

STATE OF CALIFORNIA  
AGRICULTURAL LABOR RELATIONS BOARD

HENRY A. GARCIA DAIRY	)	
A Sole Proprietorship,	)	
	)	Case No. 07-RC-01-VI
Employer,	)	
	)	33 ALRB No. 4
and	)	
	)	(August 3, 2007)
UFCW INTERNATIONAL UNION,	)	
LOCAL 5,	)	
	)	
Petitioner.	)	

**DECISION AND ORDER**

A petition for certification was filed on March 9, 2007 by UFCW International Union, Local 5. An election was held on March 16, 2007. As there were only six unchallenged votes cast and eleven challenged ballots, the Regional Director (RD) impounded the ballots pending the resolution of the challenged ballots to preserve the confidentiality of the unchallenged votes. The RD conducted an investigation, which resulted in the attached challenged ballot report issued June 8, 2007. The RD recommended that one challenge be overruled, nine be sustained, and one be held in abeyance and set for hearing only if it is outcome determinative. Specifically, the RD found 1) that the challenge to Joe Oliveira should be overruled because the investigation showed that Mr. Oliveira worked as an agricultural employee during the eligibility period, 2) nine challenges should be sustained because the challenged voters were found to be independent contractors, and 3) the challenge to Oscar Sandoval should be set for hearing if outcome determinative because a hearing is

necessary to determine if he is a supervisor.

The Employer, Henry A. Garcia Dairy, filed exceptions to the report on June 19, 2007 one day after the due date of June 18. Finding that the Employer had substantially complied with the filing requirements and finding no prejudice from the late filing, the Acting Executive Secretary issued an order, dated June 25, 2007, finding the exceptions timely filed. The Employer excepts to the RD's recommendation that nine challenges be sustained, arguing that instead these challenges should be set for an evidentiary hearing to determine if the challenged voters are employees or independent contractors.

### **DISCUSSION**

The principal factors to be considered in determining if someone is an employee or an independent contractor are: 1) whether the worker performing services is engaged in a distinct occupation or business, 2) the worker's occupation, with a focus on whether the work is usually done under the direction of the principal or by the specialist without supervision, 3) the skill required in the particular occupation, 4) whether the principal or the worker provides the necessary tools and/or place of work, 5) the length of time necessary for the performance of the services, 6) the method of payment, including whether payment is based on time or on the job as a whole, 7) whether the work is part of the regular business of the principal, and 8) whether the parties believe they are creating an employer-employee relationship. (See *S.G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal. 3d 341; *Arie DeJong dba Milky Way Dairy* (2003) 29 ALRB No. 4.)

As explained in the *S.G. Borello & Sons, Inc.* case, the above common law factors, which arose in the context of determining an employer' liability for the actions of a purported employee, must not be applied rigidly. Also included in the analysis must be factors such as 1) the remedial purpose of the legislation, 2) whether the alleged employees are within the intended reach of the legislation, and 3) the bargaining strengths and weaknesses of each party.

The RD concluded that all nine of the challenged voters placed in dispute by the exceptions provided services to the Employer as part of a distinct and independent business and, thus, were independent contractors not eligible to vote.<sup>1</sup> The evidence cited by the RD is summarized below. In all cases, the RD concluded that these individuals work without supervision. In some cases this is reflected in the challenged ballot declarations. Otherwise, these conclusions appear to be based on the fact that the lack of supervision is inherent in the type of work done and/or the specialized nature of the skills required. A few of these individuals placed the name of the dairy owner in the space on the challenged ballot form for "supervisor," but there is no specific evidence in the record that they were supervised by anyone at the dairy.

---

<sup>1</sup> As the Board made clear in *Milky Way Dairy* (2003) 29 ALRB No. 4, to be covered under the Agricultural Labor Relations Act (ALRA; Lab. Code § 1140, et seq.), a worker must be engaged in "agriculture" as defined in the statute and be an "employee" rather than an independent contractor. The exception is that under section 1140.4, subdivision (c), workers provided by a labor contractor are deemed to be the employees of the farmer engaging the labor contractor. There is no claim in this case that any of the challenged voters were provided by a labor contractor.

## Summary of Evidence

### Mike Costa

Costa stated in his challenged ballot (CB) declaration that he has owned Costa's Barn Cleaning for 17 years and cleans barns for a fee he sets depending on the size of the job. He and the customer agree on the job to be done, then he does it. He sends the dairy a monthly bill, uses his own equipment, and is the sole employee of his business, which is his sole source of income. In the record are the invoices from Costa and copies of cancelled checks from the Employer with no tax withholding.

### John Avila

Avila stated in his CB declaration that he is retired, but has a handyman business and works at the dairy as needed, as he has for 5 or 6 years. He stated that he sends the dairy an invoice for payment after he has done a few jobs. He uses his own tools. He states that he orders needed parts through the dairy's account at a hardware store, but some of his invoices also list charges for parts as well as labor. He keeps track of his own time, charges \$20 per hour, and receives checks with no tax withholding. In evidence is a Form 1099-Misc. from the dairy for the 2006 tax year, with the amount paid listed in Box 7—"Nonemployee compensation." The same is true for the Form 1099's in evidence for the other disputed voters.<sup>2</sup>

---

<sup>2</sup> Pursuant to the IRS instructions for Form 1099-Misc., this is the form and box to be utilized for reporting payments to independent contractors.

David Freitas

Freitas stated in his CB declaration that he owns two businesses, Freitas Maintenance Mobile Service, and another in his own name. While he appears to indicate that he uses Freitas Maintenance for working on commercial trucks and the other company when performing work for various dairies, the invoices in the record, which reflect charges for parts and labor, are from Freitas Maintenance Mobile Service. This company is listed in the yellow pages under “Truck Repair and Service.” Freitas states that he charges the dairy \$65 per hour, uses his own tools, and pays his own employment taxes. Employment Development Department (EDD) records reflect that he reported his earnings to EDD, he has elective disability insurance coverage, and that the Employer did not report earnings for Freitas.

Jeff Harris

Harris stated that he owns his own insemination business and that he has been examining and inseminating cows for the dairy for 28 years. Though his agreement with the dairy is that he be available 365 days a year, he also performs the same service to seven other dairies, none of which provide workers compensation insurance for him. Harris also works as sales representative for ABS Global, a company that provides various products related to the care of cows, which he sells to the dairy and administers. When he takes days off, he provides a replacement to do his job. While not entirely clear from the declaration, it appears that on those days ABS Global provides someone to do his sales job as well. He submits invoices for his work on the first of every month, supplies his own tools, gets paid by check on the 15<sup>th</sup> of the month, pays his own taxes, and receives a Form 1099 from the dairy.

The dairy did not report any earnings for him to EDD. Examples of the invoices, cancelled checks showing no tax withholding, and Form 1099's are in the record.

Louis Mendes

Mendes stated in his CB declaration that he does cement work, welding repairs, and plumbing for the Employer, as well as for ten other dairies. He uses his own tools, has his own service truck, pays his employment taxes, and receives a Form 1099 from all his customers for tax purposes. He charges \$30 per hour, submits invoices for payment, and goes to the dairy only when called by the owner. He is paid by check with no tax withholding. The invoices have "Louis Mendes Welding" at the top. Examples of the invoices, Form 1099's and cancelled checks showing no tax withholding are in the record.

Jack Pearson

Pearson stated in his CB declaration that he has owned "Valley Nutrition" since 1993 and has an office in Tulare. He has provided feed formulation to the dairy since January 1975. He bills the dairy through his company, has no employees, provides his own equipment, pays his own employment taxes, and is retained by the dairy on a monthly basis. He provides the same service to 47 other customers. In the record are examples of the invoices, Forms 1099's, and cancelled checks showing no tax withholding.

Mark Pedro

Pedro stated in his CB declaration that he has owned Pedro's Lagoon Service since 2004, uses business cards, has his own service trailer, his own equipment, and uses his

own chemicals and tools. He bills the dairy for his services and provides the same service to other dairies. He received a Form 1099 from the dairy and stated that he is self-employed. His work at the dairy consists of maintaining the proper biological activity at the lagoon at the dairy. In the record are examples of the invoices, Form 1099's, and cancelled checks showing no tax withholding.

Rosie Pena

Pena stated in her CB declaration that she has worked at the dairy since 1989, cleaning at the dairy on a weekly basis, as well as at the owner's house and the house of Rick Garcia. She stated that she provides the same service to 18 other clients. While the RD suggests in his report that she supplies some of her own cleaning products when working for other clients, in her declaration she clearly states that she is provided with all the supplies and equipment by Teresa or Rick Garcia. She normally is paid in cash every two weeks, though occasionally by check, and does not use invoices to bill for her services. When paid by check, there is no tax withholding. A review of EDD records showed that the dairy did not report any earnings for her. The RD states in his report that she sets her own wage rate, but that is not specifically reflected in the record.

Esteban Yanez

Yanez stated in his CB declaration that he has owned Yanez Lawn Care for about 20 years. He employs his son, and sometimes one other relative. He provides lawn service for the dairy and about 35 to 40 other customers. He provides all his equipment and pays all of his taxes. He has provided service to the dairy for 13 to 15 years and performs

work there every Thursday for 2 to 3 hours. His rate of pay is \$450 per month, bills the dairy, and is paid by check. In the record are examples of invoices, cancelled checks with no tax withholding, and a Form 1099. Some of the invoices include charges for sprinkler parts, plants, and soil amendments. The Employer did not report any earnings for Yanez to EDD.

### Analysis

With the exception of Rosie Pena, who will be discussed separately below, the evidence of independent contractor status cited by the RD is compelling. These eight individuals have independently organized businesses through which they perform the same service for numerous customers, provide their own equipment, are hired to do a distinct job requiring significant skill and apparently do so without supervision, set their own payment rates, bill their customers through invoices, pay their own taxes, hold themselves out as separate businesses. That both they and the Employer treat their relationship as one of independent contractors and clients is further evidenced by the lack of tax withholding and the use of Form 1099's.

Moreover, we find that these types of individuals are not within the intended reach of the ALRA. They each have sufficient bargaining strength, by virtue of their independent business and broad customer base, to have an "arms length" relationship with the Employer, without the provision of collective bargaining rights. Therefore, their exclusion from coverage does not undermine the chief remedial purpose of the ALRA, which is to "seek to ensure peace in the agricultural fields by guaranteeing



justice for all agricultural workers and stability in labor relations.” (Sec. 1, Preamble to the ALRA.)

The Employer’s exceptions do not specifically refute the cited evidence that these individuals are independent contractors operating independent businesses. The Employer does claim generally that the RD failed to conduct the type of complex analysis required to determine if someone is an employee or independent contractor. That, however, is not true, as the RD did discuss the factors relevant to that analysis and, as detailed above, cited evidence that is overwhelming in favor of independent contractor status. Instead, the exceptions are focused on claims that the RD’s analysis was deficient in other respects. As discussed below, none of these contentions is persuasive.

The Employer begins by criticizing the RD for not allowing these voters to remain on the eligibility list submitted by the Employer, claiming that they were disenfranchised by having to vote by challenged ballot after being subjected to an “interrogation.” Voting by challenged ballot does not, of course, result in disenfranchisement, as challenged voters indeed are allowed to vote. Their ballots simply are segregated pending resolution of their eligibility. Moreover, despite the Employer’s characterization as an “interrogation,” there was no evidence submitted to the RD that reflected any impropriety in the taking of challenged ballot declarations. Lastly, while disputed voters could be left on the eligibility list and nonetheless be required to vote by challenged ballot, removing them from the list does ensure that their vote will be challenged so that their eligibility can be resolved before their vote is counted. As

explained by the Board in *Artesia Dairy* (2006) 32 ALRB No. 3, there is nothing inherently wrong with such a procedure as long as no evidentiary burden is allocated as a result. The RD's report does not reflect any improper allocation.

The Employer's central claim is that all that must be established is that the challenged voter performed agricultural work during the eligibility period. In the Employer's view, all of the nine individuals at issue performed secondary agricultural work during the eligibility period, so they must be allowed to vote. As clarified in *Arie DeJong dba Milky Way Dairy, supra*, both engagement in agricultural work and status as an "employee" are required for coverage under the ALRA. The Employer attempts to avoid this simple truism by arguing that, in contrast to the National Labor Relations Act, section 1140.4, subdivision (c) of the ALRA deems independent contractors to be the employees of the farmer. This is not correct, as that provision applies only to the employees of a labor contractor, a distinct subspecies of independent contractor. There is no claim that any of the individuals at issue in this case were provided by a labor contractor; therefore, section 1140.4, subdivision (c) is of no relevance.

The Employer also argues that the manner in which employees are paid has no significance in determining their eligibility to vote and that "wages" are defined broadly under California law. This is true in the sense that the method of payment is not dispositive. As reiterated most recently in *Artesia Dairy, supra*, the fact that an individual is not on the regular payroll and/or is paid in cash creates no presumption of ineligibility. Rather, evidence of irregular payment practices must be viewed in the

context of other evidence and the circumstances as a whole to determine its probative value. In this case, the RD did not rely solely on pay practices, but instead properly relied on the lack of tax withholding, along with the use of Form 1099's reflecting "nonemployee compensation," as consistent with other evidence that the challenged voters were independent contractors.

Lastly, the Employer cites various Labor Code provisions for the proposition that under California law there is a presumption of an employment relationship. The Employer first cites section 2750.5, which is a provision that applies only where the individuals at issue are required to have a contractor's license. It is not a provision that applies generally. In any event, the provision also instructs that the presumption may be overcome by evidence of the same types of factors relied on the RD in finding independent contractor status.

The Employer also relies on a similar presumption contained in section 3357 that applies only to coverage under Workers Compensation law. The Employer asserts that this presumption also is applicable under the ALRA because the *Borello* case involved workers compensation and the court suggested that its analysis would be appropriately applied to other statutes, including the ALRA. However, there is no such presumption contained in the ALRA and the court in *Borello* did not suggest that a presumption of employee status was inherent in the generally applicable analysis that the court adopted. Rather, the court emphasized that the common law test of employee status must be applied in light of the purposes of the applicable statute. In any event, even if

such a presumption existed under the ALRA, in this case it was overcome by the strong evidence of independent contractor status.

### The Status of Rosie Pena

In contrast to the other eight challenged voters at issue, there is not definitive evidence that Ms. Pena has an established independent business. In further contrast, her work is not specialized or particularly skilled. Nor does she provide her own equipment or supplies. The record does not establish how her wage rate is set. On the other hand, having eighteen other customers and not having any tax withholding from her payment is evidence of independent contractor status. We find that the existing record does not allow us to draw a conclusion. For example, it is necessary to know more about her arrangements with her clients, i.e., the level of supervision she receives, the amount of discretion she has in determining when and how she does the cleaning, whether she sets her wage rate, etc. Therefore, we will set this challenge for hearing, if it is outcome determinative after the ballots are opened and counted.<sup>3</sup>

### **ORDER**

In accordance with the discussion above, the RD's challenged ballot report is affirmed, with the exception of setting the challenge to Rosie Pena for hearing should it be

---

<sup>3</sup> We note that if she is found to be an employee, and because she also performs domestic work for the owners of the dairy, a sole proprietorship, there would need to be an additional inquiry as to whether her agricultural work at the dairy is "substantial." (See *Artesia Dairy* (2007) 33 ALRB No. 3, pp. 18-23.)

outcome determinative after the tally of ballots. Accordingly, the challenges are resolved as set forth below. The RD shall issue a tally of ballots as soon as practicable.

Challenge Overruled

1. Joe Oliveira

Challenges Sustained

1. Mike Costa
2. John De Avila
3. David Freitas
4. Jeff Harris
5. Louis Mendes
6. Jack Pearson
7. Mark Pedro
8. Esteban Yanez

Challenges To Be Set For Hearing If Outcome Determinative

1. Oscar Sandoval
2. Rosie Pena

DATED: August 3, 2007

IRENE RAYMUNDO, Chair

GENEVIEVE A. SHIROMA, Member

CATHRYN RIVERA-HERNANDEZ, Member

## **CASE SUMMARY**

HENRY A. GARCIA DAIRY, a sole proprietorship  
(UFCW, Local 5)

33 ALRB No. 4  
Case No. 07-RC-01-VI

### **Background**

A petition for certification was filed on March 9, 2007 by UFCW International Union, Local 5. An election was held on March 16, 2007. The Regional Director (RD) impounded the six unchallenged ballots pending the resolution of the eleven challenged ballots. In his challenged ballot report, the RD recommended that one challenge be overruled, nine be sustained, and one be held in abeyance and set for hearing only if it is outcome determinative. The Employer, Henry A. Garcia Dairy, excepts to the RD's recommendation that nine challenges be sustained, arguing that instead these challenges should be set for an evidentiary hearing to determine if the challenged voters are employees or independent contractors.

### **Board Decision**

The Board affirmed the RD's conclusions as to eight of the disputed challenges, finding the evidence of independent contractor status to be compelling. The record reflected that these individuals have independently organized businesses through which they perform the same service for numerous customers, provide their own equipment, are hired to do a distinct job requiring significant skill and apparently do so without supervision, set their own payment rates, bill their customers through invoices, pay their own taxes, hold themselves out as separate businesses. In addition, the Board found that each of these eight individuals and the Employer treat their relationship as that of independent contractor and customer, as further evidenced by the lack of tax withholding and the use of Form 1099s reporting payments for "nonemployee compensation." The Board found insufficient evidence to determine if a woman who cleans at the dairy and for the owners of the dairy, as well as for numerous other clients, was an employee or independent contractor. Accordingly, the Board ordered that this challenge be set for hearing if it is outcome determinative.

\*\*\*

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

BEFORE THE  
AGRICULTURAL LABOR RELATIONS BOARD  
OF THE  
STATE OF CALIFORNIA

In the Matter of:

UFCW INTERNATIONAL UNION,  
LOCAL 5

Petitioner,

and

HENRY A. GARCIA DAIRY,  
A Sole Proprietorship

Employer

Case No. 07-RC-01-VI

CHALLENGED BALLOT REPORT

A Petition for Certification was filed on March 9, 2007 and an election was held under my direction and supervision on March 16, 2007 among the employees of the Employer in the appropriate unit consisting of all its agricultural employees in the State of California. After the election, six votes were cast and the ballots were impounded. There were 11 unresolved challenged ballots.

Because the number of challenged ballots was sufficient to effect the outcome of the election, the undersigned, under Section 20363(a) of the Regulations of the Agricultural Labor Relations Board (Board or ALRB), after reasonable notice to all parties to present relevant evidence, has completed an investigation of the challenged

ballots, duly considered all evidence submitted by the parties and otherwise disclosed by the investigation, and issues this report.

I.

THE CHALLENGED BALLOTS

The following workers were challenged on the bases that they were not on the list and not an agricultural employee:

1. Mike Costa
2. John De Avila
3. David Freitas
4. Jeff Harris
5. Louis Mendes
6. Jack Pearson
7. Mark Pedro
8. Rosie Pena
9. Esteban Yanez

The following workers were challenged on the basis that they were not on the list:

1. Joe Oliviera
2. Oscar Sandoval

II.

THE INVESTIGATION

Prior to the March 16, 2007 election, the Region received the Employer's Response to the Petition for Certification. The Employer submitted payroll summaries for eight employees but no timecards or records showing the days and hours that these workers worked during the February 19, 2007 to March 4, 2007 eligibility period. The Employer later provided timecards for seven employees but stated that one worker was a full-time employee, but did not use the time clock. The Employer also provided invoices, billing statements, and copies of checks made payable to nine other workers.



The Region determined that for ten of these workers, there was insufficient information to establish that they were employed during the eligibility period. Their names were not placed on the employee eligibility list. Another worker was alleged to be a supervisor and his name was not placed on the employee eligibility list.

At the election, the Board challenged 11 workers who were not on the eligibility list. Thereafter, Board agents interviewed these workers who signed sworn declarations regarding their jobs, their job duties and work at the dairy during the eligibility period. These workers voted, with their votes placed in challenged ballots.

After the election, the Region requested that the Petitioner and Employer submit their positions and any supporting documents regarding each of the challenged voters.

The Employer's position was that all eleven challenged voters were agricultural employees who performed work during the eligibility period and were entitled to vote.

The Petitioner maintained that David Freitas, Jack Pearson, John De Avila, Louis Mendes, Jeff Harris, Esteban Yanez, Rosie Pena, Mark Pedro, and Mike Costa were not agricultural employees. The Petitioner also alleged Oscar Sandoval was a supervisor and that Joe Oliveira did not have any supporting documents to show that he worked during the eligibility period.

During the investigation, the Employer submitted copies of payroll records, summaries of pay stubs and check histories, cancelled checks, billing statements and invoices, 1099 forms, and a W-2 form. The Petitioner submitted worker declarations, Wage Order Regulation No 14-2001 regulating agricultural occupations, and a copy of a calendar for challenged voter Jeff Harris.

On May 23, 2007, the Region gave all parties a final opportunity to submit any additional documentation in support of their positions of the challenged ballot voters by May 25, 2007.

The Employer did not submit any additional information on May 25, 2007.

The Petitioner provided additional worker declarations indicating that challenged voter Oscar Sandoval exercised supervisory duties on May 25, 2007.

The Region proceeded to conduct its own investigation regarding the eligibility of the 11 challenged ballot voters. All the responses and documentation submitted by the Employer and Petitioner, along with the declarations from the eleven challenged voters taken from interviews at the election, are considered in the foregoing analysis.

### III.

#### LEGAL AUTHORITIES

##### A. Independent Contractors

It is noted that “independent contractors” are not specifically excluded from the definition of “agricultural employee” set forth in Section 1140.4(b) of the Act; nor are they listed in Section 20355(a) of the Board’s Regulations which sets forth the categories of persons who are ineligible to vote. However, independent contractors, as defined in case precedent of the National Labor Relations Board (NLRB) are not included as “employees” under the National Labor Relations Act (NLRA). As shown in the discussion below, the reasons for such exclusion are equally applicable to the Agricultural Labor Relations Act (Act).

Under Section 2(3) of the NLRA, independent contractors are specifically excluded from the definition of “employee”. In *Chemical Workers v. Pittsburgh Plate*

*Glass Co.* (1971) 404 U.S. 157, 78 LRRM 2974, 2977, the Court stated that the term “employee” must be understood with reference to the purpose of the NLRA and the facts involved in the economic relationship. The legislative history of Section 2(3) indicated that the term “employee” was not to be stretched beyond its plain meaning embracing only those who work for another for hire.

It is clear that the intent of the Agricultural Labor Relations Act (Act) was to equalize the bargaining power between the employers and those who, until the establishment of the Act, were without such power in the work place – i.e. those who work for another for hire. Accordingly, independent contractors, whose position affords them a bargaining power equal to the employer, could not properly be included as “employee” under the Act.

In *NLRB v. United Insurance Company* (1968) 390 U.S. 254, 67 LRRM 2649, the United States Supreme Court stated that the common law agency test should be applied in distinguishing an employee from an independent contractor. The NLRB and the Courts have adopted a test relating to the right of control to determine whether individuals are independent contractors or employees.

In *Borello & Sons v. Department of Industrial Relations*, 48 Cal.3d 341 (1984), the California Supreme Court reviewed the work of farmworkers who harvested cucumbers and analyzed whether they performed work as independent contractors or employees. The Court looked closely at their job duties and stated that the right to control test for determining whether a person is an employee must be applied with deference to the purposes of the protective legislation.

The Court presented an 8-point analysis to support its decision. Additional public policy factors were also included in the analysis to bring these workers into the protection under workers compensation.

Factors to be considered as to whether an employment relationship exists:

- (a) Whether the one performing services is engaged in a distinct occupation or business;
- (b) The kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the principal or by a specialist without supervision;
- (c) The skill required in the particular occupation;
- (d) Whether the principal or the worker supplies the instrumentalities, tools, and the place of work for the person doing the work;
- (e) The length of time for which the services are to be performed;
- (f) The method of payment, whether by the time or by the job;
- (g) Whether or not the work is a part of the regular business of the principal; and
- (h) Whether or not the parties believe they are creating the relationship of employer-employee.

In addition to an inquiry into common law factors, the *Borello* test adds an inquiry into factors such as (1) the remedial purpose of the legislation, (2) whether the alleged employees are within the intended reach of the legislation, and (3) the bargaining strengths and weaknesses of each party. The decision also reasoned that other statutes, such as the ALRA, should also apply to bring similar protections to these workers.

The Board has made it clear that challenged voters who satisfied the criteria of independent contractors and performed services during the eligibility period were not eligible voters and ruled that their challenged ballots not be opened. See *Milky Way Dairy* (2003) 29 ALRB No. 4 (hoof trimmer), *GH & G Zysling Dairy* (2006) 32 ALRB No. 2,

(handyman, electrician, cleaning lady), and *Artesia Dairy*, (2006) 32 ALRB No. 3 (bookkeeper and cattle broker).

#### B. Supervisors

In determining whether an employee is a supervisor under the Agricultural Labor Relations Act, Cal. Labor Code Section 1140.4(j) defines a supervisor as 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...the exercise of such authority is not of a merely routine or clerical nature, but requires independent judgment.

### IV.

#### LEGAL ANALYSIS AND RECOMMENDATIONS

##### 1. Mike Costa

Mike Costa was challenged for not being on the list and not an agricultural employee. The Employer did not provide any payroll records, summaries of payroll records, or timecards for Costa.

Costa stated on his declaration that he has owned Costa's Barn Cleaning for 17 years. He stated that on March 1, 2007, from 6:30 a.m. to 8:00 a.m., he washed the barn at the dairy. He does the same service for other dairies and sets his fee depending on the size of the job. He further stated that the amount of the job is agreed upon prior to taking the job.

Costa sends the dairy a monthly bill that has his name stamped on the front and the dairy pays him a check upon receipt of this bill. Costa uses his own equipment when he works at the dairy, does not carry workers' compensation insurance because he does not have any employees, and receives a 1099 from the dairy at the end of the year. He is the sole employee of his own business, which is his sole source of income. The Employer provided invoices for services provided by Costa and copies of cancelled checks with no tax withholdings payable to Costa.

According to the evidence, Costa is self-employed with his own business called Costa's Barn Cleaning. He sets his own fee according to the job, and the amount for the job is agreed upon prior to taking the job. Costa bills the dairy on a monthly basis for the services and the dairy pays him by check. A review of the check does not show any tax withholdings. He also receives a 1099 from the dairy at the end of the year. He works independently and provides his own equipment. Costa provides this same service to other dairies as well. Additionally, EDD records showed that Henry Garcia Dairy did not report any earnings for Costa.

Based on the foregoing, I conclude that there is sufficient evidence that Mike Costa, owner of Costa's Barn Cleaning, is an independent contractor and therefore was not employed by the Employer in the appropriate unit. I recommend that the challenge to his ballot be sustained.

## 2. John De Avila

John De Avila was challenged for not being on the list and not an agricultural employee. The Employer did not provide any payroll records, summaries of payroll records, or timecards for De Avila.

De Avila stated in his declaration that he is retired, but does handyman work at the dairy on an as needed basis for the past 5 to 6 years. He worked 2 to 3 days at the dairy from February 16, 2007 to March 4, 2007 when he changed a switch on a dairy wall, replaced a toilet seat and lid, and put caulking on the back of a sink. De Avila stated that when he has done a few jobs, he sends the dairy an invoice for payment. He uses his own tools for the jobs and when he needs replacement parts, he purchases them through the dairy's account at a hardware store.

De Avila keeps track of his own time, sets his own rate of \$20 per hour and uses preprinted invoices that have his name, address, and "Handyman" printed at the top. The Employer submitted copies of De Avila's 1099 form for 2006, billing invoices, and checks with no tax withholdings paid by the dairy.

According to the evidence, De Avila is a self-employed handyman doing work at the dairy on an as needed basis. The Employer submitted a 1099 form for the year 2006. De Avila worked unsupervised while performing his handyman repair work at the dairy, uses his own tools for his jobs, and sends the dairy preprinted invoices for payment of these jobs.

Additionally, EDD records showed that Henry Garcia Dairy did not report any earnings for De Avila.

Based on the foregoing, I conclude that there is sufficient evidence that John De Avila, a self-employed handyman, is an independent contractor and therefore was not employed by the Employer in the appropriate unit. I recommend that the challenge to his ballot be sustained.

### 3. David Freitas

David Freitas was challenged for not being on the list and not an agricultural employee. The Employer did not provide any payroll records, summaries of payroll records, or timecards for Freitas.

Freitas stated in his declaration that he owns two businesses, one called Freitas Maintenance Mobile Service and another in his own name. When he does work for the dairy, he works under Freitas Maintenance and bills \$65 per hour and is on call 24/7 for various trucking companies. Both of his companies are at the same address.

He has worked for the dairy for about 9 years as a mechanic. He stated that the dairy hired him to repair tractors, loaders, and feed equipment. He worked February 20 and 27, 2007 and March 3, 2007 during the eligibility period. Freitas provides his own tools, bills all his customers with a statement outlining date and type of work completed, and pays all his own employment taxes.

The Employer provided copies of Freitas Maintenance Mobile Service invoices for services performed at the dairy from 2005 to 2007.

According to the evidence, Freitas operates his own mechanic repair business when he did work for the dairy. He worked unsupervised when he performs these repairs to the dairy equipment. He uses his own tools when he performs this work, and sends the dairy an invoice with "Freitas Maintenance Mobile Service" at the top that states the work done, amount owed, and hourly rate. He pays his own employment taxes and provides the same service to other trucking companies.

Freitas is also listed in the yellow pages under Truck Repair and Service as "Freitas Maintenance" with the same address and telephone number he listed on his



declaration. EDD records also showed that Freitas reports his earnings to EDD under his company name and has elective disability insurance coverage. Additionally, EDD records showed that Henry Garcia Dairy did not report any earnings for Freitas.

Based on the foregoing, I conclude that there is sufficient evidence that David Freitas, owner of Freitas Maintenance Mobile Service, is an independent contractor and therefore was not employed by the Employer in the appropriate unit. I recommend that the challenge to his ballot be sustained.

#### 4. Jeff Harris

Jeff Harris was challenged for not being on the list and not an agricultural employee. The Employer did not provide any payroll records, summaries of payroll records, or timecards for Harris.

Harris stated in his declaration that he owns his own insemination business and that he has been examining and inseminating cows at the dairy for 28 years. He also does the same service to seven other dairies where the owners determine the amount of service. He has an agreement with the dairy for his labor. The dairy pays him on a 1099 form and he is responsible for his own taxes. The dairy hires Harris to examine and inseminate the animals.

At the dairy, he submits invoices for his work on the 1<sup>st</sup> of every month using personal invoices with his name and home address listed on the top and gets paid on the 15<sup>th</sup> of every month. He supplies his own tools and the dairy supplies the chalk and the records for each cow. His agreement with the dairy is that he is there 365 days per year, but he divides his services with the other seven dairies. None of the dairies provide workers' compensation insurance for him.

Harris also works as a sales representative for ABS Global, a company that provides bovine genetics, reproduction services, technologies, and udder care products. He sells products to the dairy as a sales representative and administers the product. Harris' insemination business is unrelated to ABS Global.

According to the evidence, Harris operates his own inseminator business. He does not work under supervision and has specific skills and training in providing insemination services. He provides his own tools except for the chalk and records of the cows. He submits invoice statements that have his name and address at the heading and bills the dairy. The invoice statement also shows whether this payment is current or delinquent, the dates, transactions, amounts, and outstanding balances. He performs these insemination services to seven other dairies, receives a 1099 form from the dairy, and pays his own taxes. None of the dairies that he works for provides him with workers' compensation insurance.

Additionally, a review of EDD records shows that Henry Garcia Dairy did not report any earnings for Harris.

Based on the foregoing, I conclude that there is sufficient evidence that Jeff Harris, owner of an insemination business, is an independent contractor and therefore was not employed by the Employer in the appropriate unit. I recommend that the challenge to his ballot be sustained.

##### 5. Louis Mendes

Louis Mendes was challenged for not being on the list and not an agricultural employee. The Employer did not provide any payroll records, summary of payroll records, or timecards for Mendes.

Mendes stated in his declaration that he has worked for the dairy for about five years doing cement work, welding repairs, and plumbing. Mendes provides this same service to 10 other dairies and uses his own tools, has his own service truck, pays his own employment taxes, and receives a 1099 form from all his customers for tax purposes.

He stated that he worked approximately 11 days in February 2007 and approximately 15 days in March 2007, but did not specify the exact days. He charges \$30 per hour and sends monthly invoices to the dairy for his services. Mendes is not supervised by anyone at the dairy and goes to the dairy only when dairy owner Henry Garcia calls him.

The Employer provided invoices dating from November 2005 to December 2006, along with copies of checks with no tax withholdings from the dairy to Mendes. The invoices state "Louis Mendes Welding" and "Invoice" at the top with Henry A. Garcia Dairy listed as the delivery address, payment terms of "Net 30 days", with the labor, materials, job description, unit price, and outstanding balance.

According to the evidence, Mendes operates his own welding repair business, does not work under supervision when he does his repair work, provides his own tools and service truck, and sends invoices with the heading "Louis Mendes Welding" for the work with payment terms. Mendes pays his own employment taxes, does the same work for 10 other dairies, and receives a 1099 form from all of his customers for tax purposes.

Additionally, EDD records showed that Henry Garcia Dairy did not report any earnings for Mendes.

Based on the foregoing, I conclude that there is sufficient evidence that Louis Mendes, who does business as Louis Mendes Welding, is an independent contractor and

therefore was not employed by the Employer in the appropriate unit. I recommend that the challenge to his ballot be sustained.

6. Joe Oliveira

Joe Oliveira was challenged for not being on the list. Oliveira stated in his declaration that he has worked at the dairy for 21 years. He is currently a feeder and worked full-time during the February 19, 2007 to March 4, 2007 eligibility period. He stated that he has never used a time clock and has never been required to use a timecard. He has state and federal taxes deducted from his gross salary and receives a W-2 form from the dairy every year. Oliveira stated that he works alone throughout the dairy and does not supervise any employees.

The Employer submitted a payroll summary, a W-2 form for 2006, as well as copies of check stubs from May 2006 to March 18, 2007 showing deductions taken for Medicare, social security, federal and state taxes, and state disability insurance. The Employer also reported quarterly taxes to EDD for Oliveira.

Although Oliveira did not have any time cards, there is sufficient evidence that he worked as an agricultural employee during the eligibility period. Additionally, dairy workers have confirmed that Oliveira worked at the dairy during the eligibility period as an outside worker.

Based on the foregoing, I conclude that Joe Oliveira worked as an agricultural employee during the eligibility period and I, therefore, recommend that the challenge to his ballot be overruled.

## 7. Jack Pearson

Jack Pearson was challenged for not being on the list and not an agricultural employee. The Employer did not provide payroll records, summaries of payroll records, or timecards for Pearson.

Pearson stated in his declaration that he has owned "Valley Nutrition" since 1993 with his office in Tulare, California. He has provided feed formulation to the dairy since January 1975. The services that he provides to the dairy are billed through his company Valley Nutrition. He does not have any employees, provides his own equipment, and is retained by the dairy on a monthly basis. Pearson provides this service to 47 other customers. He worked during the eligibility period on 2 occasions for approximately 15 minutes to 2 hours.

The Employer submitted invoices with the heading "Valley Nutrition" dated from December 2005 up to February 2007 along with copies of a cancelled checks with no tax withholdings payable to Valley Nutrition for \$350. The invoices also indicate "monthly retainer". Pearson has business cards and his office has the company name posted outside for the public.

According to the evidence, Pearson is self-employed as a feed formulator under his own business "Valley Nutrition", requires no supervision as a feed formulator, provides his own tools to perform his job, and worked on two occasions at the dairy during the eligibility period. Pearson submits his company invoices to the dairy on a monthly basis, pays his own employment taxes, and provides the same service to 47 other customers.

Additionally, a review of EDD records shows that Henry Garcia Dairy did not report any earnings for Pearson.

Based on the foregoing, I conclude that there is sufficient evidence that Jack Pearson, owner of Valley Nutrition, is an independent contractor and therefore was not employed by the Employer in the appropriate unit. I recommend that the challenge to his ballot be sustained.

8. Mark Pedro

Mark Pedro was challenged for not being on the list and not an agricultural employee. The Employer did not provide any payroll records, summaries of payroll records, or timecards for Pedro.

Pedro stated in his declaration that he has owned Pedro's Lagoon Service since 2004 and uses business cards. He has his own service trailer, purchases his own equipment, uses his own chemicals, and has his own tools. He works without supervision, with the exception of being told to add additional chemicals for various reasons. He signed a 1099 form for the company. Pedro also provides the same service to other dairies and bills them the same way he bills Henry Garcia dairy. He stated that he does not carry workers' compensation insurance because he is self-employed.

He stated that he maintains biological activity from the lagoon at the dairy and sends monthly invoices to the dairy monthly for these services and is paid by check. He worked at the dairy on February 24, 2007 and March 3, 2007 with each visit taking about 30 to 45 minutes to complete his work.

The Employer submitted billing invoices, cancelled checks with no tax withholdings, and a copy of Pedro's 1099 form for 2006.

According to the evidence, Pedro has his own business called Pedro's Lagoon Service that maintains lagoons. He does not work under supervision, unless told to add additional chemicals, and admits that he has his own service trailer, chemicals, and tools. The lagoon maintenance service is not a regular part of the dairy with Pedro coming to the dairy about once a week to complete a 30 to 45 minute job. He uses his own business invoices that show the dates, transactions amounts and balance due and is paid by check. He works for other dairies, which he refers to as "his customers". Pedro also indicated that he did not carry workers' compensation because he is self-employed and did not have any employees. Pedro's business name is on his trailer hitched to his truck as well as on the back window of his truck.

Additionally, EDD records showed that Henry Garcia Dairy did not report any earnings for Pedro.

Based on the foregoing, I conclude that there is sufficient evidence that Mark Pedro, owner of Pedro's Lagoon Service, is an independent contractor and therefore was not employed by the Employer in the appropriate unit. I recommend that the challenge to his ballot be sustained.

#### 9. Rosie Pena

Rosie Pena was challenged for not being on the list and not an agricultural employee. The Employer did not provide payroll records, summaries of payroll records, or timecards for Pena.

Pena stated in her declaration that she has worked at the dairy since 1989. She cleans the dairy owner's house and the company office as well as the house of Rick Garcia. She stated that she provides the same work to 18 other clients and does not use

any invoices to bill for her services. She stated that she cleans the lunchroom and the bathroom in the milking barn and is paid every two weeks in cash for her services, but on occasion, will accept payment by check. Pena also stated that she does carry her own cleaning products.

Pena stated that the dairy provides her with cleaning products as well as the equipment. When she is paid by check, she does not have any federal or state taxes deducted. She worked at the dairy on February 22, 2007 and March 1, 2007.

Initially, the Employer stated that Pena was paid in cash but had no documents to show the cash payments. Later, the Employer provided a copy of a ledger and a check indicating she was paid \$210 but with no deductions or withholdings. The Employer stated that Pena cleaned the dairy office, lunchroom, and bathroom during the eligibility period and submitted a March 8, 2007 check payable to Pena, but there was no information regarding when she worked and the number of hours worked. A worker witness declaration stated that Pena was never seen working in the milk barn office or trailer, but has been seen at the owner's house.

According to the evidence, Pena works as a cleaning person who sets her own wage rate and is normally paid in cash by her clients and does not work under any supervision. She does supply her own cleaning products as well as using the products from her clients. She stated that she worked at the dairy on two occasions during the eligibility period, February 22, 2007 and March 1, 2007 and also does the same work for 18 other clients. When she is paid by check, she does not have any federal or state taxes deducted.



Additionally, a review of EDD records shows that Henry Garcia Dairy did not report any earnings for Pena.

Based on the foregoing, I conclude that there is sufficient evidence that Rosie Pena, a cleaning person who works for 18 other clients, is an independent contractor and therefore was not employed by the Employer in the appropriate unit. I recommend that the challenge to her ballot be sustained.

#### 10. Oscar Sandoval

Oscar Sandoval was challenged for not being on the list. He stated in his declaration that he has worked at the dairy since 1997 as an outside work with duties as a relief feeder, moving cows, treating sick cows, feeding cows, and other general outside duties. He works a split shift six days a week and worked during the February 19, 2007 to March 4, 2007 eligibility period. He also stated that he does not have the authority to give orders, days off, discipline, or hire anyone.

The Employer provided payroll summaries, payroll records, and timecards for Sandoval showing that he worked during the eligibility period. The Petitioner provided information from dairy employees that Sandoval had the authority to hire, direct workers in their work, and give permission to workers to take the day off. One dairy employee indicated that the owner told him that he was to follow Sandoval's orders because Sandoval was a supervisor.

Based on the evidence, Sandoval may exercise various supervisory responsibilities, however, at this time there is insufficient information as to the extent of his supervisory responsibilities. Accordingly, I conclude that the challenge to the ballot of Oscar Sandoval raises substantial and material factual and legal issues that can best be

resolved by a hearing on this matter. However, it is possible that this one ballot will not be outcome determinative. Therefore, it is recommended that the ballot of Oscar Sandoval not be counted and no hearing held unless it is outcome determinative after a final decision has been rendered regarding the other challenged ballots.

#### 11. Esteban Yanez

Esteban Yanez was challenged for not being on the list and not an agricultural employee. The Employer did not provide payroll records, summaries of payroll records, or timecards for Yanez.

Yanez stated in his declaration that he has owned Yanez Lawn Care for about 20 years. He employs his son Alex Yanez and when the work increases, he will hire Rosario Yanez. He provides lawn service to the dairy and about 35 to 40 other customers. He provides all his equipment and pays all of his business taxes including EDD taxes. He has worked for the dairy for about 13 to 15 years and was hired to work every Thursday for about 2 to 3 hours. He worked during the eligibility period. His rate of pay is \$450 per month and bills the dairy the 1<sup>st</sup> of every month and is paid by check.

The Employer provided copies of invoices and cancelled checks payable to "Esteban Yanez Lawn Care" with no tax withholdings. The Employer also provided a 1099 form for Yanez Lawn Care for 2006.

According to the evidence, Yanez owned his own business called Yanez Lawn Care and provided this lawn care service to the dairy during the eligibility period. He hires his own employees, provides all of his own equipment, provides the same service to 35 to 40 other customers, and pays all of his own business taxes, including EDD taxes.

The invoice heading has "Yanez Lawn Care" and under customer, Henry A Garcia Dairy is listed. The invoice also describes the work as "gardening service" for \$450 with payment listed as "check". The checks by the dairy were made payable to Yanez Lawn Care with no tax withholdings. The dairy also submitted a 1099 form for Yanez Lawn Care for the year 2006.

Additionally, a review of EDD records shows that Henry Garcia Dairy did not report any earnings for Yanez.

Based on the foregoing, I conclude that there is sufficient evidence that Esteban Yanez, owner of Yanez Lawn Care, is an independent contractor and therefore was not employed by the Employer in the appropriate unit. I recommend that the challenge to his ballot be sustained.

## V.

### SUMMARY OF RECOMMENDATIONS

#### A. Challenged Vote to Be Overruled

1. Joe Oliveira

#### B. Challenges to these Ballots Should Be Sustained

1. Mike Costa
2. John De Avila
3. David Freitas
4. Jeff Harris
5. Louis Mendes
6. Jack Pearson
7. Mark Pedro
8. Rosie Pena
9. Esteban Yanez

#### C. Challenged Vote to Be Held in Abeyance

1. Oscar Sandoval

VI.

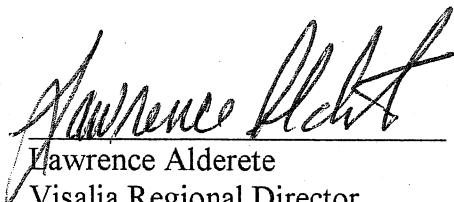
PROCEDURES REGARDING EXCEPTIONS TO THE REPORT:

Under Section 20363(b) of Title 8 of the California Code of Regulations, the foregoing conclusions and recommendations of the Regional Director shall be final and conclusive unless exceptions thereto are filed with the Executive Secretary of the Board by personal service within five (5) days, or by deposit in registered mail postmarked within five (5) days, from the date of service upon the parties of this Report.

An original and six (6) copies of the exceptions shall be filed and shall be accompanied by seven (7) copies of declarations or other documentary evidence in support of the exceptions.

Under Section 20166 of Title 8 of the California Code of Regulations, copies of any exceptions and supporting documents shall be served on all other parties to the proceeding and on the Regional Director making this Report, and Proof of Service shall be filed with the Executive Secretary of the Board with the exceptions and supporting documents.

Dated: June 8th, 2007

  
Lawrence Alderete  
Visalia Regional Director  
Agricultural Labor Relations Board  
1642 W. Walnut Avenue  
Visalia, California 93277  
Tel. (559) 627-0995