STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

FRANK PINHEIRO DAIRY dba PINHEIRO DAIRY & MILANESIO FARMS, Employer, and UNITED FOOD AND COMMERCIAL WORKERS, LOCAL 5, Petitioner.	Case No. 2009-MMC-02 (35 ALRB No. 5) 36 ALRB No. 1 (March 24, 2010)

DECISION AND ORDER

I. Introduction

This case turns on the interpretation of California Labor Code section 1164(a) which sets forth the statutory prerequisites for requiring that an employer and a union participate in the mandatory mediation and conciliation (MMC) process.[1] The portion of section 1164(a) at issue reads as follows:

> "Agricultural employer," for the purposes of this chapter, means an agricultural employer, as defined in subdivision (c) of section1140.4, who has employed or engaged 25 or more agricultural employees during any

[1] The provisions governing the entire MMC process are found at California Labor Code sections 1164-1164.13, and California Code of Regulations, title 8, sections 20400-20408.

calendar week in the year preceding the filing of a declaration pursuant to this subdivision.

The Agricultural Labor Relations Board (Board or ALRB), interpreting this section of the statute for the first time, previously found that Frank Pinheiro Dairy (Employer, Dairy or Pinheiro) met the 25 employee threshold, and ordered Employer and the United Food and Commercial Workers, Local 5 (UFCW or Union) to participate in the MMC process. (*Frank Pinheiro Dairy* (2009) 35 ALRB No. 5.) In the present Decision and Order, the Board hereby vacates *Frank Pinheiro Dairy* (2009) 35 ALRB No. 5, revises its interpretation of section 1164(a)[2] as explained below, and orders an expedited hearing on matters relevant to determining whether the preliminary requirements for participation in the MMC process have been met.

II. Background

On September 8, 2009, the UFCW filed a declaration pursuant to section 1164(a) requesting that the Board order the Employer to participate in the MMC process. The Union alleged that the Employer had employed 25 or more agricultural employees during a calendar week in the year preceding the filing of the declaration.[3] In support of this contention, the UFCW attached the list of eligible voters provided by the Employer in the course of the representation case (2009-RC-001-VIS). This list was dated

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[2] All further statutory references are to the California Labor Code unless otherwise indicated.

[3] The UFCW's declaration was filed on September 8, 2009; therefore, the pertinent 12-month time period is from September 8, 2008 to September 7, 2009.

January 26, 2009, and showed the names and addresses of 24 individuals. The UFCW argued that a 25th employee, Eliazar Reyes, was improperly left off this list because he was on vacation during the period before the election and the day of the election, but that he returned to work shortly after the election was held.[4]

In addition, the UFCW attached a list of employees provided by Employer on March 12, 2009, showing 27 employees, including two individuals with the title "Herdsman," Albert Contreras and Joe Ferrumpau. The UFCW argued that Contreras and Ferrumpau were agricultural employees and not supervisors and therefore should count toward the 25 agricultural employee threshold.

On September 22, 2009, the Employer filed its answer to the UFCW's request for mediation and conciliation. First, the Employer argued that Eliazar Reyes was not on vacation during the pay period before the election. Rather, he had been laid off for the season. In support of this contention Employer attached an Employment Development Department (EDD) Unemployment Insurance Claim dated December 19, 2008, which stated Reyes' last day worked was December 13, 2008, and the reason for separation was that "work ended." Employer stated that Reyes was recalled in February 2009.

Second, the Employer argued that Herdsmen Contreras and Ferrumpau were supervisors, and thus did not count toward the 25 agricultural employee threshold in Labor Code section 1164.

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[4] The election was held January 30, 2009. The tally of ballots showed 12 votes for the union, 9 for no union, and 2 unresolved challenged ballots for a total of 23 voters.

Finally, the Employer argued that exclusive of Contreras and Ferrumpau, Employer never employed more than 24 agricultural employees simultaneously at any given time during any calendar week in the 12 months preceding the request for mediation. In support of this contention, Employer submitted voluminous payroll data including electronic daily time records for each payroll period during the 12 months in question and an Excel spreadsheet showing the checks issued to employees of the Dairy over the course of the relevant period. The Employer did not dispute that the other statutory prerequisites for the MMC process were met.

A. Board Decision and Order (2009) 35 ALRB No. 5

On October 1, 2009, after reviewing the UFCW's request for MMC and the Employer's answer, the Board issued its decision and order referring the parties to the MMC process.

The Board found that the UFCW's argument that Eliazar Reyes was improperly left off the voter eligibility list was without merit. Documents submitted by Employer showed Reyes did not have an employment relationship with Pinheiro at the time of the 2009 election.

Consistent with the interpretation of "agricultural employees" in other provisions of the Agricultural Labor Relations Act (ALRA; Lab. Code § 1140, et seq.), the Board interpreted section 1164 as excluding supervisory employees from the 25-employee threshold; however, the Board found it was not necessary to resolve the question of whether or not Herdsmen Contreras and Ferrumpau were supervisors because

the Board concluded that the Employer engaged 25 employees exclusive of these two men during at least two calendar weeks in the year preceding the request for MMC.

The Board construed section 1164(a) as requiring a head count of the total number of agricultural employees who were on the payroll at some time in any given week in the year prior to the filing of a declaration seeking a referral to mandatory mediation and conciliation. Under this standard, the Board found that an examination of payroll records submitted by the Employer revealed that the 25-agricultural employee threshold was met during at least two calendar weeks in the year preceding the filing of the request for mediation and conciliation. Therefore, the Board ordered the parties to participate in the MMC process.

B. Employer's Petition for Writ of Review

On October 8, 2009, the Employer filed a petition for writ of review and request for immediate stay of the Board's decision and order in case number 35 ALRB No. 5 with the Court of Appeal. The Employer argued that the Board had erred in interpreting the phrase "during any calendar week."

The Employer filed a brief in support of its petition for writ of review on October 19, 2009. There, for the first time, Employer presented a detailed argument regarding the interpretation of section 1164(a). The thrust of Employer's argument was that the statute required that an employer employ 25 or more agricultural employees throughout the course of an entire calendar week in the year leading up to the request for MMC. Employer reasoned that the Legislature's use of the phrase "during any calendar

week" suggests that the 25-employee threshold must be maintained for a full seven-day calendar week.

Although the Board argued that the Court of Appeal was without jurisdiction to consider Employer's petition for review of the Board's decision referring the parties to MMC, the Board decided to revisit its interpretation of section 1164(a). While the matter was pending before the Court of Appeal, the Board indicated that it intended to reconsider its original decision referring the parties to MMC, and that it intended to stay the MMC process pending reconsideration. However, the Board's view was that it could not unilaterally act to stay the MMC proceeding until the Court ruled on the issue of whether the Court had jurisdiction to consider Employer's petition for review. A period of nearly two months lapsed before the Court acted on the matter.[5] On December 28, 2009, the Court issued an order denying Employer's October 8, 2009 petition for review. This had the effect of sending the matter back to the Board for action; however, at that time the Board was without a quorum and did not have the ability to act to stay the MMC process.

[5] On October 9, 2009, the court granted the Employer's request for an immediate stay of the MMC process; however, on October 30, 2009, the court issued an order dissolving the stay of the MMC process provided for in its previous order, but did not rule on the Employer's petition for review. Consequently, the parties were required to proceed with the MMC process.

The Board's quorum was restored on January 20, 2010, and on January 21, 2010, the Board issued Administrative Order 2010-01 which stayed the MMC process pending the Board's reconsideration of its original decision and order.[6]

On February 3, 2010, the Board issued Administrative Order 2010-02 requesting further briefing from the parties regarding the interpretation of the phrase defining agricultural employers in section 1164(a) as those who "employed or engaged 25 or more agricultural employees during any calendar week in the year preceding the filing of a declaration." Specifically, the parties were asked:

> 1) Does the phrase "during any calendar week in the year preceding the filing of a declaration" contained in Labor Code section 1164(a) require that an employer maintain a threshold of 25 or more agricultural employees throughout the course of an entire calendar week in the year preceding the request for MMC in order to qualify a matter for a referral to the mandatory mediation and conciliation process? 2) Is it sufficient that an employer employ or engage a total number of 25 agricultural employees at some time in a calendar week? 3) Is there another reasonable interpretation of the phrase "during any calendar week"?

The Board also asked the parties if they could stipulate that the electronic time and payroll records submitted by the Employer on CD ROM on September 22, 2009, were complete and contained the names and payroll data of all agricultural employees employed by Employer during the relevant 12-month period. If parties were unwilling or unable to stipulate to this, the Board requested that Employer submit a declaration verifying the records are complete, accurate and contain the names of all

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[6] The first MMC session began on January 6, 2010. It is not known how many times the parties met with the mediator before the Board issued its order staying the MMC process.

agricultural employees employed from September 8, 2008 to September 7, 2009. The Board also requested that the Union submit a declaration stating its position as to whether the records on the CD ROM were complete, accurate and contained the names of all agricultural employees employed in the relevant period.

Both parties submitted briefs on the novel issues presented by this case in response to the Board's order. The parties were unable to reach a stipulation regarding the completeness of the payroll data, and so the Employer submitted a declaration by Anthony P. Raimondo averring that the time and payroll records submitted previously were true, complete and accurate.[7]

III. Discussion

A. The Board's Jurisdiction to Reconsider its Decision and Order

As a preliminary matter, the Union argues that the Board does not have jurisdiction to change or modify its Decision in *Frank Pinheiro Dairy* (2009) 35 ALRB No. 5. The Union argues that because the Court of Appeal denied Employer's petition for writ of review without remanding the matter back to the ALRB, the Board's original decision sending the parties to MMC remains intact, and the Board does not have the authority to unilaterally modify its decision. Moreover, the Union argues, because Employer did not seek reconsideration of the Board's original decision, the Board's

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[7] Raimondo's declaration states that records from the payroll period August 31, 2009, to September 7, 2009, were inadvertently omitted from the original Excel spreadsheet showing the checks issued to employees of the Dairy over the course of the relevant period. A spreadsheet containing information from this payroll period was attached as an exhibit to Employer's brief to the Board.

decision is now final and cannot be modified. The Union further argues that the MMC statute does not provide the Board with the authority to reconsider an order directing the parties to MMC.

The Board finds no merit in the Union's arguments. The Board's position in the Court of Appeal was that the Court lacked jurisdiction to review the Board's Decision and Order, *Frank Pinheiro Dairy* (2009) 35 ALRB No. 5. The Board argued that the Employer had improperly sought intermediate review of a non-final, interim Board order referring the parties to the MMC process. While section 1160.8 includes an express provision vesting jurisdiction in the Court of Appeal upon filing of a petition for writ of review, sections 1164 to 1164.13 which govern the MMC process, do not contain such an express provision. Indeed, section 1164.9 precludes any court intervention in the MMC process until the Board issues a final decision and order under section 1164.3.[8] While the Court dismissed Employer's petition for review without explanation, the fact that it did so without remanding the matter is consistent with a recognition by the Court that it lacked jurisdiction to review the matter.[9]

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[8] Section 1164.9 provides: "No court of this state except the Court of Appeal or the Supreme Court, to the extent specified in this article, shall have jurisdiction to review, revise, correct, or annual any order or decision of the board to suspend or delay the execution or operation thereof, or to enjoin, restrain, or interfere with the board in the performance of its official duties, as provided by law and the rules of court.

[9] The Board did file a request for remand shortly after Employer's petition was filed because at the time it was unclear to the Board whether unilateral action to reconsider its decision and order was appropriate when the Court had yet to decide whether it had jurisdiction over the matter. When the parties were later asked to provide supplemental briefing to the Court on the issue of jurisdiction, the Board clarified its

(....footnote continued)

Finally, the Board disagrees with the Union's argument that the MMC statute provides no authority for the Board to reconsider an order directing the parties to the MMC process. The Board's decision at 35 ALRB No. 5 was an interim, non-final Board order referring the parties to the mediation and conciliation process. In that decision, all that occurred was the preliminary determination that the statutory prerequisites for invoking the MMC process had been met. The Board retains jurisdiction over the matter until a party seeks review of a final Board order confirming the mediator's report under section 1164.5. (See *Le Francois v. Goel* (2005) 35 Cal.4th 1094, 1100 (courts retain the inherent authority, on their own motion, to review and change their interim rulings).)

B. The Interpretation of Labor Code section 1164(a)

As stated above, the standard set forth in section 1164(a) is that the employer must have "employed or engaged 25 or more agricultural employees during any calendar week in the year preceding the filing of a declaration."

In its current brief to the Board, Employer reasserts the arguments it made in its brief to the Court of Appeal in support of its petition for review with respect to the interpretation of section 1164(a) and urges the Board to find that the phrase "during any calendar week" means that the 25-employee threshold must be maintained for a full

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(Footnote continued----)
position that it was not necessary for the Court to vacate and remand the Board's decision and order found at 35 ALRB No. 5 in order to allow the Board to reconsider and/or modify that decision and order.

seven-day calendar week.[10] Employer argues that the Board should look first to the plain meaning of the word "during," and notes that the Supreme Court has held that in the absence of a statutory definition, a statutory term is construed with its ordinary or "natural" meaning. (*FDIC v. Meyer* (1994) 510 U.S. 471, 476.)

Employer also reasons that had the Legislature intended the relevant period for examining the 25-employee threshold to be less than a full calendar week, it would have used other language. For example, if the Legislature intended the 25-employee threshold be met by the employment of 25 employees or more at any point during the calendar week, it would have used the language "at any time during any calendar week." Similarly, if the Legislature had intended to include agricultural employers who had employed 25 or more employees at any time in the year preceding the filing of an MMC declaration, it would have used the language "at any time in the year." Instead, the Employer argues, the statute requires that an employer employ 25 or more agricultural employees throughout the course of an entire calendar week during the 12-month period leading up to the request for MMC. In other words, the Legislature's use of the phrase "during any calendar week" requires that the 25-employee threshold be maintained for a full seven-day calendar week for an employer to qualify for MMC.

The Union argues in its current brief to the Board that the Employer's interpretation of the phrase "employed or engaged 25 or more agricultural employees

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[10] Employer does not raise any new arguments with respect to the interpretation of section 1164(a) and incorporates its brief to the Court of Appeal by reference in its current brief to the Board on novel issues.

during any calendar week" creates a requirement that the 25-employee threshold be maintained 7 days a week, 24 hours a day. The Union reasons that under the Employer's interpretation, an agricultural employer who normally employs 25 or more workers could avoid the Board's jurisdiction merely by closing on the seventh day of the week, or by operating with a skeleton crew on that day. We do not believe this is an accurate description of the Employer's interpretation. Rather, we understand the argument to be that 25 or more agricultural employees must be on the payroll for the duration of any calendar week in the year preceding the filing of the declaration, but need not have worked on each day of the week.

The Union's position is that an employer qualifies for MMC if it employs or engages 25 or more agricultural employees on any day during the relevant time period. In support of its argument, the Union cites several cases in which it claims courts examined what was meant by the phrase "during any calendar year," and concluded that "during" did not mean each and every day and at all times throughout the time period.

The Board finds that the cases cited by the Union do not support its position that an employer qualifies for MMC under section 1164(a) if it employs or engages 25 or more agricultural employees on any day during the relevant time period. *H.B Taylor v. Johnston* (1975) 15 Cal.3d 130, involved the interpretation of a contract term between private parties, not the interpretation of a statute, and is not applicable to the instant case. In *In the Matter of C.E. Bush* (1936) 6 Cal.2d 43, the court's focus was whether the petitioner was an "operator" within the meaning of the applicable statute. The statute in question did include a provision concerning tax credits based on the total gross receipts

"during any calendar year," but the interpretation of "during any calendar year" was not at issue in that case. Therefore, *C.E. Bush* does not provide any helpful guidance to the Board in the instant case.

Another case cited by the Union, *Evelyn, Inc. v. Cal. Employment Stabilization Commission* (1957) 48 Cal.2d 588, applied the statutory definition of an "employer" in the Unemployment Insurance Act, but that case did not involve a dispute about statutory interpretation. Instead, the statute's language clearly specified that an employer subject to its provisions was one who had in its employment four or more individuals for some portion of the day in each of 20 different weeks, and the court merely applied the plain meaning of the statute. The Union does not explain why *Evelyn, Inc.* supports its position in the present case, but presumably the Union is suggesting that the Board should find an employer qualifies for MMC under section 1164(a) if it employs 25 or more agricultural employees for some portion of a day during a calendar week period.

Finally, the Union cited *Donahue v. Le Vesque* (1985) 169 Cal.App.3d 620, a case that involved the application of a provision of section 2954.9 of the California Civil Code governing the early repayment of certain kinds of loans. The provision in question created an exception to the statutory right to prepay the balance due "during the calendar year" of the sale. The court held that the exception applied throughout the entire calendar year of the sale, and that after the end of the calendar year in which the sale occurred, the loan could be prepaid as provided for in the statute. (*Donahue v. Le Vesque*, *supra*, 169 Cal.App.3d 620 at 629.) This case does not appear to support the Union's

interpretation of section 1164(a), rather it supports the conclusion that the statute requires that an employer employ 25 or more agricultural employees throughout the course of an entire calendar week as urged by Employer.

Courts interpret statutes in order to ascertain legislative intent so as to effectuate the purpose of the law. (*Smith v. Superior Court* (2006) 39 Cal.4th 77, 83.) Words in the statute are given their usual and ordinary meaning and read in the context of the statutory scheme. (*Hunt v. Superior Court* (1999) 21 Cal.4th 984, 1000; See also, *Kim v. Superior Court* (2006) 136 Cal.App.4th 937, 940; *Hughes v. Board of Architectural Hearing Examiners* (1998) 17 Cal.4th 763, 775.) In addition, every word in a statute is presumed intended to have some meaning, and a construction making some words surplusage is to be avoided. (*Watkins v. Real Estate Commissioner* (1960) 182 Cal.App.2d 397, 400.)

Black's Law Dictionary (5th ed. 1979) defines "during" as "throughout the course of; throughout the continuance of; in the time of; and after the commencement and before the expiration of." It follows that if the word "during" in the phrase "during any calendar week" is given its primary meaning, section 1164(a) should be construed as requiring that an employer employ 25 or more agricultural employees throughout the course of any entire calendar week during the 12-month period leading up the request for MMC in order to qualify for a referral to the MMC process.

The Board is persuaded by Employer's argument that had the Legislature intended the relevant period for examining the 25-employee threshold to be less than a full calendar week, it would have used other language such as "at any time during any

calendar week" or "at any time." In our view, the Legislature intended to exclude very small employers that have a regular complement of less than 25 employees. The Board's initial interpretation, in contrast, would have brought within the MMC requirements employers who simply had an anomalous surge in employment on any given day during the prior year or had an unusual amount of turnover during a week.[11] Interpreting the statute to require that 25 or more agricultural employees be employed throughout the duration of an entire week avoids such a result and, in keeping with canons of statutory construction cited above, gives meaning to every word in the phrase "during any calendar week."

The Board does find merit in the Union's argument that the statute does not require that all 25 employees physically perform work for each of seven consecutive days for the threshold to be met. Agricultural employees who have regularly scheduled days off within a calendar week will still count toward the 25-employee threshold, as will employees who are on vacation, sick leave, and any other type of approved absence where the employment relationship has not been severed.[12] In addition, the Board finds

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[11] For example, that interpretation would include an employer who normally employed 15 employees but experienced either a mass resignation or firing followed by the hiring of 10 or more new employees within that same calendar week.

[12] The Board also recognizes that there may be individuals who are employed or engaged by an employer whose names do not appear on an employer's payroll list or other records. The fact that an individual is paid in cash and/or does not appear on the payroll list will not preclude the Board from considering whether he or she was employed or engaged during any calendar week in the relevant 12-month period.

that section 1164(a) clearly applies to employers who meet the threshold for only one calendar week during the relevant 12-month period.

In accordance with the above analysis, the Board hereby vacates its Decision in *Frank Pinheiro Dairy* (2009) 35 ALRB No. 5. Applying the standard set forth above for determining whether the 25-employee threshold is met in the current matter, the Board finds that on the face of records submitted by Employer, and excluding the individuals discussed in sections C., D. and E. immediately below, there were no calendar weeks during the period from September 8, 2008, to September 7, 2009, where the Employer met the 25-employee threshold.

C. Alberto Contreras and Joe Ferrumpau

The Union restates its position that the two men with the title "Herdsman," Contreras and Ferrumpau, should be counted toward the 25-employee threshold. In previous filings, the UFCW cited *Lassen Dairy* (2008) 34 ALRB No. 1 and *Albert Goyenetche Dairy* (2002) 28 ALRB No. 2 as cases that found herdsmen to be non-supervisory employees.

In support of its contention that the two men were supervisors and should not be counted toward the 25-employee threshold, Employer submitted several declarations along with its original answer to the request for MMC, including declarations from Contreras and Ferrumpau themselves in which they both stated that they worked independently, directed the work of dairy employees, assigned work, and had the authority to give verbal or written disciplinary warnings. They did not state that they have the authority to fire or hire, but that they did make recommendations to dairy

owners. Also attached was a declaration of dairy worker Pedro Alejandrez which stated that Contreras and Ferrumpau told workers what to do and gave instruction and further, they could hire, fire and discipline workers when necessary.

As the Board stated in its original decision, it is clear that section 1164 excludes supervisory employees from the 25 agricultural employee threshold.[13] Supervisory employees would not be included in any bargaining unit bound by a mediated collective bargaining agreement. As stated above, in the Board's previous decision, it was not necessary to resolve the question of whether or not Herdsmen Contreras and Ferrumpau were supervisors because the Board concluded that the Employer engaged 25 employees exclusive of these two men during at least two calendar weeks preceding the request for MMC.

It is not possible to conclude from the declarations and the Employer's assertions whether or not Contreras and Ferrumpau are statutory supervisors. In addition, the cases cited by the Union do not support its argument that the two men are not supervisors. Instead, *Lassen Dairy*, *supra*, 34 ALRB No. 1 and *Albert Goyenetche Dairy*, *supra*, 28 ALRB No. 2 are cases in which the Board found that there were material issues of fact as to whether individuals were supervisors, and therefore the Board ordered

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[13] Section 1140.4(j) defines "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, 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."

evidentiary hearings be held to resolve the disputed facts.[14] Similarly, in the instant case, the status of Contreras and Ferrumpau is now a material issue of fact that requires an evidentiary hearing to resolve.

Employer argues that a hearing on the supervisory status of herdsmen Contreras and Ferrumpau is not necessary because the ALRB previously entered into a prehearing stipulation that these men were statutory supervisors in unfair labor practice Case Nos. 2009-CE-11, 13, 17, 18, 19, 22, 25 and 59-VIS,[15] and is thereby bound by that stipulation in the MMC case.

First, the Employer's statement that there was a stipulation in the above case is not accurate. Instead, in Employer's answer to the complaint it admitted that these men were supervisors, and during the prehearing conference, Employer agreed that it did not dispute the supervisory status of Contreras and Ferrumpau. The parties did not mutually stipulate to these facts. Moreover, this case was settled on December 9, 2009 via an informal bilateral settlement agreement and the issue of supervisory status was never actually adjudicated.

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[14] Following the evidentiary hearing in the *Goyenetche* matter, the individual in question was actually found to be a supervisor. (See *Albert Goyenetche Dairy* (2002) 28 ALRB No. 5.) Questions of supervisory status are deeply fact-intensive. (*Albert Goyenetche Dairy, supra*, 28 ALRB No. 5, decision of the ALJ at p. 10, citing *Brusco Tug & Barge Co.* (D.C. Cir. 2001) 247 F.3d 273.) In determining whether an individual is a statutory supervisor, the Board will inquire into actual duties, not merely titles or job classifications. (*Albert Goyenetche Dairy, supra,* citing *Longshoremen v. Davis* (1986) 476 U.S. 380, fn 13: *Carlisle Engineered Products, Inc.* (2000) 330 NLRB No. 189.)

[15] These charges were consolidated in a complaint issued by the General Counsel on April 24, 2009.

The case cited by Employer for the proposition that the status of Contreras and Ferrumpau has already been resolved, *Sequoia Orange* (1987) 11 ALRB No. 21, is distinguishable. In that case, which was a consolidated representation and unfair labor practice case where the identity of the employer was an issue, there had been a stipulation among all parties in the representation phase of the case that a number of entities constituted a single employee. (*Sequoia Orange, supra*, 11 ALRB No. 21, ALJ decision at p. 11.) In contrast to the instant case, which was settled with no admission of liability prior to litigation, the issue of employer identity was fully litigated and adjudicated in the *Sequoia Orange* matter. Here, Employer's admissions have no continuing legal significance, nor any binding effect.

D. Harold Shaw and Eliazar Reyes

For the first time in its brief on novel issues, the Union argues that an individual named Harold Shaw should be counted throughout the 12-month period because Shaw was on disability leave for the bulk of that period. A declaration by Shaw is attached to the Union's brief.[16] The Union also reiterates its argument that Eliazar Reyes, who was laid off prior to the election, and hired again some months later should be counted during the time he was away from work.

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[16] Employer argues that the Board should not consider Shaw's declaration because it is not signed under penalty of perjury and merely states that it is correct to the best of Mr. Shaw's knowledge. Nevertheless, the continued appearance of Mr. Shaw's name in the Employer's archived time records for the entire 12-month period and the undisputed fact that Shaw asserts that he was not working due to a workplace injury creates an adequate material issue of fact for the Board to set a hearing on Shaw's employment status independent of his declaration.

The Board has already addressed the status of Reyes in its original decision and order, finding that the unemployment insurance claim filed by Reyes showing he was laid off on December 13, 2008, supported the conclusion that Reyes was on seasonal lay off for nearly two months. Reyes was rehired in February 2009. Reyes' cannot be said to have been employed by Employer during his layoff period, rather his employment relationship was terminated and later reinstated.

The First District Court of Appeal has held that under circumstances where workers are laid off without a definite recall date, a layoff terminates the employment relationship. In *Campos v. EDD* (1982) 132 Cal.App.3d 961, 974, a group of frozen food processors had been placed on a seasonal layoff subject to recall and were collecting unemployment benefits when their union went on strike against their employer. The employer then attempted to recall the laid-off workers. The workers refused to return to work and the Employment Development Department (EDD) terminated their benefits. The Court of Appeal held the termination of benefits was improper because of a provision in the Unemployment Insurance Code which allows a worker receiving benefits to refuse "new work" if the vacancy is due to a strike, lockout or other labor dispute. The Court found that because the layoff had terminated the employment relationship, the employer's attempt to recall the workers constituted "new work." (*Campos v. EDD*, *supra*, 132 Cal.App.3d 961, 974.)

This is consistent with the Board's treatment of seasonally laid-off workers in representation matters where voter eligibility is at issue. The Board has held that employees on seasonal layoff who have not yet been rehired are not eligible to vote.

(*Wine World, Inc. dba Beringer Vineyards* (1979) 5 ALRB No. 41 at p. 3; *Rod McLellan* (1977) 3 ALRB No. 6 at p. 4.)

Harold Shaw, in contrast to Reyes, was purportedly absent due to a workplace injury. Shaw's declaration is dated November 8, 2009, and states that after he was injured on the job on November 3, 2007, he had surgery and then returned to working at the dairy with restrictions and light duties. He states that his last day of work was November 25, 2008.[17] He goes on to state that he voted a challenged ballot in the January 2009 election upon the urging of a representative of the Employer. Mr. Shaw states that he received a letter from Employer on April 27, 2009, notifying him that he was on unpaid leave, and that as of this date, Employer stopped his health benefits.[18]

Employer argues that Shaw should not be counted toward the 25-employee threshold after November 25, 2008, as he has had a break in employment effective that date with no specified date of return. However, Employer has submitted no documentation to support its position that Shaw's employment relationship with Employer was severed on November 25, 2008. Indeed, Shaw's name continues to appear in the archived time records (albeit showing no time worked) that the Employer submitted on CD ROM through the end of the relevant 12-month time period and he asserts that his absence was due to a workplace injury.

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[17] Employer does not dispute this date as being Shaw's last day of actual work.

[18] This letter was not attached to Shaw's declaration.

In representation matters, the Board has held that employees who were on unpaid sick leave or unpaid holiday, may, under appropriate circumstances, vote in an ALRB election. (*Rod McLellan, supra*, 3 ALRB No. 6 at p. 3.) In deciding whether an employee is absent due to illness or injury, the Board will consider factors such as the individual's employment history, continued payments into insurance funds, and any other relevant evidence which bears upon the question of whether or not there was a current position held for the employee during the relevant eligibility period. (*Valdora Produce Co.* (1977) 3 ALRB No. 8 at p. 6; see also *Artesia Dairy* (2007) 33 ALRB No. 3 at p. 3-4.) In addition, the National Labor Relations Board (NLRB) has held when determining voter eligibility, that employees absent from work for reasons of illness or injury are presumed to continue in their employment status, and in order to rebut this presumption, the employer must affirmatively show that the employee was discharged or resigned. (*Thorn Americas, Inc.* (1994) 314 NLRB 943; *Red Arrow Freight Lines, Inc.* (1986) 278 NLRB 965.)

As the issue of whether Shaw's employment relationship with Employer continued past November 25, 2008, remains a disputed material issue of fact, the Board orders that an evidentiary hearing be held to determine whether Shaw continued to be employed by Employer for any portion of time from November 25, 2008, to September 7, 2009.[19]

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[19] The Board does not agree with the Employer's contention that the Legislature did not intend the Board to "examine the precise circumstances of an employee's departure when examining the 25-employee threshold," and instead merely intended that

(....footnote continued)

E. Status of Other Individuals Whose Names Appear in Employer Time Records

Finally, Employer submitted a declaration from attorney Anthony P. Raimondo setting forth his unsuccessful attempt to reach a stipulation with the UFCW regarding the completeness of the time and payroll records previously submitted by Employer. Raimondo states in his declaration that the time records filed in response to the original request for MMC are true, complete, and accurate, including all agricultural employees of the Employer. The Union states that it disputes the completeness of the time and payroll records submitted by Employer. The Union argues that while the records submitted by Employer may show who was paid on any given day, the records do not show employees on temporary leave or who otherwise remained "employed or engaged" by Employer.

The archived time records submitted by Employer on CD ROM show the actual times each individual punched in and out for each day in the payroll period. The Board notes that the names of a large number of individuals (over 75 people, including Harold Shaw and many others) appear in the electronic time records, without showing any time worked. No explanation as to the employment status of these individuals has been offered by either the Employer or Union. As the Board indicated above, employees

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(Footnote continued----)
the Board simply take payroll records as true on their face and count only individuals who performed physical work toward the threshold. An inquiry into whether and when an individual ceased to be employed is indeed a relevant and necessary determination in examining whether an Employer employed or engaged 25 or more agricultural employees during any calendar week in the appropriate 12-month period.

who have regularly scheduled days off within a calendar week will still count toward the 25-employee threshold, as will employees who are on vacation, sick leave, or other type of leave of absence where the employment relationship is maintained. The Board therefore orders an evidentiary hearing to determine whether any of the individuals whose names appear in the Employer's archived time records without showing time actually worked maintained an employment relationship with Employer for any portion of the relevant 12-month period. In addition, the hearing shall address the issue of whether there were any agricultural employees employed or engaged during the relevant period who do not appear on the payroll records.

ORDER

The Board hereby vacates its Decision in *Frank Pinheiro Dairy* (2009) 35 ALRB No. 5.

In accordance with the above decision, it is hereby ordered that an expedited hearing pursuant to Board regulation section 20402(c)(3) be set in which the hearing examiner shall take evidence on whether Alberto Contreras and Joe Ferrumpau are supervisors within the meaning of section 1140.4(j) of the Act. In addition, the hearing examiner shall take evidence on whether Harold Shaw continued to be employed by Employer for any portion of time from November 25, 2008 to September 7, 2009. Also, the hearing officer shall examine whether any of the individuals whose names appear in the Employer's archived time records without showing time actually worked, were employed or engaged by Employer for any portion of the relevant 12-month period, September 8, 2008, to September 7, 2009. Finally, the hearing shall address the issue of whether there

were any agricultural employees employed or engaged during the relevant period who do not appear on the payroll records.

Dated: March 24, 2010

GENEVIEVE A. SHIROMA, Member

CATHRYN RIVERA-HERNANDEZ, Member

WILLIE C. GUERRERO, Member

CASE SUMMARY

FRANK PINHEIRO DAIRY dba PINHEIRO DAIRY & MILANESIO FARMS
(United Food and Commercial Workers Union, Local 5)

Case No. 2009-MMC-02
(35 ALRB No. 5)
36 ALRB No. 6

Background

On September 8, 2009, United Food and Commercial Workers, Local 5, (UFCW) filed a request for mandatory mediation and conciliation (MMC) pursuant to California Labor Code section 1164(a). On October 1, 2009, the Board issued Decision and Order (2009) 35 ALRB No. 5 in which it interpreted section 1164(a)'s 25-agricultural employee prerequisite as requiring a head count of all agricultural employees employed or engaged at some time in any given week in the year prior to the request for MMC. Under this standard, the Board found that payroll records submitted by the Employer showed that the 25-employee threshold was met during two calendar weeks in the relevant 12-month period. Therefore, the Board ordered the parties to participate in the MMC process.

On October 8, 2009, the Employer filed a petition for writ of review of (2009) 35 ALRB No. 5 with the Court of Appeal. The Employer argued that the Board erred in interpreting the statute's 25-employee prerequisite. Although the Board argued that the Court was without jurisdiction to consider Employer's petition, the Board found merit in certain arguments presented by Employer in its petition and expressed the intent to reconsider its decision. On December 28, 2009, the Court issued an order denying Employer's petition for review. On January 21, 2010, the Board issued an order staying the MMC process pending the reconsideration of its original decision.

Board Decision

The Board vacated its previous decision and order, 35 ALRB No. 5. The Board revised its interpretation of section 1164(a), and construed the statute's phrase "...employed or engaged 25 or more agricultural employees during any calendar week..." as requiring an employer to employ or engage 25 or more agricultural employees throughout the course of any entire calendar week during the 12-month period leading up to the request for MMC. The Board ordered an expedited hearing on the status of several individuals, and on other issues relevant to determining whether the 25-employee threshold has been met.

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