ballot shall be sustained.

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## ORDER

In accordance with the discussion above, the challenges are resolved as follows:

Sustained

John Eric Verkaik, Jr.
Victor Vera
David Rose
Hector Alonzo Vera Lira
Sergio Melendez Rey
Kevin John Avila II
Kasey John Avila
Kannen Avila
Angelita Flores Pacheco
John Grijalbe Flores

Overruled

Jesus Mesa Martinez
Rosa Sterriquez Pacheco
Alfredo Rodriguez

DATED: April 20, 2007

IRENE RAYMUNDO, Chair

GENEVIEVE A. SHIROMA, Member

CATHRYN RIVERA-HERNANDEZ, Member

# CASE SUMMARY

ARTESIA DAIRY, a sole proprietorship (United Farm Workers of America)

33 ALRB No. 3
Case No. 06-RC-1-VI

## Background

An election was held on March 7, 2006. The initial tally of ballots showed 25 votes for the Petitioner, United Farm Workers of America, 24 votes for "No Union," and 15 unresolved challenged ballots. As a result of an earlier Board decision (*Artesia Dairy* (2006) 32 ALRB No. 3) on review of the Regional Director's challenged ballot report two challenges were sustained, one was overruled, and twelve were set for hearing. During the hearing, the parties stipulated that two challenged voters were supervisors whose challenges should be sustained. On January 10, 2007, the Investigative Hearing Examiner (IHE) issued a decision recommending that one challenge be sustained and the remaining nine challenges be overruled. The Employer filed an exception to the overruling of one challenge. The UFW filed exceptions regarding the other eight challenges overruled by the IHE. There was no exception to the challenge sustained by the IHE.

## Board Decision

The Board affirmed the IHE's recommendation to overrule the challenges to Jesus Mesa and Rosa Pacheco, finding that Mesa would have worked but for his work-related injury and that Pacheco performed a regular and substantial amount of her work for the Employer's farming operation. The Board sustained the challenges to Hector Vera and Sergio Rey, finding that the former was a part-time supervisor and the latter a full-time supervisor. The Board sustained the challenges to Kevin, Kasey, and Kannen Avila, nephews and foster children of the owners of the dairy, finding that they were the functional equivalent of the owners' children during the time in question and thus ineligible under Regulation 20352. The Board sustained the challenge to Angelita Pacheco, finding that she is primarily a domestic worker for the Employer/owner, a sole proprietorship, who did not spend a substantial amount of her time engaged in agricultural work. The Board sustained the challenge to John Flores, finding that he solely performed decorative landscaping work without any operational connection to the dairy and, thus, his work did not constitute secondary agriculture because it was not incidental to or in conjunction with the farming operation. As a result of the Board's decision, in conjunction with its earlier decision at 32 ALRB No. 3, of the original 15 challenged ballots, 3 were overruled and, thus, will be opened and counted, and 12 were sustained.

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STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

| | | |
|---|---|---|
| **In the Matter of:** | ) | **Case No.** 06-RC-1-VI |
| | ) | |
| ARTESIA DAIRY, A Sole Proprietorship, | ) | (32 ALRB No. 3) |
| | ) | |
| Employer**,** | ) | |
| | ) | |
| **and** | ) | |
| | ) | |
| UNITED FARM WORKERS OF AMERICA, | ) | |
| | ) | |
| Petitioner. | ) | |

Appearances:

Howard A. Sagaser and Sarah Wolfe
Sagasar, Jones & Hahesy
Fresno, California
For the Employer

Mario Martinez
Marcos Camacho, A Law Corporation
Bakersfield, California
For Petitioner

Francisco T. Aceron, Jr.
ALRB Visalia Regional Office
For the Regional Director

## DECISION OF THE INVESTIGATIVE HEARING EXAMINER

DOUGLAS GALLOP: On February 28, 2006, United Farm Workers of America (hereinafter Petitioner) filed a petition in the above-captioned matter to represent the agricultural employees of Artesia Dairy, A Sole Proprietorship (hereinafter Employer or Dairy). An election was conducted on March 7, 2006, with the Tally of Ballots showing 25 votes for Petitioner and 24 for no union, with 15 unresolved challenged ballots. The Board Agent conducting the election challenged 14 voters on the basis they were not on the voting list, and Petitioner challenged one voter on the basis that he is a supervisor. After an investigation, the Visalia Regional Director of the Agricultural Labor Relations Board (hereinafter ALRB or Board) issued a challenged ballot report, to which the Employer filed exceptions.

On August 2, 2006, the Board issued its decision in (2006) 32 ALRB No. 3, sustaining the challenges to two ballots, overruling one challenge, and setting the remaining 12 for hearing.[1] Said hearing was conducted before the undersigned on October 24, 25, 26 and 27, 2006, at Visalia, California. Subsequent to the hearing, the Employer and Petitioner 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.

[1] In that decision, the Board accepted untimely evidence submitted by the Employer, stating it would consider barring such evidence in the future. In its brief, Petitioner requests that the undersigned recommend such evidence not be accepted. Such a recommendation would not be appropriate, given the Board's awareness of the issue.

## FINDINGS OF FACT

### Voters Challenged As Supervisors[2]

Victor Vera

At the hearing, the parties stipulated that the challenge to Victor Vera's ballot should be sustained.

John Eric Verkaik, Jr.

Verkaik testified he was hired on October 1, 2005, by Jelle Hans Reitsma, the Employer's owner. He was told he would be responsible for maintenance throughout the Dairy. Verkaik alternately referred to himself as the maintenance supervisor and head mechanic. Verkaik last worked for the Employer in April 2006.

Verkaik testified that, in November 2005, he was dissatisfied with the work performance of a mechanic, and recommended to General Manager, Marvin Borges Machado, Jr., that he be suspended. Machado said that instead, the worker should be discharged, but before doing so, Verkaik would have to issue three disciplinary warning letters. Thus, the issuance of the warning letters constituted grounds for further discipline. Verkaik initially decided to verbally reprimand the employee, but when the problems continued, he issued the warning letters. After the third written warning Verkaik discharged the employee.

[2] Technically, most of the challenges were made by the Board, on the basis the voter was not on the voting list. In fact, almost all of the voters were on the list submitted by the Employer, but were removed by the Regional Director, based on his determination they were not eligible to vote. The challenges are stated by the underlying reason for the dispute as to the voters' eligibility. Petitioner contends that the three remaining unresolved challenged voters in this section were supervisors, while the Employer claims they were not.

Verkaik testified that after the employee was discharged, around Thanksgiving 2005, he told Machado he needed a replacement. Machado told him to find someone, and set a maximum wage rate Verkaik could offer. Verkaik contacted an individual he considered qualified, whom he knew was seeking employment. Verkaik offered him the job, at the maximum permissible wage rate. Verkaik informed Machado of his desire to hire the new worker, and Machado approved it.

Verkaik further testified he was dissatisfied with the work performance of the mechanic he hired. He discharged this worker, in December 2005, after informing Machado of his intention. Since this worker was a new hire, no written warnings were issued prior to his discharge.

Verkaik assigned the work of other mechanics. He testified that since the work assignments varied as to the skills required, he had to determine who was most qualified to perform a given task. Verkaik was required to ensure that the work of other mechanics was performed properly, although the record does not disclose whether he would be rewarded or disciplined based on the work performance of others. Verkaik testified that Machado conducted meetings only attended by persons he considered supervisors, including himself, Victor Vera, Hector Vera, and Frank Costa, but not Sergio Rey, who had recently been hired.

Hector Alonzo Vera Lira (Hector Vera)

Hector Vera was hired in about October 2005, to work as an inseminator and to check pregnant cows. He works days, six days per week, three as an inseminator and three with the pregnant cows. When working as an inseminator, Vera works with a few

other employees who only perform insemination duties. As a "preg-checker," he works alone or with Victor Vera. Vera is paid an annual salary of $60,000, which is substantially more than the other inseminators, who are paid hourly and punch a time clock. Vera and Hans Reitsma testified that his relatively high salary is based on his veterinary skills. In his testimony, Vera denied hiring, firing, disciplining or rewarding any employee, or recommending such actions. Vera also denied telling other employees what to do. Vera denied that Machado ever told employees that he was in charge when on Victor Vera's day off. Machado, however, acknowledged he did make such a statement, "a long time ago," but did not specify if this was before or after the election.

Reitsma also denied that Vera exercised any supervisory authority. Machado described Vera as one of his "conduits" for instructions to employees. Machado stated that Vera could recommend that an individual be hired, as could any other employee, but did not give any examples where this had taken place. Machado denied that Vera discharged, disciplined or rewarded any employee, or recommended such action. Machado testified that the work of the inseminators is routine, and requires little supervision.

Hector Vera and other witnesses testified that the Employer has posted a notice in an employee break area stating that he, Machado, Reitsma, Victor Vera, Sergio Rey and Frank Costa are supervisors, listing their telephone numbers to call if there are problems. Costa is the Employer's electrician, and no one, except Verkaik, contends he is a supervisor. The Employer placed into evidence what it contends is the notice in question. It actually reads, "Manager's Phone List," and does not contain anything else, other than

the first names and phone numbers. Caroline Sue Hanstad, the Employer's Office Manager, testified that she created and posted this notice, in the two Dairy barns, when there was a change of personnel who were "taking care of" the various areas of the Employer's operation.

In disqualifying Hector Vera from voting, the Regional Director primarily relied on Vera's challenged ballot statement, which contains the following, in English:

> Does not hire/fire anyone. Does recommend to Marvin re disciplining or correcting another worker's work. Does recommend to Marvin who to hire. An individual will come to me and ask for a job, and I will tell Marvin whether to hire such individual or not.

Vera, who testified through an interpreter, stated he only knows a little English. His application for employee health insurance benefits, however, states that English is his language of preference. Vera repeatedly contended that the Board agent who took the declaration only read it to him in English, and he only understood a little of what she said. Vera later indicated, however, that the statement was read to him in Spanish. Vera further denied making the statements attributed to him above.

The Board agent who took the declaration testified she wrote it in English, because this was more convenient for her, even though she is totally fluent in Spanish.[3] She took about seven minutes to interview Vera, write out the declaration, read it to him in English and Spanish and obtain his signature. She affirmed that Vera had made the statements attributed to him.

[3] The Board Agent did not contend that she had made this decision because English is Vera's preferred language.

Petitioner called six employee and former employee witnesses. Four of these worked the evening/night shift in January and February 2006, and none of them worked on Vera's crew at the time of the election. Two of these witnesses gave hearsay testimony that Hector Vera issued a warning letter to an employee for tardiness, apparently after the election. The Employer did not object to this testimony. Neither actually saw the warning letter. The Employer did not present any rebuttal to this testimony.

Arcadia Pena became an inseminator after the election. He testified that Victor Vera is his supervisor, but Hector Vera is in charge on his brother's day off. When Hector Vera has been in charge, he has told Pena to obtain medication for the cows, to remove dead cows, and to move cows to corrals. The other witnesses for Petitioner testified that on occasion, they and/or other employees were told by Hector Vera, on Victor Vera's days off, to do things like putting feed in a corral, to move or not move cows, to righten cows that have fallen down, to remove dead cows, to round up cows that have left their pens, to get out of his way, to milk cows in a given corral, to not milk a cow that was sick, to pick up garbage, to clean the employee restroom, to work faster, to get paint and to keep the equipment clean and in good mechanical condition.[4]

Sergio Melendez Rey[5]

Rey began working for the Employer on January 15, 2006 as a maintenance employee. He had worked with Machado in Kansas for five years, and was hired by him.

[4] As with Pena's allegations, several of these alleged directives also took place outside the voting eligibility period.
[5] Rey's last name is misspelled in the transcript. His full name appears in the challenged ballot declaration.

Rey checks with each department to see if any machinery or other equipment is in need of repair, and then performs that work. He keeps the corrals clean, and performs maintenance work assigned to him by Machado. Rey also assists in the home schooling of Reitsma's children and one of his nephews. Rey, Machado and Reitsma denied that Rey exercises any supervisory functions.

Rey is paid a salary of $50,000.00 per year. Machado testified he made this arrangement with Rey before he began working at the Dairy. He works with five other maintenance employees. Rey testified that the other maintenance employees receive their work assignments from Machado, and denied he performs that function on a daily basis. Rey performs most of the repair work, while the others perform less mechanical duties, such as spreading manure. Machado testified that the other maintenance employees have permanent job assignments, and only occasionally need to be told what type of work to do. When necessary, Rey may perform this function. Machado and Rey described the work of other maintenance employees as routine.

Rey testified through an interpreter. For reasons not disclosed in the record, his challenged ballot declaration was taken in English. The declaration was read to him in Spanish before he signed it. The declaration states that Rey is in charge of the other maintenance workers, they report to him, he is their supervisor, and Machado told him he would be their supervisor when Rey was hired. It also states that Rey "reviews" the work of other maintenance employees. Rey denied making any of these statements. Rey agreed that he told the Board agent that if a maintenance worker is absent, he will obtain a replacement from Victor Vera, and then show the replacement what to do. Rey also

agreed that he told the Board agent that while he usually works by himself, he will ask another worker to help him as needed. Rey agreed that he told the Board agent he attended a meeting with two supervisors, but denied telling the agent he was also a supervisor. As noted above, Rey is listed as a manager on the notices in the Dairy barns.

Gerardo Barraza Macias (Barraza) testified he worked as a feeder at the time of the election. After the election, Rey asked Barraza if he would like to work with Rey, operating a scraper to move dirt. Barraza said he would, and they met with Machado. After discussing the matter, Machado told them Barraza would work with Rey, and that Rey would explain what Barraza needed to do.

Rey told Barraza and the other three or four employees on the crew what corrals to scrape and to scrape manure. Other witnesses testified that Rey has also told them and/or other employees to do these things, to remove a dead cow, and to move pumps and trailers, primarily, if not exclusively, after the election. At least one of Petitioner's witnesses, however, agreed that Rey primarily works alone.

## The Remaining Challenged Ballots

David Rose

At the hearing, the parties stipulated that the challenge to this ballot should be sustained.

Kevin John II, Kasey John and Kannen Avila

The Avila brothers are Reitsma's nephews, and at the time of the election, he and his wife were their foster parents. Petitioner initially contended they were not eligible to vote, because they did not work for the Employer during the voting eligibility

period, February 13 – 26, 2006. In its brief, Petitioner also contends they should not be permitted to vote due to their familial relationship to Reitsma. The brothers began living with the Reitsmas on the Dairy in August 2005, and left to live with their grandparents in the summer of 2006. Kevin Avila testified he worked at the Dairy before, during and after the voting eligibility period, commencing shortly after he began living there. Reitsma told him he and his brothers could ask him what they could do at the dairy, as time permitted, and to keep track of their hours. He would normally pay them an hourly rate, usually in cash, with no payroll deductions. If they did something "extracurricular," Reitsma might just give them $20.00. The Reitsmas also gave their nephews allowances, $20.00 per week for Kevin.

According to Kevin Avila, he performed a variety of functions at the Dairy, such as driving a tractor, moving cows, working in the barn, data entry, moving fence lines and cleaning the water troughs. He worked after school and on weekends. Avila began making notations on his calendar of the work he performed at the Dairy in January 2006. The calendar notes indicate that he performed data entry work (tracking the location of the Employer's cows) for about two hours each day on January 1 and 2, and one and four hours of scraping work (using a tractor) on February 16 and 18. The calendar also shows a total of five hours' work on February 20, 22 and 23. Avila testified he learned to use a dump trailer, and then operated it to move almond shells for feed, on those dates. According to Avila, he "got lazy sometimes" about marking down all of his hours worked on the calendar, and actually performed more work than noted therein.

On cross-examination, it became apparent that this witness had been substantially coached as to his testimony, and was probably told to give certain answers to questions posed to him by the Board agent taking his challenged ballot declaration, and in his testimony the hearing. In any event, there are several discrepancies between his testimony, the declaration, and notes he took to prepare himself therefore.[6] Thus, the declaration and/or notes grossly overstate the number of hours he worked and the frequency of his payments by Reitsma. The Employer also submitted petty cash vouchers for the Avila brothers, which Kevin Avila stated he had never seen, and they do not comport with the hourly rate stated by him.

Kasey Avila testified that he worked at the Dairy, mostly cutting twine on bales of hay. He believes he began doing this around the beginning of 2006. Avila testified he worked more than 10, but probably less than 15 hours cutting twine during the two weeks prior to the election. When shown his declaration, he agreed with the statement therein, that he worked about 21 hours during the period February 13 – 26, 2006. He sometimes worked with Kannen Avila, and with an employee named Raul.[7] Avila testified he worked frequently, two or three hours on school days, and five to seven on weekends. He was also paid mainly cash by Reitsma. Avila was uncertain if he was paid an hourly rate, and if so could not recall what the rate was. His challenged ballot declaration states he thinks he was paid $5.00 per hour. He would keep a mental note of the number of hours he worked, and then periodically submit the total in a note to his uncle. Avila's

[6] In this regard, Avila testified he has a "horrible" memory.
[7] This name is misspelled in the transcript. See Employer Exhibit 4, Raul Ornelas.

declaration lists a number of job duties he performed at the Dairy, but not cutting twine. Avila testified that the main, if not only work he performed shortly prior to the election was cutting twine. Avila testified that his brother, Kannen did this with him during that period.

Kannen Avila testified that he began cutting twine at the Dairy in about mid-September 2005, and performed this work in January and February 2006. He occasionally performed other tasks at the Dairy. During January and February, he worked at the Dairy about two and one-half to three hours per week. He recalled working five – six hours in mid-February, and specifically on February 24, the day before the birthday of one of his brothers. Kannen sometimes cut twine with his brother, Kasey. Kasey and Kannen Avila also testified that they continued to work at the Dairy after the election.

Reitsma, in his testimony, generally corroborated his nephews' testimony. Machado testified that he saw the Avila brothers working at the Dairy before the election, but could not specify whether he saw them work during the voting eligibility period. Raul Ornelas, a feeder, testified that he worked with the Avila brothers before the election. He first saw them working there perhaps a month before. He primarily observed them cutting twine, but also saw them engaged in other work, such as driving the scraper. His testimony differs somewhat from Kevin Avila's, in that he stated Avila primarily cut twine.[8]

[8] Petitioner contends that Ornelas vacillated in his testimony, and therefore, cannot be found to have corroborated the Avilas'. While Ornelas did express some uncertainty as to dates, he firmly testified that the brothers worked with him prior to the election.

The parties stipulated that the Avila brothers did not complete employment applications or W-2 forms for their work or punch a time clock, and that the Employer did not take payroll deductions from their wages, report those wages to the Employment Development Department or issue any tax forms for them.

Petitioner's witnesses either testified that they never saw the Avilas work at the Dairy, or that they only saw this after the election. As noted above, four of the six witnesses worked the evening/night shift in January and February 2006.

Jesus Mesa Martinez (Mesa)

Mesa was challenged by the Board agent because his name was not on the voting eligibility list. The Employer contends he was not eligible to vote because he was injured and had no reasonable expectation of recall. Mesa worked as a milker, commencing in about August 2005. He injured his knee on the job, October 27. Mesa was off work until November 5, when he was released to return for light duties. The Employer gave him light-duty work driving a tractor, but after about two hours, Mesa further injured his knee and had to leave.

Mesa had knee surgery on January 26, 2006. Thereafter, he received physical therapy. Mesa was again released to return to work, well after the election, but was restricted from lifting over 30 pounds, kneeling or squatting. Mesa admitted he still cannot walk properly, and this is required in order to be a milker.

In May 2006, Mesa attempted to obtain light-duty work from the Employer, but Machado told him none was available. Machado said that if any such positions became

available, he would contact Mesa. Mesa recently obtained employment at another dairy, but gives cows medicine, rather than working as a milker, due to his physical limitations.

Machado testified that Mesa was replaced, but gave no details as to when, and did not name the person who replaced Mesa. Machado testified there are some 30 milkers at the Dairy, and that Mesa was a good employee. He further stated there have been no light-duty positions available that do not require significant walking.

Rosa Sterriquez Pacheco and Angelita Flores Pacheco

Petitioner contends the Pachecos are not eligible to vote because they did not work during the voting eligibility period, did not engage in any agricultural employment, or if the work was agricultural, it was insubstantial. Petitioner further contends that the Pachecos are confidential employees, and that Rosa Pacheco is an independent contractor.

Angelita Pacheco works fulltime for the Reitsmas, primarily in their home. Rosa Pacheco testified she works eight hours per week for the Reitsmas, normally on Tuesdays and Thursdays, and is paid $80.00 in cash weekly. She also works 30 (her challenged ballot declaration states 40) hours per week for another company, cleaning homes. Rosa Pacheco testified that she is self-employed in her work for the Reitsmas, and considers herself employed by the other company. The Pachecos take care of the children, prepare meals, do housework and assist in home schooling.

Rosa Pacheco testified that beginning about December 2005, she and Angelita Pacheco began cleaning the Dairy office and, prior to the election also cleaned the Dairy bathroom and snack area. They did this during the afternoon hours. Pacheco insisted she

did this during the payroll eligibility period, but the number of hours she worked doing this is unclear from her testimony. Her challenged ballot declaration states she did this about two hours per week, while she testified to more hours in her testimony, albeit inconsistently. The Pachecos used the Reitsmas' equipment and supplies for their cleaning work at the Dairy.

Angelita Pacheco testified she was employed by the Reitsmas, and was paid $750 per month by check, less payroll deductions. She testified that in February 2006, she and Rosa Pacheco also cleaned the office, bathroom and snack bar at the Dairy. On direct examination, she estimated they did this four to six hours each on Tuesdays and Thursdays in February 2006. On cross-examination, she initially testified it was four times for the month, and then expanded somewhat on the estimate. Angelita Pacheco testified that she always works with Rosa when she cleans at the Dairy, but sometimes, Rosa goes by herself.

Reitsma testified that Angelita Pacheco helped clean the restrooms and office about once a week before the election, and that Rosa Pacheco did this before the election as well. He estimated that Angelita Pacheco spends about 10% of her time working at the Dairy, as opposed to in the Reitsmas' home, and Rosa Pacheco spends between three-eights and one-half of her work time for the Employer between the two locations. The Employer's Office Manager, Caroline Hanstad, and Marvin Machado also testified that the Pachecos worked at the Dairy performing the cleaning work, in the second half of February 2006.

Petitioner's witnesses, four of whom worked the evening/night shift during the payroll eligibility period,[9] either testified they never saw the Pachecos clean the employee restroom or break area, or only saw this after the election. Most of them testified it was their responsibility to perform these functions, and they were told to do so by Machado, Victor Vera and Hector Vera. Contradicting this, one witness testified he had never seen anyone clean the bathroom in two years. Curiously, one employee testified he cleaned the bathroom every day, another testified he did this two or three times per week, and others testified they also performed this function. Similarly, one witness testified he cleaned the break area every day, while others testified they also did this. One of Petitioner's witnesses denied seeing the Pachecos cleaning the Dairy office.

John Grijalbe Flores

Petitioner contends that Flores is ineligible to vote because he did not work during the voting eligibility period, did not perform agricultural work and was an independent contractor. Flores began working at the Dairy in December 2005. He was hired by Reitsma's wife, to perform yard work on the Dairy property. The property has extensive lawn areas, including the commercial portion of the property, and the lawns around the house and trailer. The great majority of the grassy areas are on the commercial portion of the property. Flores worked a flexible schedule totaling about 28 – 30 hours per week, cutting the lawns, clearing weeds and performing repair work on the sprinklers. He sometimes re-set trees brought down by the wind, assisted by Dairy employees. Kannen

[9] In addition, one of these witnesses testified he was off on Thursdays in January and February 2006.

Avila sometimes helped him mow the lawns. Flores also sometimes worked in the Reitsma's garden, planting flowers, fertilizing and spraying. Flores performed lawn cutting work during the last two weeks of February 2006. Reitsma's wife told him what duties to perform.

Flores testified he was paid $250 per week, cash, except for one company check given to him on the day of the election. Cash vouchers submitted by the Employer do not correspond with Flores' testimony. He did not complete an application for employment or punch a time clock. Flores used both the Employer's lawnmower and his own, in addition to his own garden tools. He does not have a business license, and other than a stipend to care for his mother, did not have any other employment when he worked at the Dairy. Flores stopped working at the Dairy about two weeks after the election.

## ANALYSIS AND CONCLUSIONS OF LAW

### The Alleged Supervisors

Victor Vera

As noted above, the parties stipulated that Victor Vera's ballot should not be counted. Therefore, it is recommended that the challenge be sustained.

John Verkaik

Section 1140.4 (j) of the Act provides:

> 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 National Labor Relations Board and at least one appeals court have clearly stated that the burden of proof in establishing supervisory status is on the party contending such status is present. *Oakwood Healthcare, Inc*. (2006) 348 NLRB No. 37 [180 LRRM 1257]; *BO-ED, Inc. d/b/a Golden Fan Inn* (1986) 281 NLRB 226 [123 LRRM 1116]; *NLRB v. Dole Fresh Vegetables* (C.A. 6, 2003) 334 F.3d 478 [172 LRRM 2935].[10] The language contained in section 1140.4(j) is essentially identical to that contained in section 2(11) of the National Labor Relations Act. Therefore, the NLRB precedent should apply to cases under our legislation. In this case, Petitioner contends that Verkaik and the others so alleged are supervisors.

The evidence shows that Verkaik effectively recommended an individual for hire, without any independent investigation from Machado. He also disciplined employees, and effectively recommended that an employee be discharged. Furthermore, Verkaik decided whether to verbally counsel an employee or issue a written warning. That Mercado, in one instance, altered the methodology and ultimate outcome of the discipline did not negate Verkaik's overall ability to effectively recommend discipline. In *Progressive Transportation Services, Inc.* (2003) 340 NLRB 1044 [174 LRRM 1183], a voter's authority to effectively recommend discipline, albeit not the level of discipline,

[10] The NLRB has held that in all cases, the burden of proof in a representation matter is on the party contending that an individual in not eligible to vote. *BO-ED, Inc. d/b/a Golden Fan Inn*, supra, at page 230, fn. 24; *Regency Service Carts, Inc.* (1998) 325 NLRB 617 [158 LRRM 1138]; *Harold J. Becker Co.* (2004) 343 NLRB No. 11 [175 LRRM 1401]. In addition to questions of supervisory status, this burden of proof has been applied to dual-function employees (*Harold J. Becker* and *Golden Fan Inn ),* alleged independent contractors (*BKN, Inc.* (2001) 333 NLRB 143 [166 LRRM 1185]; *Argix Direct, Inc.* (2004) 243 NLRB No. 108 [176 LRRM 1395]), laid off employees (*Regency Service Carts, Inc.*), and casual employees (*Golden Fan Inn).* In no case has the NLRB created a burden of proof based on whether the voter's name appears on the voting eligibility list; rather, the NLRB looks to the underlying reason for the challenge.

and the ability to decide whether to verbally counsel or write up employees were held sufficient to establish supervisory status. Although these actions took place prior to the voting eligibility period, they demonstrate that Verkaik possessed such authority at that time. Therefore, it is concluded that Verkaik was a statutory supervisor, and it is recommended that the challenge to his ballot be sustained.

Hector Vera

As noted above, two employees gave hearsay testimony that Vera issued a warning letter to another employee. Although hearsay, the evidence may form the basis of findings of fact, because the Employer did not object thereto. *Frudden Enterprises, Inc. v. ALRB* (1984) 153 Cal.App.3d 262 [201 Cal.Rptr. 371]. Nevertheless, the testimony concerning this incident is sketchy. The witnesses did not see the warning letter, so it is unclear whether it was signed by Vera, and the record does not establish what role Mercado might have played in its issuance. Furthermore, the testimony establishes that the warning letter was issued after the election.

While a single instance of the exercise of supervisory authority may establish supervisory status,[11] it does not, as a matter of law, prove this. Rather, the facts concerning such exercise must be examined. *Highland Superstores, Inc. v. NLRB* (CA 6, 1991) 927 F.2d 918 [136 LRRM 2770]. In this case, none of the facts surrounding the issuance of the warning letter have been established, such as whether it was signed by Vera, whether it was based on his recommendation, or whether he exercised independent judgment in deciding whether it should be issued. The timing of the warning letter, after

the election, also diminishes its probative value, since the primary inquiry for voter eligibility is the status as of the payroll eligibility period. Therefore, this hearsay evidence is insufficient to establish that Vera exercised independent judgment in issuing the warning letter. *Dean & Deluca New York, Inc.* (2003) 338 NLRB 1046 [174 LRRM 1563].

In support of its supervisory argument, Petitioner points to the statements contained in Vera's challenged ballot declaration, and the notice in the break area identifying him as a manager.[12] Aside from the issues raised by taking the declaration in English, rather than Spanish, generalized statements of supervisory authority and job titles carry little weight in determining whether the individual, in fact, was authorized to exercise statutory authority in the interest of the Employer. *Salinas Valley Nursery* (1989) 15 ALRB No. 4; *Karahadian & Sons, Inc.* (1979) 5 ALRB No. 19; *Wilshire at Lakewood* (2004) 343 NLRB No. 23 [175 LRRM 1522]. Vera's declaration is largely conclusory, and contains no specifics as to any indicia of supervisory authority. Similarly, the appearance of Vera's name as a manager or supervisor on the notices do not show his supervisory functions.

Petitioner also argues that since Hector Vera is paid a salary, at substantially higher wages than other unit employees, and unlike them, did not punch a time clock, he

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[11] See *Biewer Wisconsin Sawmill, Inc*. (1993) 312 NLRB 506 [144 LRRM 506].

[12] Although the notice was posted by the Employer's Office Manager, Machado and Reitsma are aware of its existence, and have not had it removed. On the other hand, the Employer's electrician, who is not alleged as a supervisor, also appears on the list. Petitioner contends that there is another notice, which identifies the individuals thereon as "supervisors." Although the undersigned does not believe this is correct, the analysis herein would be the same if such a notice existed.

should be considered a supervisor. While these are secondary factors used in evaluating supervisory status, they do not, in themselves, establish that an individual is a statutory supervisor. *Salinas Valley Nursery*, supra; *NLRB v. Dole Fresh Vegetables*, supra.

The evidence shows that Hector Vera is in charge of the employees on his shift on the day off of his brother, Victor. Petitioner contends that on those days off, Hector Vera is a supervisor because he assigns work to the other employees. Where an individual is engaged part of the time as a supervisor, the legal determination as to his or her status is whether the individual spends a regular and substantial portion of his or her work time performing supervisory functions. "Regular" means according to a pattern or schedule, as opposed to sporadic substitution. While the National Labor Relations Board has not adopted a strict numerical standard for the substantiality test, it has found that test satisfied where the substitute individuals have served a supervisory role for at least 10 – 15 percent of their total work time. *Oakwood Healthcare, Inc.*, supra, and cases cited therein.

The evidence shows that Vera regularly substitutes for his brother as being in charge of the daytime workers. Even if all the testimony of Petitioner's witnesses was accepted, however, and all of his work-related instructions were considered statutory assignments of work, it is clear that, even on his day in charge, only a small percentage of his time is spent giving orders. As a percentage of his total work time, the percentage would be minute. Therefore, the evidence fails to show that Vera's purported supervisory functions were substantial.

The National Labor Relations Board has recently issued a series of decisions expanding upon, and modifying its interpretations of the terms, "assign," "responsibly to direct," and "independent judgment" under their governing legislation. The lead cases are *Oakwood Healthcare, Inc*., supra and *Croft Metals, Inc.* (2006) 348 NLRB No. 38 [180 LRRM 1293] (applying the *Oakwood* principles to non-healthcare industries). The NLRB now defines an assignment as "the act of designating an employee to a place (such as a location, department, or wing), appointing an employee to a time (such as shift or overtime period), or giving significant overall duties, i.e., tasks, to an employee." The determination of the order in which employees complete their tasks, and specific instructions as to what tasks to perform within the employee's existing work functions would not constitute work assignments. Based on the foregoing, the orders to perform specific tasks Petitioner's witnesses attributed to Hector Vera, if made, would not constitute job assignments within the definition set forth in *Oakwood Healthcare* and *Croft Metals.*

Furthermore, even if Vera's purported directives did constitute work assignments, both the NLRA and our Act require that the assignments involve the exercise of independent judgment, as opposed to routine decision-making. See *Bright's Nursery* (1984) 10 ALRB No. 18, at ALJD pages 30-35. The NLRB now defines "independent" as "not subject to the control of others," and "judgment" as "the action of judging; the mental or intellectual process of forming an opinion or evaluation by discerning and comparing." Even if the decision-making falls within these definitions, the assignment will not be considered supervisory if it is routine in nature.

Vera's purported directives, irrespective of how independent he may be in making them, hardly involve "the mental or intellectual process of forming an opinion or evaluation by discerning and comparing." Even if they did, it is clear that the Employer's milking operation, and attendant duties such as feeding, scraping and the movement of livestock, are routine in nature. *Bright's Nursery,* supra; *Highland Superstores, Inc. v. NLRB*, supra. Therefore, the evidence fails to show that Vera's directives involved the exercise of independent judgment.

Based on the foregoing, it is concluded that the evidence fails to show that Hector Vera was a supervisor, and it will be recommended that the challenge to his ballot be overruled.[13]

Sergio Rey

Petitioner reiterates many of the same arguments set forth above in urging that Rey be found to be a supervisor. Unlike Hector Vera, Rey is alleged to be a fulltime supervisor, so the case law regarding part time supervisors does not apply to him. Based on the discussion above, it is concluded that the reference to him as a manager in the notice, his remuneration by salary at a relatively high rate, the lack of a requirement for him to punch a time clock, the purported generalized admissions in his declaration and the routine orders attributed to him by Petitioner's witnesses, if made, do not establish him as a statutory supervisor.

[13] Although not asserted as a ground for unit exclusion by Petitioner, the Act also states that those who "responsibly direct" the work of others are supervisors. Under *Oakwood Healthcare, Inc.* supra, the NLRB requires that the direction be general and not isolated, that the individual empowered to give such direction be held accountable for the work of those he or she is directing, and that the direction involve independent judgment, rather than being

As discussed earlier in this Decision, however, an employee testified that Rey initiated a change in his overall job duties. Inasmuch as the Employer did not recall Rey or Machado to respond to this testimony, the testimony is credited. The employee, however, also testified that Rey did not implement the change in his duties without first consulting with Machado, thus placing in question whether Rey exercised independent judgment in taking the action. It is also noted that Rey was not hired by the Employer until about two months before the election, so at is problematic whether this incident demonstrates that Rey possessed such authority as of the payroll eligibility period. Furthermore, the evidence shows that John Verkaik was the maintenance supervisor at the time of the election.

As noted above, even one example of the exercise of supervisory authority may be sufficient to establish supervisory status. Under all the facts presented concerning Rey's job duties, however, including the fact that he works alone most of the time, it is concluded that he was not a supervisor, at least as of the payroll eligibility period. *Highland Superstores, Inc. v. NLRB*, supra. Accordingly, it is recommended that the challenge to Rey's ballot be overruled.

**The Remaining Challenged Ballots**

David Rose

Inasmuch as the parties stipulated that the challenge to Rose's ballot be upheld, it is recommended that this challenge be sustained.

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routine in nature. The evidence fails to establish that Vera's alleged sporadic orders satisfy any of these requirements.

The Avila Brothers

Section 20352(b)(5) of the Board's Regulations provides that the parent, child or spouse of the owner or substantial shareholder of an agricultural employer is not eligible to vote. In *Bunden Nursery, Inc.* (1988) 14 ALRB No. 18, the Board stated it would not expand upon these specified exclusions. In light of this precedent, it would be inappropriate for the undersigned to create another voting exclusion, based on the Avilas' familial status, and Petitioner's arguments thereon should be addressed to the Board.

Petitioner also contends that the challenges to these ballots be sustained because the Avila brothers were not employed by the Dairy during the voting eligibility period. The Board's most recent pronouncements in this area are contained in *Arie De Jong dba Milky Way Dairy* (2003) 29 ALRB No. 9 and *G H & G Zysling Dairy* (2006) 32 ALRB No. 2. In *Milky Way Dairy*, 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 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.

Petitioner does not dispute that the work attributed to the Avilas would be considered agricultural, and it is so found.

Secondly, under *Milky Way Dairy*, 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.

While it has been established that the Employer did not require employment applications from the Avilas, paid them in cash, did not make payroll deductions, did not

require them to punch a time clock, and did not report their earnings to governmental agencies, none of these factors mandates a finding that no employment relationship existed. Although the challenged ballot declaration(s) of one or two of the brothers exaggerate the nature and extent of their job duties, they appear to have been coached in their testimony and the petty cash vouchers submitted by the Employer are regarded with suspicion, it is still found that all three did work at the Dairy during the payroll eligibility period. In this regard, it is noted that two of Petitioner's witnesses acknowledged seeing them work at the Dairy, although after the election.[14] The notations on Kevin Avila's calendar and the corroborating testimony of employee, Raul Ornelas, were particularly compelling in establishing such employment during the voting eligibility period. The youngest Avila brother, Kannen, was also a credible witness. Since the Board permits individuals to vote, even if their work is irregular, casual and/or minor, so long as some agricultural employment was performed during the payroll eligibility period, the evidence establishing such employment qualifies Kevin, Kasey and Kannen Avila to vote in the election, under the *Milky Way Dairy* and *Zysling Dairy* decisions. For this reason, it is concluded that Kevin, Kasey and Kannen Avila were agricultural employees of the Dairy during the payroll eligibility period, and it is recommended that the challenges to their ballots be overruled.[15]

[14] Inasmuch as four of Petitioner's six witnesses worked evening/nights, it is no surprise that they saw little or none of the Avila's work. It is also not surprising, given the brief duration of their work, that the two day shift workers saw little or none of it.

[15] Petitioner contends that under all the circumstances presented, the evidence "suggests" that the Avilas were hired to vote in the election. Even if the evidence established such a suggestion, this would be an insufficient showing upon which to base a finding.

Jesus Mesa

The Board, in some of its earlier decisions, held that injured employees are eligible to vote if the evidence shows they would have been working absent their injuries. Under that test, the Board considers all evidence relevant to the issue of whether there was a position available during the payroll eligibility for a job the employee had actually worked. *Wine World, Inc. dba Beringer Vineyards* (1979) 5 ALRB No. 41. See also *Rod McLellan Co.* (1977) 3 ALRB No. 6; *Valdora Produce Co.* (1977) 3 ALRB No. 8. In *Cocopeh Nurseries, Inc.* (2001) 27 ALRB No. 3, the Board stated that the evidence must also show the employee had a reasonable expectation of returning to work.

The National Labor Relations Board has specifically rejected a "reasonable expectation" test for injured or ill employees. Rather, employees absent from work for these reasons are presumed to continue in their employee status. In order to rebut this presumption, the employer must show that the employee was discharged or resigned. *Thorn Americas, Inc.* (1994) 314 NLRB 943 [147 LRRM 1078]; *Red Arrow Freight Lines, Inc.* (1986) 278 NLRB 965 [121 LRRM 1257]; *Garney Morris, Inc.* (1993) 313 NLRB 101, at page 121 [146 LRRM 1153].

Irrespective of which test is used, the focus of the inquiry is the employee's status *as of the voting eligibility period.* Thus, in *Wine World*, supra, not all of the injured employees returned to work after the election, but this was held irrelevant to the question of their voter eligibility. In this case, Mesa was on workers' compensation disability as of the payroll eligibility period. The Employer considered him a good worker, and employed some 30 employees in his job classification. Machado's testimony, that Mesa

had been replaced, absent any specifics as to the date and circumstances, is insufficient to establish that Mesa would not have been permitted to return to work if he had been able to during the eligibility period. To the contrary, given the circumstances presented, it is clear that such return would have been permitted, as of the voter eligibility period, but for the injury. The Board, in its underlying decision, emphasized the critical nature of this issue.

Thus, the evidence fails to establish that Mesa should be precluded from voting under either the Board's original test, or the NLRB's. Furthermore, even if a "reasonable expectation" test were employed, it would still pertain to the circumstances existing as of the payroll eligibility period. At that time, Mesa had undergone knee surgery only two or three weeks earlier, and it is highly doubtful that he or the Employer would have realized his injury would not heal properly, at such an early date. Therefore, it would still be necessary for the Employer to show there was no work available for him in his job category as of that time. The evidence fails to establish this.

Based on the foregoing, it is recommended that the challenge to Mesa's ballot be overruled.

The Pachecos

The Board has held that cleaning duties pertaining to agricultural facilities constitute secondary agriculture, and warrant unit inclusion. *Milky Way Dairy*, supra;

*Zysling Dairy*, supra.[16] Therefore, if the Pachecos were employed by the Dairy during the voting eligibility period, they would be eligible to vote. Although the cleaning employee in *Zysling Dairy* was found to be an independent contractor, the evidence fails to establish such status herein. As noted above, the Board accords little weight to irregular payroll practices in determining employee status. Rosa Pacheco's testimony, that she considered herself self-employed when working for the Reitsma's, is insufficient, without more, to establish her as an independent contractor.

Although the Pachecos' testimony concerning their employment during the payroll eligibility was somewhat flawed, it is found that they did perform some cleaning work on the Employer's facilities during the voting eligibility period. Caroline Hanstad's credible and corroborating testimony was particularly compelling, in this regard. Four of Petitioner's six witnesses worked the evening/night shift, and would have had little opportunity to observe the Pachecos' work. In any event, three of them admitted seeing the Pachecos perform cleaning work, including cleaning the employee bathroom, but contended this took place after the election. Said testimony falls short of rebutting the Employer's evidence that such work was performed prior to the election.

Since the Pachecos work both as Dairy employees and as the Reitsmas' domestic servants, this may raise an issue of whether they are dual-function employees, and as such, whether this affects their eligibility to vote. The National Labor Relations Board

[16] Petitioner questions whether janitorial work constitutes secondary agriculture, and whether the Board has found this to be the case. The Board decisions in this area appear to be quite specific. The janitorial employee in *Zysling Dairy*, supra, was found ineligible to vote because she was an independent contractor, not because her work was not agricultural in nature.

does consider this factor in determining voter eligibility, most commonly where the employer has more than one existing or potential bargaining unit, and the employees perform only a portion of their work in the voting unit. In these cases, dual function employees are included in the unit if they regularly perform duties similar to those performed by unit employees for sufficient periods of time to demonstrate that they have a substantial interest in the working conditions of the unit. Where one employee spent about 15% of the time performing unit work, and another worked in the unit 15% to 25% of the time, the NLRB found them ineligible to vote. On the other hand, where the unit/non-unit work split 40% to 60%, the employee was permitted to vote. *Continental Cablevision of St. Louis County, Inc.* (1990) 298 NLRB 973 [134 LRRM 1271]; *Arlington Masonry Supply, Inc.* (2003) 339 NLRB 817 [172 LRRM 1437]; cf. *KCAL-TV* (2000) 331 NLRB 323 [164 LRRM 1207].

The NLRB test, however, is part of its community of interest analysis, expressly rejected by the Board in determining voter eligibility under *Milky Way Dairy.* Furthermore, the Board has included employees in the unit, even when their hours of work were few, sporadic and constituted a small percentage of their overall working hours. Prior to the issuance of the *Milky Way Dairy* decision, the Board did employ a substantiality test to determine unit inclusion, but did so to determine whether the employees' work was agricultural in nature. The test employed was whether the "bulk" of the work was agricultural. The Board emphasized that it was engaging in this analysis because the employees also performed work for the employers' non-agricultural operations, and potentially would be subject to NLRB jurisdiction. *Prohoroff Poultry*

*Farms* (1976) 2 ALRB No. 56; *Point Sal Growers and Packers* (1983) 9 ALRB No. 57; *Sam Andrews' Sons* (1983) 9 ALRB No. 57; cf. Dairy *Fresh Products Co.* (1976) 2 ALRB No. 55.[17] In *Prohoroff Dairy* (at page 6), the Board also stated:

> Because the issues involved in mixed-work situations are complex, and the applicable law is ambiguous, we are reluctant to announce a general rule. Our holding is therefore limited to this case.

The undersigned does not believe that the Board's substantiality test used in the above cases applies herein. The Employer does not operate a separate commercial enterprise, so there is no question of NLRB jurisdiction. Since the Board permits employees to vote, even if their work is occasional, or minor, so long as some agricultural employment was performed during the voting eligibility period, it is concluded that the Pachecos' work, during that period, qualified them to vote in the election. For this reason, it is recommended that the challenges to their ballots be overruled.[18]

John Flores

The evidence shows that during the payroll eligibility period, Flores performed work cutting the Employer's lawns and repairing the sprinklers. While Flores also mowed the lawns of the Reitsmas' residence and trailer, and may have worked in their garden, the bulk of his work was on the agricultural property. In *George Lucas &* Sons (1977) 3 ALRB No. 5, the Board held that gardeners working on the operations portions

[17] Petitioner cites *William Warmerdam Packing Co.* (1998) 24 ALRB No. 2, which also took placed in a mixed commercial/agricultural setting. The Board subsequently vacated its decision in that case.

[18] Petitioner's argument, that the Pachecos are confidential employees is rejected. Confidential employees are those who assist and act in a confidential capacity to persons who formulate, determine and effectuate management policies in the field of labor relations. *Koyama Farms* (1984) 10 ALRB No. 4; *Tani Farms* (1984) 10 ALRB No. 5. There is no evidence that either of the Pachecos act in such a capacity.

of an agricultural employer's property are within the definition of maintenance employees contained in section 3(f) of the Fair Labor Standards Act, and are therefore agricultural employees. Petitioner cites National Labor Relations Board cases expressly or implicitly stating that gardeners are within their jurisdiction. Those cases are inapposite, however, because those employees did not work for, or on agricultural operations. Since much of Flores' gardening work was on the Dairy property, his work would satisfy a substantiality test, if such test were appropriate. Contrary to Petitioner's argument, the evidence does establish that Flores worked during the payroll eligibility period, in spite of some conflicts in the evidence, primarily the cash vouchers.

The evidence also establishes that the parameters of Flores' work were controlled by the Employer, and therefore, he was an employee. In this regard, the evidence fails to establish that Flores operated an independent business. The other factors cited by Petitioner, such as Flores' use of his own lawnmower and some of his own gardening tools, not punching in for work, being paid a flat rate, as opposed to an hourly wage, the lack of an application and other paperwork, and the failure to report his wages, have all been found by the Board to be insufficient to show lack of employee status.

Based on the foregoing, it is concluded that Flores was an agricultural employee of the Dairy as of the voting eligibility period, under the *Milky Way Dairy* and *Zysling Dairy* decisions. Accordingly, it is recommended that the challenge to his ballot be overruled.

## SUMMARY OF RECOMMENDATIONS

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

John Eric Verkaik, Jr.

Victor Vera

David Rose

It is recommended that the challenges to the following voters be overruled:[19]

Hector Alonzo Vera Lira

Sergio Melendez Rey

Kevin John Avila II

Kasey John Avila

Kannen Avila

Jesus Mesa Martinez

Rosa Sterriquez Pacheco

Angelita Flores Pacheco

John Grijalbe Flores

Dated: January 10, 2007

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DOUGLAS GALLOP
Investigative Hearing Examiner, ALRB

[19] The Board also affirmed the Regional Director's determination that the challenge to Alfredo Rodriguez's ballot be overruled.