Morgan Hill, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

KAWAHARA NURSERIES, INC. Employer, and UNITED FARM WORKERS OF AMERICA Petitioner.	)	Case No. 2010-RC-001-SAL 36 ALRB No. 3 (June 10, 2010)

DECISION AND ORDER

Background

On January 12, 2010, a petition for certification was filed by the United Farm Workers of America (Union or UFW) to represent the agricultural employees of Kawahara Nurseries, Inc. (Employer). Kawahara Nurseries is a wholesale plant nursery with three locations: Gilroy, Morgan Hill and San Lorenzo. On January 19, 2010, an election was held among Employer's employees. The initial tally of ballots was as follows:

Union……70

No Union……..68

Unresolved Challenged Ballots……28

Total Ballots Cast…….166

Twenty-eight individuals were challenged as being ineligible to vote in the election. Of the 28 challenges above, 23 individuals were challenged by the UFW as being non-agricultural employees, 4 individuals were challenged as being supervisors (3 by the UFW

and 1 "mistakenly" by Employer), and 1 was challenged by Board agents as not being on the eligibility list.

Regional Director's Challenged Ballot Report

As the challenged ballots in this matter are sufficient in number to affect the outcome of the election, the Regional Director (RD) of the Agricultural Labor Relations Board (ALRB or Board), Salinas Regional Office, conducted an investigation of the eligibility of the challenged voters. On March 29, 2010, the RD issued his report on challenged ballots. The RD recommended that the challenges to all 23 employees challenged as non-agricultural employees be sustained. He recommended that the challenges to three of the alleged supervisors be set for hearing if their ballots are outcome-determinative. Finally, he recommended that the challenge to one of the alleged supervisors be overruled, and that the challenge to the individual not on the eligibility list be sustained.

The Merchandisers

The 23 voters who were challenged as being non-agricultural workers work as "merchandisers" at retail stores including The Home Depot, Orchard Supply Hardware (OSH) and other retail operations in various locations. According to the record currently before the Board, common duties of the merchandisers include organizing and displaying plants at the retail locations, putting price tags on plants, cleaning around displays, watering and deadheading plants, and removing old plants. Merchandisers do not handle plants grown at Kawahara Nursery until they are delivered to the retail locations. A number of the challenged individuals merchandise plants from sources other than Kawahara Nursery at their assigned retail location. The amount of time they handle plants from other nurseries varies for each

person. According to Employer, Kawahara employees perform this service for other nurseries in exchange for an overall sales commission.

The 23 employees who were challenged by the UFW as non-agricultural employees are:

1. Manuel Vasquez
2. Dustin Corey
3. Angelo Imperial De Castro
4. Robert Valencia, Jr.
5. Andrew Lee Koscinski
6. Larry William Howard
7. Lyle Ray Weiss
8. Orlando Carillo
9. Ralph Garcia
10. Jacob Patrick Morrison
11. Cristian Juarez-Morales
12. James Camillo-Scuderi
13. Justin Coyote Suico
14. Lance Harrison-Brown
15. Eric. D. Fisher, Jr.
16. Phyllis L. Penick-Logan
17. Julio Cesar Lopez
18. Keith W. Vandertuig
19. Misty Lee Wilson
20. Jordan Forbes
21. Eric Fimbrez
22. Meg H. Frink
23. Brendan Harada

The RD concluded that the merchandisers are not agricultural employees. He reasoned that they do not perform any work under the primary definition of agriculture as they do not perform any harvesting duties, nor do they produce, cultivate or grow the plants. [1]

[1] The definition of the term "agriculture" in section 1140.4(a) of the Agricultural Labor Relations Act (Cal. Lab. Code § 1140 et seq.) is identical to the definition of agriculture in section 203(f) of the Fair Labor Standards Act (29 U.S.C. § 201 et. seq.)

(Footnote continued….)

Rather, the merchandisers' duties occur only after the plants have already been harvested, produced, cultivated, grown, purchased by retailers and delivered to market.

The RD also concluded that the merchandisers do not engage in any secondary agricultural activities such as preparation for market, delivery to storage, and delivery to carriers for transportation. The RD reasoned that these activities precede delivery to market, while in contrast, all of the merchandisers' duties occur after delivery to market. In support of his conclusion, the RD cited *L & A Investment Corp. of Arizona* (1975) 221 NLRB 1206 for the proposition that any handling of agricultural commodities after delivery to market is not agricultural activity. [2]

The Alleged Supervisors

The individuals challenged as being supervisors are:

1. Miguel Becerra Tovar (UFW challenge)

(Footnote continued)
The regulations issued by the Department of Labor interpreting section 203(f) of the Fair Labor Standards Act (FLSA) provide helpful guidance in determining whether or not an individual is engaged in agriculture (see 29 C.F.R. § 780 et. seq.) The RD relied on 29 C.F.R. § 780.118 to support his conclusion that the merchandisers were not engaged in harvesting duties, and relied on 29 C.F.R. section 780.117 to support his conclusion that the merchandisers were not engaged in any production, cultivation or growing duties.

[2] In footnote 2 on page 27 of his challenged ballot report, the RD stated that the merchandisers' duties were also potentially not secondary agricultural activity because they may have "regularly" handled a "substantial" amount of non-Kawahara grown plants in the course of their work. In addition, the RD noted that the Employer provided declarations from six merchandisers stating that they did not handle non-Kawahara plants. The RD stated that he could not make a determination on this issue because the Employer did not provide sufficient information. The RD stated that he made his determination that all of the merchandisers were not engaged in secondary agricultural activities on grounds other than whether they regularly handled other nurseries' plants.

2. Alfredo Elizondo Rodriguez (UFW Challenge)
3. Maria Cortes (UFW Challenge)
4. Severiano Cruz-Santiago (Employer Challenge)

Tovar and Cortes stated in their challenged ballot declarations that they are not supervisors, while Rodriguez stated that he was an assistant to the supervisor of the truck driving crew. During the challenged ballot investigation, the UFW provided witness declarations indicating that Tovar, Rodriguez and Cortes were supervisors, while the Employer provided witness declarations indicating that they were not supervisors.

The RD found that whether Tovar, Rodriguez and Cortes are supervisors involve material issues of fact and/or credibility, and therefore recommended that an investigative hearing be held to determine their status should their ballots become outcome determinative.

The RD recommended that the challenge to Cruz-Santiago's ballot be overruled. Despite Cruz-Santiago's own statement that he is a supervisor, the RD observed that the details Cruz-Santiago provided about his job duties do not indicate that he is a supervisor pursuant to section 1140.4(j) of the Agricultural Labor Relations Act (ALRA). One of the Employer's observers apparently challenged Cruz-Santiago by mistake. The RD pointed out that the UFW's position is that Cruz-Santiago's ballot be counted.

Individual Not on Eligibility List

Finally, Gabriel Garcia was challenged by Board agents as not being on the eligibility list. In his challenged ballot declaration he stated that when he went to vote he was told by a Board agent that he had already voted. A ballot had previously been cast under the name Gabriel Garcia without challenge, but Garcia denied that he had voted. The RD's

recommendation is that the challenge to Garcia's ballot be sustained, because to count his ballot could result in a ballot being cast twice by the same person.

Employer's Exceptions to the Regional Director's Challenged Ballot Report

The Employer filed its exceptions to the RD's Challenged Ballot Report on April 9, 2010. Employer excepts to the RD's conclusion that the 23 merchandisers did not perform any primary or secondary agricultural duties, and to the RD's recommendation that the challenges to these voters be sustained. Employer also excepts to the RD's failure to conclude that Miguel Becerra Tovar, Alfredo Elizondo Rodriguez and Maria Cortes are not supervisors. Employer did not except to the RD's recommendation that the ballot of Severiano Cruz-Sanchez be overruled, nor to his recommendation that the challenge to Gabriel Garcia's ballot be sustained. Therefore, the RD's conclusions and recommendations as to these two individuals are final.

Employer argues that *L & A Investment Corp. of Arizona*, *supra*, 221 NLRB 1206, relied on by the RD to support his conclusion that the merchandisers did not engage in agricultural activities, is not relevant in determining whether the merchandisers are agricultural employees because that case concerns employees who perform only secondary agricultural activities for a grower other than their employer. In contrast, Employer's position is that Kawahara's merchandisers are engaged in both primary and secondary agricultural activities, and that the merchandisers spend at least half of their time engaged in primary agricultural activities.

Employer argues that the RD improperly focused his analysis on where the merchandisers performed their duties, rather than the nature of the work performed, and

contends that it does not matter whether an individual performing primary agricultural activities does so for his own employer or on behalf of another farmer, nor does it matter where such activities are performed. In support of this contention, Employer cites *Farmers Reservoir & Irrigation Co. v. McComb* (1948) 337 US 755, and *Mann Packing Co., Inc*. (1975) 2 ALRB No. 15 at p. 4.

In addition, the Employer cites *Light's Tree Co.* (1971) 194 NLRB 229 in which nursery employees were found to be engaged in agricultural activities when they planted trees and plants on the property of customers who had purchased the nursery stock from their employer.

The Employer argues that the merchandisers care for the plants at the retail outlets in the same manner as they are cared for at the nursery itself as part of a subordinate marketing function. Moreover, the Employer states, on non-delivery days, the only work they perform is watering and maintaining the plants, which, the Employer claims, is the same work performed by the Mobile Merchandising Unit (MMU) employees at store locations and at Kawahara nursery facilities. [3] The Employer maintains that these duties fall within the primary definition of agriculture.

The Employer does not dispute that some of the merchandisers perform work for plant producers other than Kawahara. Employer's position is that such work falls in the

[3] Kawahara's MMU employees are based at Kawahara's nursery facility in Morgan Hill. According to the Employer, the MMUs also work for a portion of their time at the same retail stores where the merchandisers work to fill in as needed, and perform the same duties as the merchandisers do whether they are at Morgan Hill or a retail store. While the record does not specifically state that the MMUs voted in the election, no employee with the job title "MMU" is the subject of a challenge in this case.

category of secondary agriculture, thus creating a "mixed-work" situation, but that because the merchandisers engage in primary agriculture a substantial amount of the time, they fall under the jurisdiction of the ALRB. Therefore, the Employer argues that the challenges to the ballots of the 23 merchandisers should be overruled. Employer further argues that six of the 23 merchandisers handle only plants grown by Kawahara Nursery and are therefore clearly engaged in "agriculture." [4] Alternatively, Employer argues that the status of the 23 merchandisers be set for hearing should the Board affirm the RD's recommendation to send to hearing the issue of the supervisory status of the employees discussed below.

Employer also excepts to the RD's failure to conclude that Miguel Becerra Tovar, Alfredo Elizondo Rodriguez and Maria Cortes are not supervisors, and argues that it is not necessary to hold an investigative hearing to determine whether or not these individuals are eligible to vote.

Employer argues that Tovar, Rodriguez and Cortes are "lead persons" rather than supervisors, and that these individuals do not exercise independent judgment. Employer cites *Oakwood Heathcare, Inc*. (2006) 348 NLRB No. 37 and *Croft Metals, Inc*. (2006) 348 NLRB No. 38 in support of its position. Employer also points out that other employees who work with them do not perceive them as supervisors, and that Cruz-Santiago, whose ballot the RD recommended be opened and counted, performs the same work as Tovar, Rodriguez and Cortes.

[4] These individuals are: Angelo Imperial De Castro, Robert Valencia, Jr., Ralph Garcia, Cristian Juarez-Morales, Phyllis L. Penick-Logan, and Jordan Forbes.

Discussion and Analysis

Section 1156.2 of the Agricultural Labor Relations Act (ALRA) provides that the bargaining unit in a representation election "shall be all agricultural employees of an employer." ALRA section 1140.4 (a) defines agriculture as follows:

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

Under this definition, "agriculture" has a primary and secondary meaning. The primary meaning refers to actual farming operations, such as cultivation, tilling, growing and harvesting of agricultural commodities. The secondary meaning includes any practices which are performed by a farmer or on a farm as an incident to or in conjunction with such farming operations. (*Farmers Reservoir & Irrigation Co. v. McComb*, *supra*, 337 U.S. 755, 762-763.)

The Merchandisers Are Not Engaged in Primary Agriculture

The first issue to be determined in this matter is whether Kawahara's merchandisers are agricultural employees. Employer's position is that although the merchandisers do not work on site at any of the nursery facilities, they are engaged in primary agricultural activities when they perform duties to maintain the plants' health such as watering them, removing dead leaves and flowers, clipping off old growth, and checking the soil in the plants' containers after they are delivered to the retail outlets. Employer claims that the

merchandisers are engaged in such activities at least 50 percent of the time. As mentioned above, in support of its position, the Employer cites *Light's Tree Co.*, *supra*, 194 NLRB 229. The Employer also argues that section 780.206(a) of the Department of Labor's regulations provides support for its position that the merchandisers are engaged in primary agriculture.

We are not persuaded that *Light's Tree* supports a finding that the merchandisers are engaged in primary agriculture. *Light's Tree* involved two distinct types of employees at a nursery: nursery employees and landscape employees. The nursery employees propagated, cultivated, watered, transplanted, trimmed, sprayed, dug, and "engaged in other related functions necessary to insure the development and proper growth of the nursery stock." (*Id*. at 229.) The landscape employees planted, mulched, watered, and trimmed stock grown by their employer on the private property of customers (residences, businesses, etc.) who had purchased the stock. The landscape employees also performed a small amount of nonhorticultural work such as installing sprinklers or erecting fences on customers' properties.

The NLRB held that "the nursery employees and the landscaping employees, except to the extent that they are engaged in nonhorticultural landscaping activities, [were] engaged in exempt agricultural work." (*Id*. at 230.) While the NLRB's discussion is not entirely clear, a close reading of *Light's Tree* and of section 780.206(a) reveals that while the NLRB found that Light Tree's nursery employees were engaged in agriculture under the primary definition, the landscape employees were engaged in agriculture under the secondary meaning.

Section 780.206(a), which was cited by the NLRB in *Light's Tree*, [5] addresses both primary and secondary agricultural activities in nursery operations. Section 780.206(a) provides that:

> "The planting of trees and bushes is within the scope of agriculture where it constitutes a step in the production, cultivation, growing, and harvesting of agricultural or horticultural commodities, or where it constitutes a practice performed by a farmer or on a farm as an incident to or in conjunction with farming operations (as where it is part of the subordinate marketing operations of the grower of such trees or bushes). Thus, employees of the nurseryman who raised such nursery stock are doing agricultural work when they plant the stock on private or public property, trim, spray, brace, and treat the planted stock, or perform other duties incidental to its care and preservation. Similarly, employees who plant fruit trees and berry stock not raised by their employer would be considered as engaged in agriculture if the planting is done on a farm as an incident to or in conjunction with the farming operation on that farm." (emphasis added.)

The phrase "the planting of trees and bushes is within the scope of agriculture where it constitutes a step in the production, cultivation, growing, and harvesting of agricultural or horticultural commodities," refers to nursery related activities that fall under the definition of primary agriculture. The description of activities following that phrase which, as discussed below, is analogous to the work of the merchandisers in the present case, describes secondary agricultural work. Thus, we believe that the most accurate reading of *Light's Tree* is that the NLRB relied on the latter portion of section 780.206(a) to find that the landscape employees were engaged in agriculture. Thus we do not agree that the landscape employees in

[5] At the time *Light's Tree* was decided, 29 C.F.R. section 780.206 was numbered section 780.175. The old section numbers are cited in *Light's Tree.*

Light's Tree were found to be engaged in primary agriculture. Therefore, the Board rejects the Employer's argument that the merchandisers are engaged in primary agriculture. [6]

The Merchandisers May Be Engaged in Secondary Agriculture

If Kawahara's merchandisers are not engaged in primary agriculture, the next question to be answered is whether they are engaged in secondary agriculture. To come within the secondary meaning of agriculture, a practice must be performed either by a farmer, or on a farm. It must also be performed either in connection with the farmer's own farming operations or in connection with the farming operations conducted on the farm where the practice is performed. In addition, the practice must be subordinate to the farmer's farming operations. (*Mitchell v. Huntsville Wholesale Nurseries* (1959) 267 F.2d 286, 290, citing *Farmers Reservoir v. McComb, supra,* 337 U.S. 763; *Maneja v. Waialua* (1955) 349 U.S. 254; *Mitchell v. Budd* (1956) 350 U.S. 473.)

In the instant case, the RD concluded that Kawahara's merchandisers were not engaged in secondary agriculture because the merchandiser's activities all occur after "delivery to market… to storage… and to carriers for transportation to market" as defined in 29 C.F.R. sections 780.150, 780.153 and 780.155. The RD noted that section 780.154 indicates that "delivery to market ends with the delivery of the commodities at the receiving platform."

[6] We note that to the extent that Kawahara employees who work at Kawahara's Gilroy, Morgan Hill and San Lorenzo nursery facilities perform duties such as planting seeds, cultivating and transplanting seedlings, watering, fertilizing, pruning, grafting, and bracing plants until they reach sufficient maturity to be transported and sold in retail outlets, they are clearly engaged in primary agriculture. (See *Stark Brothers Nurseries* (1942) 40 NLRB 1243, 1249; *Rod McLellan Co*. (1968) 172 NLRB 1458, 1460; *Silver Terrace Nurseries* (1993) 19 ALRB No. 12, p. 4; see also 29 C.F.R. § 780.205.)

The sections of the Department of Labor regulations that the RD relies on elaborate only on the portion of the secondary definition of agriculture that refers to activities such as "preparation for market and delivery to storage or to market or to carriers for transportation to market." These activities are not the only activities that constitute secondary agriculture; rather, they are examples of duties "performed by a farmer or on a farm as an incident to or in conjunction with such farming operations." As discussed above, section 780.206(a), and *Light's Tree Co., supra*, 194 NLRB 229, contemplate secondary agricultural activities that can occur after a grower's nursery stock has been purchased and planted on a customer's property.

The RD also cites *L & A Investment Corp. of Arizona, supra*, 221 NLRB 1206 for the proposition that the handling of agricultural commodities after delivery to market is not agricultural activity. However, a close reading of *L & A Investment Corp.* reveals that this case did not turn on the fact that the employees in question handled agricultural activities after delivery to market. Rather, the NLRB found that the employees in question worked at a facility that was an independent commercial enterprise, and it was for this reason that they were not engaged in agriculture. (*L & A Investment Corp. of Arizona*, *supra*, 221 NLRB 1206, 1207.)

L & A Investment Corp. involved a fairly complex relationship between a grower who contracted with ranchers in Mexico who leased land in Baja California on which the grower's crops were grown. Following the harvesting of the crops, they were sent to an independently owned packing and cooling facility in Mexico. The packaged produce was then shipped by Mexican common carrier to the grower's "marketing facility" in the U.S. where the

produce was stored temporarily before being shipped to retail outlets. The question in that case was whether the employees at the grower's U.S. "marketing facility" were performing duties for a farmer or on a farm, and if so, whether such duties were part of the agricultural activity or a distinct business activity. (*Id*. at 1207.) The NLRB found that the marketing facility was a wholly commercial operation for the purpose of the wholesale distribution of produce, and that the work performed by the employees at that facility was in conjunction with the commercial operation, not in conjunction with the grower's farming operations. (*Id*. at 1207.)

In contrast, in *Walling v. Rocklin* (1942) 132 F.2d 3, the employees of a nursery's retail operation were found to be agricultural employees when the court found that the retail operation was not maintained as a separate enterprise but was in connection with and incident to the nursery's general enterprise. (*Id*. at 7.) In that case, the employees in the nursery's retail store handled plants grown by the nursery after delivery to market (the retail store), but the deciding factor in that case was that the retail operation was incidental to the general nursery operation.

Another case that provides guidance is *Rod McLellan Co*. (1968) 172 NLRB 1458. That case involved a nursery operation that operated a retail shop in which it sold cut flowers, potted plants and also accessories such as gardening books and flower pots. The nursery carried on a mail order operation through this shop and maintained a route-selling operation in which it solicited and filled orders from commercial operations. Sixty percent of the retail employees' time was spent on sales, and 40 percent on packing and preparation of cut flowers and potted plants.

The nursery in *Rod McLellan Co*. also carried on a "plant boarding" operation where a customer who purchased plants could have them tended by Rod McLellan's employees during months when the plants were not in bloom or the customer otherwise did not want to display them. The boarding service was provided at a cost in addition to the price of the plant, and while the service was mostly used by Rod McLellan's customers, 1 percent of the boarded plants were not sold by the company.

The NLRB found that the retail employees engaged in cutting, grading, sorting, potting and packing plants and flowers were engaged in secondary agriculture. The sale and delivery of the plants and flowers was also secondary agriculture as these activities were the final steps in the nursery's marketing operation. (*Rod McLellan Co.*, *supra*, 172 NLRB 1458, 1460.) However, the NLRB found that the sale of gardening books, flowerpots and other accessories that were not agricultural commodities, was not incident to or in conjunction with the nursery operation. (*Id*.) The NLRB also found that the character of the plant boarding operation was a separate commercial enterprise and therefore was a nonagricultural function. (*Id*.)

Kawahara itself maintains no separate commercial operation such as the marketing facility run by *L & A Investment Corp*. While the merchandisers work on the property of wholly commercial operations such as The Home Depot and OSH, these businesses are not Kawahara's separate commercial operations. Kawahara's merchandisers are actually more similar to the employees of the nursery retail employees in *Walling v. Rocklin*, and *Rod McLellan Co*. because they are carrying out the final steps in Kawahara's marketing operation.

Therefore, as discussed further below, to the extent they handle only the nursery products of Kawahara, the merchandisers' duties fall under the secondary definition of agriculture.

While some comparisons may be drawn between the activities of Kawahara's merchandisers and those of the employees working in Rod McLellan Co.'s plant boarding operation, e.g., watering and tending to potted plants to keep them alive and presentable, a key difference is that the plants handled by the merchandisers remain Kawahara's property until purchased by a retail customer. More importantly, the boarding operation was found to have the characteristics of a separate commercial enterprise. While Kawahara's merchandisers handle plants that have left Kawahara's nursery facilities and have been delivered to the retail outlets for sale, the plants must continue to be cared for and maintained in the same manner as when they are at Kawahara's nurseries. The merchandisers' work can therefore be viewed in connection with and incident to the nursery's general enterprise rather than in connection with a separate commercial enterprise, and therefore secondary agriculture.

Do the Merchandisers Regularly Handle Products of Other Producers on a Regular Basis?

As the Board finds that Kawahara's merchandisers may be engaged in secondary agriculture, the question then becomes whether they regularly handle plants from sources other than Kawahara.[7]

[7] The Employer is incorrect that the "mixed work/substantiality" test applies to determine whether the ALRB has jurisdiction over the merchandisers who handle non-Kawahara plants. Rather, in the present case, the Board must first apply the standard set forth in *Camsco Produce, Inc., supra*, 297 NLRB 905 to determine whether each merchandiser regularly handles any amount of non-Kawahara plants, and is therefore outside of the jurisdiction of the ALRB. In contrast, the substantiality test applies to

(Footnote continued….)

In *Camsco Produce Co., Inc*. (1990) 297 NLRB 905, the NLRB stated that it would assert jurisdiction over off the farm packing shed employees if any amount of farm commodities, other than those of the employer-farmer, are regularly handled by the employees. (*Id*. at 908.) The NLRB reasoned that an employer-farmer "who handles the products of other producers on a regular basis, however small the quantity may be, has departed from the traditional model of a farmer who simply prepares his own products for market." (*Id*.) At the same time, the NLRB recognized that employees of a farmer could still be exempt if they only handle outside products on a rare or emergency basis, such as when an unexpected storm destroys a significant part of the crop. The NLRB went on to find the employees in question in *Camsco* were not engaged in secondary agriculture and thus were not exempt from NLRB jurisdiction because the evidence showed the employees handled mushrooms produced by a farmer other than their employer, and Camsco had not demonstrated that its handling of such mushrooms occurred very rarely, on only an emergency basis. (*Id*. at 909.)

There has not been much guidance from the NLRB on the question of what constitutes "regularly." The ALRB has held that where purchases from outside entities were not typical, were undertaken only because of insufficient supply from an employer's own operations, and were avoided whenever possible, this "outside mix" was not regular and

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(Footnote continued)
situations where an employee performs both agricultural work (either under the primary or secondary meaning) and non-agricultural work for a single employer. In such situations, the NLRB will assert jurisdiction over the non-agricultural work if it is "substantial."

therefore the operations were agricultural even under the *Camsco* standard. (*Olsen Farms, Inc*. (1993) 19 ALRB No. 20.)

Many of the merchandisers estimated the percentage of their time spent handling non-Kawahara grown plants in their challenged ballot declarations. From these declarations, it does appear that the majority of these individuals do handle non-Kawahara plants on a regular basis, and would therefore not be subject to the jurisdiction of the ALRB. The fact that Kawahara appears to have a standing agreement with Plant Source, another nursery, for a flat commission covering merchandising and sales of Plant Source plants also points toward a finding that Kawahara's merchandisers regularly handle outside products. However, Kawahara's position is that it does not keep track of which merchandisers handle other nurseries' products or how much time they spend doing so because this varies and is somewhat sporadic at certain locations. According to a declaration submitted by Ken Portue, Vice-President of Sales for Kawahara, some merchandisers may handle non-Kawahara plants only on a seasonal basis (poinsettias). In addition, the Employer maintains that six merchandisers never handle non-Kawahara plants. Therefore, the question of whether all 23 merchandisers regularly handle non-Kawahara plants presents a material issue of fact that must be resolved by an evidentiary hearing. Any individuals who are found to regularly handle "outside" plants will fall outside of the ALRB's jurisdiction, and the challenges to these individuals will be sustained.[8]

[8] Section 1140.4 (b) of the ALRA limits the jurisdiction of the ALRB to employees who are excluded under the NLRA. The two jurisdictions are mutually exclusive. If a matter is arguably covered by the NLRA, principles of federal preemption

(Footnote continued….)

The record currently before the Board does not indicate whether any of Kawahara's merchandisers engage in both agricultural and non-agricultural work. However, a full picture of the merchandisers' daily duties will be established by the evidentiary hearing. Should it be found that any merchandisers do not regularly handle non-Kawahara plants, the substantiality test may then need to be applied to determine whether these individuals engage in agricultural work a substantial amount of the time. (see *Artesia Dairy* (2007) 33 ALRB No. 3 at pp. 20-23; *Royal Packing Company* (1995) 20 ALRB No. 14; *Warmerdam Packing Co*. (1998) 24 ALRB No. 2; *Associated-Tagline, Inc*. (1999) 25 ALRB. No. 6; *Sutter Mutual Water Co*. (2005) 31 ALRB No. 4.)

The Alleged Supervisors

The RD found that the status of Miguel Becerra Tovar, Maria Cortes and Alfredo Elizondo Rodriguez involve questions of material issues of fact and credibility, and recommended that an investigative hearing be set to determine whether these three individuals are eligible to vote. The RD points out that the Union provided declarations concerning these three individuals that indicated that they were supervisors, while Kawahara provided declarations that they were not supervisors. Kawahara argues in its exceptions to the RD's challenged ballot report that a determination regarding the status of these individuals can be made on the evidence currently in the record and that these individuals are not supervisors, but are instead "lead persons," and therefore are eligible voters.

(Footnote continued)
will prevent the assertion of jurisdiction by the ALRB. (*San Diego Building Trades Council v. Garmon* (1959) 359 U.S. 236; *Gerawan Farming Co*. (1995) 21 ALRB No. 6; *Warmerdam Packing Co*. (1998) 24 ALRB No. 2, ALJ Dec. at p. 14.)

Section 1140.4 (j) of the ALRA provides:

> The term "supervisor" means any individual having the authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or the responsibility to direct them, or to adjust their grievances, or effectively to recommend such action, if, in connection with the foregoing, the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

In 2006 the NLRB issued a series of decisions expanding upon, and modifying its interpretations of the terms, "assign," "responsibility to direct," and "independent judgment" under their governing legislation. The lead cases are *Oakwood Heathcare, Inc.*, *supra*, 348 NLRB No. 37 and *Croft Metals, Inc.*, *supra*, 348 NLRB No. 38. The NLRB now defines an assignment as "the act of designating an employee to a place (such as a location, department, or wing), appointing an employee to a time (such as shift or overtime period), or giving significant overall duties, i.e., tasks to an employee." The Board followed and applied *Oakwood Healthcare, Inc*., and *Croft Metals, Inc*. most recently in *Artesia Dairy*, *supra*, 33 ALRB No. 3.

Because the Board makes the determination of supervisory status on the basis of the actual job duties of each employee in question (*Salinas Valley Nurseries* (1989) 15 ALRB No. 4), the RD is correct that the question of whether Tovar, Cortes and Rodriguez are statutory supervisors presents material issues of fact and credibility that must be resolved in an evidentiary hearing.

Remaining Challenged Voters

Employer did not except to the RD's recommendation that the ballot of Severiano Cruz-Sanchez be counted, nor to his recommendation that the challenge to Gabriel Garcia's ballot be sustained. Therefore, the RD's conclusions and recommendations as to these two individuals are final.

ORDER

IT IS ORDERED THAT the Investigative Hearing Examiner take evidence, in accordance with the discussion above, on the issue of whether the challenges to the ballots of the following twenty-three voters should be sustained or overruled on the basis of whether they are agricultural employees within the jurisdiction of the ALRB.

1. Manuel Vasquez
2. Dustin Corey
3. Angelo Imperial De Castro
4. Robert Valencia, Jr.
5. Andrew Lee Koscinski
6. Larry William Howard
7. Lyle Ray Weiss
8. Orlando Carillo
9. Ralph Garcia
10. Jacob Patrick Morrison
11. Cristian Juarez-Morales
12. James Camillo-Scuderi
13. Justin Coyote Suico
14. Lance Harrison-Brown
15. Eric. D. Fisher, Jr.
16. Phyllis L. Penick-Logan
17. Julio Cesar Lopez
18. Keith W. Vandertuig
19. Misty Lee Wilson
20. Jordan Forbes
21. Eric Fimbrez
22. Meg H. Frink

23. Brendan Harada

In addition, the Investigative Hearing Examiner is directed to take evidence on the issue of whether the challenges to the ballots of each of the following individuals should be sustained or overruled on the basis of whether or not he or she is a supervisor as defined in Labor Code section 1140 (j).

1. Miguel Becerra Tovar
2. Alfredo Elizondo Rodriguez
3. Maria Cortes

IT IS FURTHER ORDERED that the challenge to the ballot of Severiano Cruz-Santiago be overruled, but that the opening and counting of his ballot be held in abeyance until the final resolution of the challenged ballot process. Finally, the Board upholds the Regional Director's recommendation to sustain the challenge to the ballot of Gabriel Garcia.

DATED: June 10, 2010

Genevieve A. Shiroma, Member

Cathryn Rivera-Hernandez, Member

Willie C. Guerrero, Member

CASE SUMMARY

KAWAHARA NURSERIES, INC. Case No. 2010-RC-001-SAL
(United Farm Workers of America) 36 ALRB No. 3

Background

On January 12, 2010, a petition for certification was filed by the United Farm Workers of America (Union or UFW) to represent the agricultural employees of Kawahara Nurseries, Inc. (Employer). After the January 19, 2010 election, the initial tally of ballots was as follows: "union," 70; "no union," 68, and 28 unresolved challenged ballots. Twenty-three individuals with the job title "merchandisers" were challenged as non-agricultural employees, 4 were challenged as supervisors, and 1 was challenged as not on the eligibility list. The Regional Director (RD), in his report on challenged ballots, recommended that the challenges to all 23 merchandisers be sustained, reasoning that they were not engaged in agriculture because all of their duties occurred after delivery to market. (*L&A Investment Corp. of Arizona* (1975) 221 NLRB 1206.) He recommended that the challenges to 3 of the alleged supervisors be set for hearing. He also concluded that the challenge to one of the alleged supervisors be overruled and that the challenge to the individual not on the eligibility list be sustained. Employer filed exceptions to the RD's report, arguing that the challenges to the 23 merchandisers should be overruled because they were engaged in primary agriculture. (*Light's Tree Co*. (1971) 194 NLRB 229.) Employer also argued that it was not necessary to hold a hearing on the status on the 3 alleged supervisors as these individuals did not exercise independent judgment and were "lead persons," not supervisors.

Board's Decision and Order

The Board affirmed the RD's recommendation to set the challenges of the 3 alleged supervisors for hearing because their status presents material issues of fact. The Board disagreed that *Light's Tree Co*. supported a finding that the merchandisers were engaged in primary agriculture. The Board found, in contrast to the RD, that the merchandisers may be engaged in secondary agriculture as their work could be viewed in connection with and incident to Employer's general enterprise rather than in connection with a separate commercial enterprise. The Board found that the question of whether any of the merchandisers regularly handle non-Kawahara plants, thereby taking them out of the ALRB's jurisdiction, presented material issues of fact, and ordered the challenges to these individuals be set for hearing.

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