Bakersfield, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

LASSEN DAIRY, INC., dba MERITAGE DAIRY FARMS,	)	
Employer,	)	Case No. 07-RC-04-VI
and	)	
UFCW UNION, LOCAL 5,	)	34 ALRB No. 1 (February 15, 2008)
Petitioner.	)	

DECISION AND ORDER

UFCW Union Local 5 (UFCW or Union) petitioned for an election on September 4, 2007, seeking an election among the agricultural employees of Lassen Dairy, Inc. dba Meritage Dairy (Employer or Dairy). On September 11, 2007, an election was held. The initial tally of ballots was as follows:

Union……17

No Union……..15

Unresolved Challenged Ballots… 6

Voided Ballot…….1

Five individuals were challenged because they were not on the eligibility list: William Peter Vander Poel, Jr., Juan Alberto Tostado, Jose Antonio Tostado, Jose

Perez Tapia and Carlos Martinez. One individual, Refugio Ramirez, was challenged based on an allegation by the Union that he is a supervisor.

Because the challenged ballots were sufficient in number to affect the outcome of the election, the Regional Director (RD) of the Agricultural Labor Relations Board's (ALRB or Board) Visalia Regional Office conducted an investigation of the eligibility of the challenged voters and issued a report containing his recommendations on November 9, 2007. The RD's recommendations about individual voters are outlined below. On November 19, 2007, the Employer filed its exceptions to the RD's report on challenged ballots.

The Regional Director's Recommendations:

1. William Vander Poel, Jr.

William Vander Poel, Jr. was challenged for not being on the eligibility list. The RD's report indicates that he performed work at the Dairy during the eligibility period, but that he is the son of a major stockholder in Lassen Dairy, Inc., William Vander Poel, Sr.[1] The RD concluded that under section 20352(b)(5) of the Board's regulations,[2] William Vander Poel, Jr. was not eligible to vote as he is the child of a substantial stockholder of an agricultural employer. The RD recommends that the challenge to Vander Poel's ballot be sustained.

[1] We note that Vander Poel, Sr. is actually a trustor and trustee of the William and Kerry Vander Poel Trust, which is the majority stockholder of Lassen Dairy, Inc. The Dairy is a California corporation owned by Richard Oppedyk (2,222 shares) and the William and Kerry Vander Poel Trust (20,000 shares).

[2] The Board's regulations are codified at Title 8, California Code of Regulations, section 20100 et seq.

2. Juan Alberto Tostado and Jose Antonio Tostado

Juan Alberto Tostado and Jose Antonio Tostado were both challenged as not on the eligibility list. Neither individual worked during the eligibility period because both had been terminated by the Employer before the eligibility period began. However, both had filed unfair labor practice (ULP) charges concerning their discharges (Juan Alberto filed a charge on August 9, 2007 and Jose Antonio filed a charge on June 12, 2007). The RD states in his report that he had not received any evidence refuting that both men would have worked at the Dairy during the eligibility period but for being discharged. Since the discharges are the subject of ULP investigations, the RD recommends that the ballots of both men be resolved based on the resolution of the ULP charges and that their ballots remain sealed until then.

3. Jose Perez Tapia and Carlos Martinez

Jose Perez Tapia and Carlos Martinez were also challenged as not on the eligibility list. The RD's report states that although Tapia and Martinez were not on the initial employee list provided by the Employer in its response to the petition for certification, the Employer later provided time cards for these two individuals which purported to show that they worked during the eligibility period for the Dairy. According to the Employer, both men primarily work for Bonanza Farms, which is adjacent to the Dairy and grows and harvests products used to feed the Dairy's cows. Bonanza Farms is a general partnership which is owned by the William and Kerry Vander Poel Trust (25%) and Geneva Vander Poel (75%). The RD found that the declarations submitted by the Employer failed to establish that Tapia and Martinez worked at the Dairy during the

eligibility period. The RD also noted that both Tapia and Martinez informed Board agents that they worked for Bonanza Farms, not the Dairy. The RD recommends that the challenges to Tapia and Martinez's ballots be sustained.

4. Refugio Ramirez

Refugio Ramirez was challenged as being a supervisor. The RD's report indicates that Ramirez's own declaration states that he has been employed as a herdsman at the Dairy since February 2007, and also states that he does not supervise any employees or have the authority to hire or fire any one. The Union provided declarations from other employees of the Dairy stating that Ramirez is in charge of the dairy when the main supervisor, Carlos Rey, is absent. Ramirez is also paid more than other herdsmen. The RD's report points out that although there are some indicia of supervisory status, there is not enough evidence to conclude Ramirez is a supervisor and therefore ineligible to vote. The RD's report finds that the challenge to Ramirez's ballot raises substantial and material factual and legal issues that would best be resolved in an evidentiary hearing.

Discussion and Analysis

1. William Vander Poel, Jr.

William Vander Poel, Jr. is the son of William Vander Poel, Sr., a trustor and trustee of the William and Kerry Vander Poel Trust, which is the majority stockholder in Lassen Dairy, Inc., a California corporation owned by the Trust (20,000 shares) and Richard Oppedyk (2,222 shares). Vander Poel, Jr. works full time at the Dairy during the summer and on weekends during the rest of the year.

The Employer argues in its exceptions to the RD's Challenged Ballot Report that Board regulation section 20352(b)(5), which was relied on by the RD to find Vander Poel, Jr. ineligible to vote, is invalid because it is without any enabling statute.

We find that the Employer has provided no basis for challenging the validity of Board regulation section 20352(b)(5). Section 20352(b)(5) is a duly promulgated, narrowly applied regulation which carves out an exclusion for only the closest relatives of an employer (parents, children and spouse).[3] This is in line with traditional norms of bargaining unit membership. As the Board has previously stated, section 20352(b)(5) "embodies 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." (*Pete Vanderham Dairy, Inc*. (2002) 28 ALRB No. 1.)

The Employer further argues that even if regulation section 20352(b)(5) is valid, it does not apply to the facts in the instant case because the William and Kerry Vander Poel Trust is a legally distinct entity with which Vander Poel, Jr. cannot have a familial relationship. The Employer reasons that Vander Poel, Jr. is merely an employee of the corporation and is therefore eligible to vote.

We find this argument unpersuasive. In *Foam Rubber City #2 of Florida* (1967) 167 NLRB 623, the National Labor Relations Board (NLRB) found immediate

[3] Other persons excluded from eligibility under regulation section 20352(b) include supervisors as defined in Agricultural Labor Relations Act (ALRA or Act) section 1140.4(j), security guards employed by the employer, managerial employees, and confidential employees.

relatives of substantial stockholders of a corporation were excluded from the definition of employee contained in section 2(3) of the National Labor Relations Act (NLRA). In that case, the NLRB looked "beyond the employer's corporate form to the fundamentals of its existence," and found it was "clear that the employer is actually owned and managed by just two individuals who possess, and are in a position to exercise, full bargaining authority on behalf of the corporation in precisely the same fashion as if they were copartners." In the case of *Cerni Motor Sales* (1973) 201 NLRB 918, the NLRB fashioned the rule that NLRA section 2(3) serves to exclude immediate relatives of shareholders who own a 50 percent or greater interest in the company. The NLRB's view is that children of corporate principles who own a majority interest in a company are not merely employees of the corporation.

This view is mirrored in Section 20352(b)(5) of the Board's regulations, which state that children, spouses and parents of substantial stockholders of an employer are ineligible to vote. Although technically the William and Kerry Vander Poel Trust rather than Vander Poel, Sr. is the majority shareholder in the company, it is not the mere corporate form of the employer but the "fundamentals of its existence" that inform the Board whether the individual in question has the type of relationship with the employer that triggers the 20352(b)(5) exclusion from voter eligibility.

The William and Kerry Vander Poel Trust is a revocable family trust. Such a trust is a common estate-planning tool in which the trustee generally retains complete control over the property and assets in the trust and has the right to amend or cancel the trust during his lifetime.

William Vander Poel, Sr. exerts the same control over the Dairy as a trustee as he would if he were a substantial shareholder in the company in his individual capacity or if he were a sole proprietor. Several employees stated in declarations submitted by the Employer in support of its exceptions that Vander Poel, Sr. was the "boss," and this stands undisputed. (Declaration of Jose Perez Tapia, Declaration of Carlos Martinez.) It is unnecessary in this case to determine if the creation of a revocable trust is ever of legal significance in the context of an employment relationship. However, in this case it is apparent that Vander Poel Sr.'s control of the Dairy's operations precludes observance of such a legal fiction. It follows, therefore, that Vander Poel, Jr. and his father have the type of relationship that triggers the 20352(b)(5) exclusion from voter eligibility. We therefore sustain the challenge to William Vander Poel, Jr.'s ballot and order that it not be opened and counted.

2. Juan Alberto Tostado and Jose Antonio Tostado

As indicated above, Juan Alberto Tostado and Jose Antonio Tostado had been terminated by the Employer before the eligibility period began. There are pending unfair labor practice charges alleging that the Employer improperly fired the Tostados in violation of the Act. As of the date of this decision, these charges have not been disposed of by the Regional Director or General Counsel.

In representation proceedings the Board must defer to the exclusive authority of the General Counsel regarding the investigation and resolution of unfair labor practice charges where evaluation of the merits of issues in the representation case is dependent on the resolution of issues in a pending unfair labor practice matter.

(*Mann Packing Co. Inc.* (1989) 15 ALRB No. 11; *Richard's Grove and Saralee's Vineyard, Inc*. (2007) 33 ALRB No. 7.)

In the instant case, the evaluation of the challenged ballots of Juan Alberto Tostado and Jose Antonio Tostado depends on the resolution of the pending unfair labor practice charges. If it is determined that these two individuals were terminated unlawfully, then the challenges to their ballots would be overruled and their votes counted.[4] As specified below, the challenged ballots of the Tostados shall be held in abeyance pending the General Counsel's resolution of the related ULP charges.

3. Jose Perez Tapia and Carlos Martinez

The Employer argues that although Tapia and Martinez work primarily for Bonanza Farms, attendance cards show that they worked at the Dairy during the eligibility period. The Employer also argues that even when the two men are working for Bonanza Farms, they are also employed by the Dairy.

We find that neither the timecards submitted for Tapia and Martinez nor any of the declarations in the record indicate that they worked at the Dairy during the eligibility period of August 17, 2007-August 30, 2007. The timecards simply indicate that they worked during that period performing "farming," the work customarily performed for Bonanza Farms. The declarations indicate that they sometimes work at the Dairy when there is little or no work at Bonanza Farms, but fail to indicate that they did

[4] Due to a lack of evidence to the contrary, the RD found that the Tostados would have been working during the eligibility period if not for their discharges that are the subject of the pending unfair labor practice charges, and in its exceptions the Employer does not dispute that finding.

so during the eligibility period. Therefore, the Board upholds the RD's conclusion that the Employer failed to establish that Tapia and Martinez worked at the Dairy during the eligibility period.

Although the Employer does not directly make the argument that the Dairy, Bonanza Farms, and Tule River Farms constitute a single employer for collective bargaining purposes, its argument in favor of overruling the challenges to Tapia and Martinez's ballots contains elements of the Board's single employer test discussed below. The Regional Director did not evaluate whether the entities in question met the single employer test. As previously stated, his investigation of challenged ballots indicated that both men worked for Bonanza Farms during the eligibility period, were not agricultural employees of the Dairy, and were therefore not eligible to vote. Therefore, it is necessary for the Board to determine whether the single employer criteria are met in this case. If so, then Tapia and Martinez would be in the bargaining unit regardless of whether they worked at the Dairy or in the neighboring fields at Bonanza Farms during the eligibility period.

In *Andrews Distribution Company* (1988) 14 ALRB No. 19, the ALRB adopted the NLRB's test for determining whether two or more entities are in fact a single employer for collective bargaining purposes. The analysis used by the NLRB and courts in determining whether two or more entities are sufficiently integrated so that they may fairly be treated as a single employer is that set out in *Parklane Hosiery Co.* (1973) 203 NLRB 597. The four principal factors considered by the NLRB in *Parklane, supra,* were: 1) functional interrelation of operations; 2) common management; 3) centralized

control of labor relations; and 4) common ownership or financial control. In *NLRB v. Carson Cable TV, et al.* (9th Cir. 1986) 795 F.2d 879, the court observed that the NLRB has often stressed the first three of the factors listed above, particularly that which relates to control of labor relations, because such factors are reliable indicators of an operational integration. The court cautioned that while no one factor is controlling, neither must all four factors be present in order to find single employer status. Thus, single employer status depends on all of the circumstances and has been characterized as an absence of an "'arm's length relationship . . . among unintegrated companies." (*Blumenfeld Theaters Circuit* (1979) 240 NLRB 206, 215, enforced (9th Cir. 1980) 626 F.2d 865.)

When these standards are applied to the Dairy, Tule River Farms and Bonanza Farms using the undisputed facts presently in the record, there is a strong, though not conclusive, basis for finding these entities to be a single employer.

The entities appear to be functionally interrelated. According to the Employer, Bonanza Farms, which is located directly next door to the Dairy, exists for the sole purpose of supporting the Dairy. Feed for the Dairy's cows is grown next door at Bonanza Farms. Tapia and Martinez clock into work in the break room located at the Dairy even when working at Bonanza Farms. Bonanza Farms employees share the break room, office, restroom and other facilities with Dairy employees. Tule River Farms, Inc. owns the equipment used to harvest crops grown at Bonanza Farms and also operates a payroll service for Bonanza Farms' two employees, Tapia and Martinez. Richard Oppedyk, a shareholder of Lassen Dairy, Inc., states in his declaration that Bonanza

Farms exists in order to meet the requirement to off-set environmental impacts of the Dairy.

Bonanza Farms and the Dairy appear to share common management. Carlos Martinez stated in his declaration that his boss is "Bill" (presumably William Vander Poel, Sr.) and that Bill gives his orders through Cesar Rey, who also supervises employees at the Dairy. Similarly, Jose Tapia stated in his challenged ballot declaration, and in his declaration submitted in support of the Employer's position on the challenged ballots, that Mr. Vander Poel tells him what to do and where to work. Dairy Supervisor Cesar Rey states in his declaration that he "communicates to the [Bonanza Farms employees] from the owners of Bonanza Farms as to their work," and that he has the authority to send them home or fire them if they should engage in serious misconduct.

Tule River Farms, Bonanza Farms, and the Dairy appear to be under common ownership and control. Bonanza Farms a general partnership is owned by the William and Kerry Vander Poel Revocable Trust (25%) and Geneva Vander Poel (75%). One hundred percent of Tule River Farms, Inc. stock is held by the William and Kerry Vander Poel Trust. Lassen Dairy, Inc. dba Meritage Dairy is a California Corporation owned by the William and Kerry Vander Poel Revocable Trust (20,000 shares) and Richard Oppedyk (2,222 shares). The Employer submits the share certificates of the Dairy in support of its petition.

As for centralized control of labor relations among these entities, Ken Hernandez, human resources manager for Tule River Ranch, Inc., states in a declaration submitted in support of the Employer's position on the challenged ballots that he

oversees all human resource services of related entities "such as Tule River Farms, Bonanza Farms and Meritage Dairy." There is no other information in the record that describes the labor relations policies of the three entities.

While there is information in the record that is useful in evaluating whether Tule River Farms, Bonanza Farms, and the Dairy constitute a single employer for collective bargaining purposes, additional information, particularly regarding whether there is centralized control of labor relations, is necessary to reach a conclusion. We therefore order Tapia's and Martinez's challenges be set for hearing before a hearing examiner who will take evidence on whether the three entities constitute a single employer under the test set forth in *Andrews Distribution Company*, *supra*, 14 ALRB No. 19. In addition, the Board takes notice that one of the pending objections filed by the Employer following the election alleges that employees of Bonanza Farms should have been included in the bargaining unit. Although the Board makes no ruling on the objection at this time, in the interest of judicial economy, the Board orders that the IHE take evidence on the number of agricultural employees employed by Bonanza Farms and Tule River Farms and whether such employees received actual notice of the election held on September 11, 2007.

4. Refugio Ramirez

In support of its exceptions, the Employer submits numerous declarations stating that Ramirez is not a supervisor and works on an equal level as other employees. Ramirez himself denied having any supervisory duties in his challenged ballot declaration. During the challenged ballot investigation, the union submitted declarations

from employees who state that they were told that Ramirez was their supervisor and that they should follow his directions.

The employee earnings summary submitted during the challenged ballot investigation shows that Ramirez earned $1,846 between August 21, 2007 and September 3, 2007, an amount that is about $700 or $800 higher than other employees except for Cesar Rey, the undisputed supervisor, who earned $3,653, and Juan Torres, whose declaration indicates he works at the Dairy as an inseminator. Torres earned $1,910. As the RD points out in his challenged ballot report, the fact that Ramirez received a higher salary does not itself establish supervisory status. We agree that there remain substantial, material legal and factual questions in dispute that must be resolved by an evidentiary hearing.

We therefore affirm the RD's recommendation as to Ramirez, and set his ballot for hearing. The investigative hearing examiner will take evidence on whether the challenge to his ballot should be sustained or overruled on the basis of whether or not he is a supervisor as defined in section 1140(j) of the Act.

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ORDER

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

Sustained
William Vander Poel, Jr.

Set for Hearing
Jose Perez Tapia
Carlos Martinez
Refugio Ramirez

Held in Abeyance
Juan Alberto Tostado
Jose Antonio Tostado

DATED: February 15, 2008

GUADALUPE G. ALMARAZ, Chair

GENEVIEVE A. SHIROMA, Member

CATHRYN RIVERA-HERNANDEZ, Member

CASE SUMMARY

LASSEN DAIRY, INC. dba
MERITAGE DAIRY
(UFCW UNION, LOCAL 5)

Case No. 07-RC-04-VI
34 ALRB No. 1

Background

A representation election was conducted on September 4, 2007 to determine whether or not agricultural employees at Lassen Dairy, Inc. dba Meritage Dairy (Employer or Dairy) wished to be represented by UFCW Union, Local 5 (UFCW or Union). A total of 39 ballots were cast, with 17 votes for the Union, 15 votes for "no union," 6 unresolved challenged ballots and 1 voided ballot. The Regional Director (RD) conducted a post election investigation of the challenged ballots, and on November 9, 2007 issued a Challenged Ballot Report recommending that that the challenges to 3 ballots be sustained, that 2 challenges be held in abeyance pending the resolution of related ULP charges, and that 1 ballot be set for hearing should it became outcome determinative. The Employer filed exceptions to the RD's report.

Board Decision and Order

The Board's decision affirmed in part and overruled in part the RD's Challenged Ballot Report as follows:

The Board sustained the challenge to the ballot of the son of a trustee of a family trust which is the majority stockholder in the Dairy and found the son was ineligible to vote under Board regulation section 20352(b)(5). The Board found the Employer had not provided a basis for its challenge to the validity of section 20352(b)(5). The Board also rejected the Employer's argument that even if valid, section 20352(b)(5) did not apply because the son could not have a familial relationship to the trust. The Board reasoned that under the circumstances of this case, the trustee/father exerted the same control over the company as he would if he were a substantial shareholder acting in his individual capacity, therefore the section 20352(b)(5) exclusion was applicable.

The Board set for hearing the challenges of two individuals who are the employees of a neighboring farm. The Board ordered the hearing examiner to take evidence on whether the farm, the Dairy and a related business that provides payroll services and equipment to the Dairy and farm constitute a single employer for collective bargaining purposes under the test set forth in *Andrews Distribution Company* (1988) 14 ALRB No. 19.

The Board affirmed the RD's recommendation to set for hearing the challenged ballot of an individual alleged to be a statutory supervisor. The Board also affirmed the RD's recommendation to hold the challenged ballots of two individuals in abeyance pending the General Counsel's resolution of related ULP charges.

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