

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

SOUTH LAKES DAIRY FARM	)	Case No. 2010-RC-002-VIS
	)	
Employer,	)	
	)	
and	)	
	)	36 ALRB No. 5
UNITED FOOD AND	)	
COMMERCIAL WORKERS	)	(December 17, 2010)
UNION, LOCAL 5	)	
	)	
Petitioner,	)	

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**DECISION AND ORDER**

On July 12, 2010, a petition for certification was filed by the United Food and Commercial Workers, Local 5 (Union or UFCW) to represent the agricultural employees of South Lakes Dairy Farms (Employer or Dairy). Employer operates a dairy in Pixley, CA. On July 19, 2010, an election was held among Employer’s agricultural employees. The initial tally of ballots was as follows:

Union.....	23
No Union.....	26
Unresolved Challenged Ballots.....	<u>9</u>
Total Ballots Cast.....	58

Of the above nine challenged ballots, five individuals were challenged by Board agents as not being on the eligibility list, one individual was challenged because her name was removed from the eligibility list due to a determination that she was potentially a confidential

employee, and finally, three individuals were challenged by the union on the basis that they are supervisors.

**The Regional Director's Challenged Ballot Report:**

After a post-election investigation of the challenged ballots, the Visalia Regional Director (RD) issued his report on the challenged ballots on October 25, 2010. The RD recommended that the challenge to the ballot of Marin Gonzalez Salcedo be overruled as the RD concluded that but for a work-related injury, Salcedo would have worked during the eligibility period. The RD recommended that the challenge to the potential confidential employee, Dyanna Renee White, be overruled as the investigation revealed that her job is limited to basic clerical duties. The RD recommended that the opening and counting of the ballots of three employees (Gabriel Julian Saucedo, Adolfo B. Cuevas, and Juan Pablo Mayo Suastegui) be held in abeyance because these individuals had filed ULP charges related to their terminations, and these charges were still under investigation at the time of the election. The RD recommended sustaining the challenge to Bryan Lee Soares because it was concluded that he was not an employee of South Lakes Dairy. Finally, the RD recommended that the challenges to the three alleged supervisors (Richard L. Aguiar, Manuel Vera and Fernando Gonzalez) be sustained as the investigation supported the conclusion that these three men are ineligible statutory supervisors.

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

The Employer filed exceptions to five of the RD's recommendations, and argues that an evidentiary hearing be held with respect to the eligibility of Martin Gonzalez Salcedo, Bryan Lee Soares, Richard Aguiar, Manuel Vera and Fernando Gonzalez.

The Employer did not except to the RD's recommendation to hold in abeyance the ballots of Gabriel Julian Saucedo, Adolfo B. Cuevas, and Juan Pablo Mayo Suastegui pending the resolution of their ULP charges, nor did the Employer except to the RD's recommendation to overrule the challenge to Dyanna Renee White. Therefore, the RD's recommendations as to these four individuals are final.

The UFCW did not file any exceptions to the RD's challenged ballot report.

### **Discussion and Analysis**

#### 1. Martin Gonzalez Salcedo:

Salcedo was challenged for not being on the eligibility list. In his challenged ballot declaration, Salcedo stated that he was injured on the job in March 2009. He stated that he continued to work, but when his pain did not improve, he saw a doctor who issued work restrictions for him in late December 2009. Salcedo also filed a workers' compensation claim around this same time. On December 22, 2009, he presented this documentation to his supervisor, Hector "Javier" Vera, who told him that because of the restrictions, there would be no work available for Salcedo.

Salcedo stated that on January 5, 2010, he went to the Dairy to pick up his paycheck. At this time he spoke to Dairy owner and partner, Ryan Schakel and Dairy manager Manuel Rodriguez. According to Salcedo, Schakel was angry that he had not been informed earlier of Salcedo's doctor-ordered work restrictions. Salcedo also stated that Rodriguez told him that "now I don't even know if you are going to return to work with me." Salcedo's version of events is that he left with his paycheck and was never called again by the Dairy.

The RD found that Salcedo would have been working during the eligibility period but for his injury, citing the test for the eligibility of injured or ill workers that the Board recently clarified in *Artesia Dairy* (2007) 33 ALRB No. 3, pages 3-4. Key pieces of evidence supporting the RD's conclusion that Salcedo would have been working but for his injury include the following: He had worked for the Dairy for several years before he was injured, and except for one written warning, he had no negative work history. The copy of Salcedo's January 5, 2010 paystub supports his contention that he spoke to Schakel and Rodriguez. He also presented a copy of a state disability pay stub dated August 10, 2010, showing a claim date of December 22, 2009.

When the Employer submitted its response during the challenged ballot investigation, it merely stated that Salcedo was to return to work on January 19, 2010, and when he did not he was replaced. The Employer did not attach declarations or other documentary evidence to support this contention. It was only when the Employer filed its exceptions on November 4, 2010, that it submitted a sworn statement from Ryan Schakel concerning the January 5, 2010 conversation with Salcedo. Schakel stated in his declaration that he informed Salcedo that he needed to report back to work on January 19, 2010, and that when Salcedo failed to return to work on that date, he was let go and replaced. As discussed below, this evidence is untimely and will not be considered by the Board.

Board Regulation section 20360<sup>1</sup> states that when considering exceptions to a regional director's challenged ballot report the Board will not consider, absent extraordinary

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<sup>1</sup> The Board's regulations are codified at Title 8, California Code of Regulations, section 20100, et seq.

circumstances, evidence that was not submitted timely to the regional director during the challenged ballot investigation. Because the Employer did not submit Schakel's declaration during the challenged ballot investigation, there was no material factual dispute as to whether Salcedo's employment relationship with the Employer had been severed, and the RD properly concluded that the challenge to Salcedo's ballot should be overruled.<sup>2</sup>

2. Bryan Lee Soares: The RD concluded following his investigation that Soares was not an employee of South Lakes Dairy, did not work during the eligibility period, and therefore, he was not eligible to vote. The RD found evidence that Soares is employed by another company, Diversified Dairy Solutions (DDS), and noted that Soares is paid in cash. While the RD found that this information alone was not conclusive of Soares' status, when combined with the Dairy's failure to provide any evidence of Soares' work or payment for work, the RD found that the evidence as a whole supported the conclusion that Soares is not an employee of South Lakes Dairy.

Employer's position is that Soares is a casual laborer who works at the Dairy on an "as needed" basis, is paid in cash, and that he worked during the eligibility period. In his challenged ballot declaration, Soares stated that he worked at South Lakes Dairy between June 16, 2010 and June 30, 2010. He stated that he is supervised by Manuel Rodriguez and that he

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<sup>2</sup> We also note that Employer's exceptions do not apply the proper test under Board precedent for determining the eligibility of injured or ill workers, instead citing irrelevant Worker's Compensation Appeals Board precedent standing for the proposition that a person on long term disability leave does not have a guarantee of reinstatement. *Judgson Steel Corp. v. WCAB* (1978) 22 Cal.3d 658. The Board made it clear in *Artesia Dairy, supra*, 33 ALRB No. 3, that there is no requirement that an injured or sick worker have a reasonable expectation of returning to work.

has a verbal agreement with Rodriguez about getting paid. He describes his job at the Dairy as “measuring heifers,” and that the Dairy provides the supplies needed to do this job.<sup>3</sup>

Both the RD and Employer are correct that the fact that Soares was not on the regular payroll and is paid in cash creates no presumption of ineligibility. (*Henry Garcia Dairy* (2007) 33 ALRB No. 4, pp. 10-11; *Artesia Dairy* (2006) 32 ALRB No. 2, p. 5.) It is well-settled that agricultural workers who are not on the regular payroll can still be eligible to vote if they worked during the eligibility period. (*Valdora Produce Co.* (1977) 3 ALRB No. 8.)

The purpose of a challenged ballot investigation held pursuant to Board regulation section 20363, subdivision (a), is not to resolve material factual issues in dispute, rather it is to determine whether challenges to voters’ eligibility can be resolved based on undisputed facts. Where this is not possible, an evidentiary hearing is the proper forum in which to resolve material issues of fact and credibility. Here, Soares’ challenged ballot declaration creates a material factual dispute as to whether he is an employee of the dairy and whether he actually worked during the eligibility period such that an evidentiary hearing is necessary to resolve the challenge to his ballot. If it is determined that Soares worked during the appropriate time period, it will be necessary to determine whether he had status as an employee of the Dairy or was acting as an independent contractor. (*Henry Garcia Dairy*

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<sup>3</sup> We note that in support of its exceptions, the Employer submitted a declaration from Soares dated November 2, 2010, and as with Shakel’s declaration about Salcedo’s status, this declaration was untimely under Board Regulation section 20360. Similarly, declarations by Richard Aguiar, Manuel Vera and Fernando Gonzalez dated November 3, 2010, and attached to Employer’s exceptions are also untimely and will not be considered by the Board.

(2007) 33 ALRB No. 4; *Arie De Jong dba Milky Way Dairy* (2003) 29 ALRB No. 4. pp. 12-16)

3. Richard L. Aguiar: Aguiar was challenged by the Union as being an ineligible supervisor. The RD found that the primary evidence indicating that Aguiar is a supervisor consisted of declarations by two workers who state that they were told by Manager Manuel Rodriguez that Aguiar was in charge of the truck maintenance department. One of the workers also stated that he knew that Aguiar supervised two other maintenance workers. Secondary indicia of supervisory status the RD considered include being paid a fixed monthly salary (rather than an hourly wage) that far exceeds what others on the mechanic crew are paid, not having to punch in to a time clock like other workers, and his eligibility to participate in the Dairy's 401K plan.

In Aguiar's challenged ballot declaration, he states that he is a mechanic, is supervised by Rodriguez and Schakel, and does not have any individuals working under him. During the challenged ballot investigation, Employer provided a pay stub showing Aguiar was paid a fixed sum on a bi-monthly basis.

Labor Code section 1140.4(j) provides:

The term "supervisor" means any individual having the authority, in the interest of the employer, to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward, or discipline 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.

It is not necessary that an individual engage in all of the 12 supervisory functions listed in the statute in order to be considered a statutory supervisor; it is sufficient that he/she engages in any one of those functions. (*NLRB v. Kentucky River Community Care, Inc.* (2001) 532 U.S. 706 at p. 713; *Tsukiji Farms* (1998) 24 ALRB No. 3, ALJ dec. at pp.10-11.)

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

The declarations relied on by the RD to conclude that Aguiar is the supervisor of the maintenance department contain very general statements, and do not sufficiently describe Aguiar’s duties. As with Soares, discussed above, Aguiar’s challenged ballot declaration creates a material factual dispute as to his duties and responsibilities. Moreover, the RD’s report states that the exact extent of Aguiar’s authority to direct the work of others and how much independent judgment he exercises is not clear.

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 Healthcare, Inc.* (2006) 348 NLRB No. 37 and *Croft Metals, Inc.* (2006) 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.” Responsibility directing work applies to those individuals who exercise basic supervisory duties but who lack the authority to carry out other supervisory functions such as hiring, firing and disciplining. The direction must be both responsible and be carried out with independent judgment. For the direction to be responsible, the person directing must be accountable for the performance of the task with the possibility of adverse consequences if the task is not completed. To be independent, the judgment must involve a degree of discretion that rises above the routine or clerical, and the decision cannot be “dictated or controlled by detailed instructions, whether set forth in company policies or rules, the verbal instructions of a higher authority, or in the provisions of a collective bargaining agreement.” (*Oakwood Healthcare, Inc., supra*, 348 NLRB No. 37, p. 7-8.) The Board followed and applied *Oakwood Healthcare, Inc.*, and *Croft Metals, Inc.* in *Artesia Dairy, supra*, 33 ALRB No. 3.

Therefore, it is ordered that a hearing be held to determine whether Aguiar’s duties and responsibilities make him a statutory supervisor under the standards discussed above.

4. Manuel Vera: The Union challenged Vera as a supervisor and also alleged that he was an independent contractor. The RD found that there was no evidence that Vera was an independent contractor, but the RD did conclude that he was a statutory supervisor.

In concluding that Vera is a supervisor and therefore ineligible to vote, the RD relied on the declarations of several workers who stated that Vera directed the work of others,

assigned at least one worker to another position, and effectively recommended the discipline of others. One worker stated that Vera supervises in the afternoons. Secondary indicia of supervisory status relied on by the RD include the fact that Vera doesn't punch into a time clock like others, information from his pay stub showing he is paid more than double what his coworkers are paid, and additional information from his pay stub showing that he receives a special housing benefit in the form of a rent subsidy.

Vera states in his challenged ballot declaration that he is an inseminator and that he also works at the hospital documenting cows that are ill. He states that his supervisor is Xavier Vera. He states that he cannot hire or fire workers, cannot assign workers to their jobs, and cannot promote or discipline workers. Nor can he give workers time off. He states that when he reports to his supervisor, he reports only about his own work, not about the work of others.

As with Soares and Aguiar, Vera's declaration creates a material factual dispute. Therefore, the dispute as to Vera's specific duties and responsibilities is properly resolved through an evidentiary hearing.

If it is determined at hearing that Vera engages in any of the duties of a statutory supervisor, it appears that there may also be a question of whether Vera engages in these duties for a sufficient amount of time to be considered a part-time supervisor. An employee who works part of the time as a supervisor is considered a statutory supervisor if the supervisory duties are "regular and substantial." (*Artesia Dairy, supra*, 33 ALRB No. 3 at p. 9; *Oakwood Healthcare, Inc., supra*, 348 NLRB No. 37.) A relevant inquiry is how often the individual holds supervisory authority. For example, someone acting as a supervisor one day out of a 5-

day week would be viewed as being a supervisor 20 percent of the time. (See, e.g., *N & T Associates, Inc. dba Aladdin Hotel* (1984) 270 NLRB 838.)

Under the NLRB's standard, "regular" means according to a pattern or schedule as opposed to sporadic substitution. While the NLRB has not adopted a strict numerical rule in defining "substantial," it has found supervisory status for those who serve in a supervisory role at least 10-15 percent of their total work time. (*Oakwood Healthcare, Inc., supra*, at p. 9.) In *Artesia Dairy, supra*, 33 ALRB No. 3, the Board found that a part-time supervisor who served in a supervisory role 16.7 percent of the time was a supervisor and ineligible to vote.

5. Fernando Gonzalez: Gonzalez has been employed by the Dairy for more than 17 years, and he has worked as an inseminator for 8 years. In his challenged ballot declaration, he states that his supervisors are Ryan Shakel, Manuel Rodriguez and Xavier Vera. He states that he gets paid twice a month, and that he works on a two-person team, but does not give the other person any orders.

The Union's position is that Gonzalez hires and supervises workers in the milking parlors. One worker's declaration states that during the 2008 union organizing campaign, Dairy owner, Ryan Schakel and Manager Manuel Rodriguez told several workers that Gonzalez was their new milking supervisor. The same worker states that Gonzalez would give warning tickets and would also schedule days off. Another worker states in his declaration that he was hired by Gonzalez.

The copy of Gonzalez's time card provided by the Employer indicates "supervisor" as his job description. The Dairy's position is that this was a clerical error, and the pay stub should have read "outside."

The RD's challenged ballot report discusses secondary indicia of supervisory status such as Gonzalez's pay differential. In addition the RD states that the investigation revealed that Gonzalez lives rent free, in a house on the Dairy's property near the mechanical shop. Finally, the RD notes that when Board Agents went to the property to post the notice and direction of election, it was Gonzalez who interacted with them and gathered workers together. When Board Agents advised Gonzalez and Xavier Vera that they needed to speak to workers only, both men voluntarily left the area. Board Agents also observed Gonzalez standing in the middle of the milking parlor, apart from other workers and issuing them directives. The RD therefore concluded that Gonzalez was a supervisor and that the challenge to his ballot should be sustained.

While the notation on Gonzalez's pay stub is telling, neither job title nor classification alone is sufficient to warrant finding an individual to be a supervisor. 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.) Though the evidence submitted to the RD appears to weigh in favor of finding Gonzalez to be a supervisor, his challenged ballot declaration raises a material factual dispute as to whether he actually possesses any supervisory authority. Accordingly, it is ordered that an evidentiary hearing be held to determine his status.

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**ORDER**

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

follows:

**Overruled <sup>4</sup>**

Martin Gonzalez Salcedo  
Dyanna Renee White

**Held in Abeyance Pending Resolution of ULPs**

Gabriel Julian Saucedo  
Adolfo B. Cuevas  
Juan Pablo Mayo Suastegui

**Set for Hearing**

Bryan Lee Soares  
Richard L. Aguiar  
Manuel Vera  
Fernando Gonzalez

DATED: December 17, 2010

Genevieve A. Shiroma, Member

Cathryn Rivera-Hernandez, Member

Willie C. Guerrero, Member

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<sup>4</sup> The opening and counting of the ballots of these two individuals shall be held in abeyance pending the resolution of the challenges set for hearing.

## CASE SUMMARY

**SOUTH LAKES DAIRY FARM**  
(United Food and Commercial Workers  
Union, Local 5)

Case No. 2010-RC-002-VIS  
36 ALRB No. 5

### Background

On July 12, 2010, a petition for certification was filed by the United Food and Commercial Workers Union, Local 5 (Union or UFCW) to represent the agricultural employees of South Lakes Dairy Farm (Employer or Dairy). An election was held July 19, 2010, and the initial tally of ballots was as follows: “union,” 23; “no union,” 26, and 9 unresolved challenged ballots.

After an investigation of the challenged ballots, the Visalia Regional Director (RD) issued a challenged ballot report. The RD recommended that the challenge to an alleged confidential employee be overruled because her job was limited to clerical duties. The RD recommended that the opening of the ballots of three employees be held in abeyance because they had filed ULP charges related to their terminations and the charges were still under investigation. The RD recommended that the challenge to one individual be overruled as the RD concluded that but for a work-related injury, he would have worked during the eligibility period. The RD recommended sustaining the challenge to one individual because it was concluded that he was not employed by the Dairy. Finally, the RD recommended that the challenges to three individuals be sustained because the RD concluded that they were ineligible statutory supervisors. The Employer excepted to the recommendations only as to the latter five challenges.

### Board Decision

The Board affirmed the recommendation as to the individual found not to be working because he was on disability leave, concluding that the timely evidence provided by the Employer, that submitted during the RD's investigation, failed to raise a material factual dispute. The Board overturned the RD's recommendation as to the individual who was allegedly not employed by the Dairy because the Board found there were disputed material issues of fact as to his status and whether he worked during the eligibility period requiring an evidentiary hearing to resolve. Similarly, the Board found that there were disputed facts as to the status of the three alleged supervisors, and ordered that a hearing be held to determine whether their duties and responsibilities make them ineligible statutory supervisors.

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