STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

NURSERYMEN'S EXCHANGE, INC., **Employer**, and UNITED FARM WORKERS OF AMERICA, **Petitioner.**	)	Case No. 2010-RC-003-SAL 36 ALRB No. 6 (December 17, 2010)

DECISION AND ORDER

On July 26, 2010, the United Farm Workers of America (UFW) filed a Petition for Certification to represent the agricultural employees of Nurserymen's Exchange, Inc. (NEI or Employer). On August 2, 2010, a representation election was held, and the Tally of Ballots showed the following result:

United Farm Workers of America	3
No Union	58
Unresolved Challenged Ballots	107
Total Ballots Cast (including unresolved ballots):	168

The UFW challenged 13 employees as commercial workers but withdrew its challenges. NEI challenged 94 employees who had received notices on July 1, 2010, that they would be laid off August 31, 2010, and were placed on paid administrative leave for a 60-day period. The 60-day notice was provided by NEI in compliance with the

federal Worker Adjustment and Retraining Notification Act (the "WARN Act," 29 U.S.C. §§ 2101 – 2109) and its state equivalent (Lab. Code § 1400 et seq. [1]). NEI challenged the employees on the grounds that they were not eligible to vote because they were on the payroll during the applicable payroll period *solely* because of the notice requirements of the WARN Act and that they performed no work during this period because there was no work for them to do. The Salinas Regional Director rejected NEI's challenges in his Challenged Ballot Report issued October 7, 2010, because NEI failed to prove that the employees had separated or been terminated from their employment with the company prior to the applicable payroll period for determining voter eligibility. (See Lab. Code §§ 1156.3(a)(1) and 1157.) NEI filed timely exceptions. We agree with the Regional Director, overrule NEI's exceptions, and deny its request for amicus briefing.

In sum, NEI's argument is that its required compliance under the federal and state WARN Acts in giving 60 days' notice prior to a mass layoff should not suffice to confer voter eligibility on these 94 employees who, but for the WARN Act, would not have been kept on NEI's payroll and who performed no work during the applicable payroll period. NEI's WARN Act notice read in relevant part:

> This is to inform you that Nurserymen's Exchange, Inc. will conduct layoffs at its facility located at 2651 Cabrillo Hwy N., Half Moon Bay, CA 94019. These layoffs are expected to be permanent.
>
> The layoffs are expected to commence during the 14-day period between August 30th and September 12th. From the date of this notice, you are being placed on **paid** administrative leave for the next 60 days. During this 60 day period you are

[1] All statutory references are to the California Labor Code unless otherwise stated.

> relieved of your duties. At the end of your 60 day paid leave **your employment with the Company will terminate which means you will be laid-off on August 31, 2010**. There are no bumping rights at this facility. (July 1, 2010 Letter of Jesse Melendrez, Vice President, Human Resources, Nurserymen's Exchange, Inc. (emphasis added)).

By its own admission, NEI considered these workers employees until August 31st and they were on the payroll during the applicable eligibility period. Therefore, the requirements for peak and voter eligibility under Labor Code sections 1156.3(a) and 1157 were met. We need not inquire further into the circumstances of the employer-employee relationship, nor have we, in cases where employees *were* on the payroll and on some form of paid leave during the applicable payroll period. (*Cf. Ruline Nursery Co.* (1985) 169 Cal. App. 3d 247, 256.) We find no persuasive reason to deviate from that approach in this case.

The cases NEI cites for the proposition that we should inquire further into the employment relationship – *Yoder Brothers, Inc.*,[2] *Rod McLellan Co.*,[3] *Wine World, Inc. dba Beringer Vineyards*,[4] *Comite 83, Sindicato de Trabajadores Campesinos Libres* (*Hiji Brothers*),[5] *Kubota Nurseries, Inc.*, [6] and *Artesia Dairy*[7] -- as well as one case it did not cite, *The Careau Group dba Egg City*[8] -- involved circumstances where employees

[2] (1976) 2 ALRB No. 4.

[3] (1977) 3 ALRB No. 6.

[4] (1979) 5 ALRB No. 41.

[5] (1987) 13 ALRB No. 16.

[6] (1989) 15 ALRB No. 12.

[7] (2007) 33 ALRB No. 6.

[8] (1988) 14 ALRB No. 2.

were not on the payroll during the applicable payroll period such that further inquiry was required to determine whether an employer-employee relationship existed. We consistently have rejected use of the NLRB's "reasonable expectation of employment" standard in making that determination.[9] Rather, the inquiry has been focused on whether there was an employment relationship during the pre-petition payroll period, as employment during that period is the only statutory requirement for voter eligibility. (See Lab. Code § 1156.3(a)(1).)

NEI also argues that the federal WARN Act creates a supremacy clause issue and a conflict between the federal WARN Act and the Board's definition of an eligible voter under sections 1156.3(a)(1) and 1157 such that amicus briefing is warranted on this "novel" issue. Not so. The federal WARN Act explicitly states:

> The rights and remedies provided to employees by this Act [29 U.S.C.S. §§ 2101 et seq.] are in addition to, and not in lieu of, any contractual or statutory rights and remedies of the employees, and are not intended to alter or affect such rights and remedies, except that the period of notification required by this Act shall run concurrently with any period of notification required by contract or any other statute.

(29 U.S.C. § 2105). Clearly, the federal WARN Act was not intended to supplant rights employees otherwise enjoy under state law. Therefore, to construe the federal WARN Act as requiring the provision of 60 days' notice of an impending layoff while simultaneously disenfranchising employees under the ALRA who remain employed

[9] *Artesia Dairy, supra,* 33 ALRB No. 6 at pp. 3-4; *Hiji Brothers, supra*, 13 ALRB No. 16 at pp. 11-12.

during that notice period is a strained construction of *both* acts. Amicus briefing is not warranted.[10]

NEI is correct on one point: The ALRB Election Manual is not legal authority for determining voter eligibility under the ALRA and should not be cited as such. Rather, the Manual is simply a guide designed to be consistent with existing statutory, regulatory, and case law authorities. (See generally *Oceanview Produce Co.* (1994) 20 ALRB No. 16 at p. 9, fn. 7 (materials in Election Manual are not binding rules, but intended to provide operational guidance); (*Lonoak Farms* (1991) 17 ALRB No. 19 at pp. 27-28 (deviations from procedures in Election Manual, without more, are insufficient grounds for setting aside election)).

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[10] NEI further argues that "payments" made pursuant to the federal and state WARN Acts are not considered "wages" for purposes of qualifying for unemployment benefits and that these employees should not be considered "unemployed" for purposes of receiving unemployment benefits and simultaneously "employed" for purposes of voting under the ALRA. This misrepresents applicable law, as it is only penalties an employer would pay to employees for failure to provide the 60 days' notice prior to layoff that are not considered wages. (Cal. Lab. Code § 1407.) If the employees remain employed by the employer during the 60-day notice period, any "payment" they would receive from the employer would be "wages," not a "penalty."

ORDER

Finding the Employer's exceptions to be without merit, we affirm the Regional Director's decision to overrule the challenges to the 94 employees on paid leave and Order that their ballots be opened and counted.

DATED: December 17, 2010

Genevieve A. Shiroma, Member

Cathryn Rivera-Hernandez, Member

Willie C. Guerrero, Member

CASE SUMMARY

NURSERYMEN'S EXCHANGE, INC. Case No. 2010-RC-003-SAL
(United Farm Workers of America) 36 ALRB No. 5

On July 26, 2010, the United Farm Workers of America (UFW) filed a Petition for Certification to represent the agricultural employees of Nurserymen's Exchange, Inc. (Employer). On August 2, 2010, a representation election was held, and the Tally of Ballots showed the following result: "union" 3; "no union," 58; and 107 unresolved challenged ballots. Thirteen employees were challenged as commercial workers but the UFW later withdrew these challenges. Ninety-four employees were challenged by the employer as not eligible to vote because they had received 60-day notices of layoff on July 1, 2010 pursuant to the federal Worker Adjustment and Retraining Notification Act (the "WARN Act") and its state equivalent. Employer argued that these employees were effectively relieved of their duties on July 1, 2010, and remained on the payroll solely for purposes of WARN Act compliance. Employer argued that the ALRA conflicted with the federal WARN Act and the federal law should control. Employer further argued since they performed no work during the applicable payroll period and there was no reasonable expectation of employment for them, they were not "currently employed" under Labor Code section 1156.3(a)(1) and not eligible to vote under Labor Code section 1157.

The Salinas Regional Director (RD) rejected the challenges in his report on challenged ballots on the grounds that Employer failed to prove these employees had separated or been terminated during the applicable payroll period. The RD stated that Employer acknowledged that the employees in question were not terminated until at least August 31, 2010, in order for Employer to avoid WARN Act penalties. The RD rejected the argument that the employees were not eligible to vote because they had been on paid administrative leave, citing the ALRB Election Manual for the proposition that employees who were absent from work during the applicable payroll period but who received pay for that period from the employer were eligible to vote. The RD also stated there was no reason to treat this group of employees any differently than employees on sick leave or paid vacation who are also allowed to vote, as they were on the payroll and had not been discharged or laid off.

The Board affirmed the recommendations of the RD to overrule the challenges because it saw no reason to deviate from well-established precedent that employees on paid leave are eligible to vote without inquiry into whether they had a reasonable expectation to return to work. The Board pointed out that it is only in cases where employees *were not* on the payroll that the Board has looked to other factors and that in those instances it was solely to determine if there was an employment relationship during the applicable payroll period. The Board also held that there is no conflict with the federal WARN Act, as that statute specifically states that is not intended to supplant rights under state law. Lastly, the Board noted that the ALRB Election Manual is merely a guide based on existing law and should not be cited as legal authority.

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