

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

<b>In the Matter of:</b>	)	Case No. 2009-MMC-02
	)	
FRANK PINHEIRO DAIRY dba PINHEIRO	)	
DAIRY & MILANESIO FARMS,	)	ORDER REQUESTING
	)	BRIEFING ON NOVEL ISSUE;
<b>Employer,</b>	)	ORDER REQUESTING
	)	STIPULATION CONCERNING
and	)	PAYROLL RECORDS
	)	
	)	Admin Order No. 2010-2
UNITED FOOD AND COMMERCIAL	)	
WORKERS, LOCAL 5,	)	
	)	
<b>Petitioner.</b>	)	
_____	)	

On January 21, 2010, the Agricultural Labor Relations Board (Board) issued Administrative Order 2010-1 staying the mandatory mediation and conciliation (MMC) process in the above-captioned matter pending reconsideration by the Board of its Decision and Order, *Frank Pinheiro Dairy* (2009) 35 ALRB No. 5.

At issue in this case is the interpretation of California Labor Code section 1164(a), which sets forth the preliminary requirements for a Board order requiring that an employer and a certified union participate in the MMC process.<sup>1</sup> The portion of section 1164(a) specifically at issue reads as follows:

“Agricultural employer,” for the purposes of this chapter, means an agricultural employer, as defined in subdivision (c) of section 1140.4, who has employed or engaged 25 or more agricultural

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<sup>1</sup> 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.

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

The Board, interpreting this section of the statute for the first time, previously found that Frank Pinheiro Dairy (Employer or Pinheiro) met the 25 employee threshold and ordered Employer and the United Food and Commercial Workers, Local 5 (UFCW) to participate in the MMC process. The Board interpreted the words “during any calendar week” to mean “at some time in any calendar week,” and held that Labor Code section 1164(a) required a head count of the total number 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 the MMC process. 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 MMC. Therefore, the Board ordered the parties to participate in the MMC process.

On October 8, 2009, the Employer filed a petition for a writ of review of the Board’s order in case number 35 ALRB No. 5 with the Court of Appeal. In its brief to the Court, Employer argued that the Board erred in its interpretation of Labor Code section 1164(a). Specifically, Employer argued that section 1164(a) 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. In its brief to the Court, 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.<sup>2</sup>

This argument was first presented by Employer in its brief to the Court. Employer did not previously raise this argument in any other filing with the Board, including its answer to the UFCW’s request for MMC filed with the Board on September 22, 2009. Instead, Employer previously argued that it did not meet the 25 agricultural employee threshold because there was never a single day in which 25 or more employees were simultaneously employed during any calendar week.<sup>3</sup>

In order to ensure full and complete consideration of all legal arguments on the proper interpretation of Labor Code section 1164(a), both parties shall be given the opportunity to submit additional arguments and rebuttals.

#### ORDER

As indicated above, interpretation of the phrase “during any calendar week” in Labor Code section 1164(a) presents a matter of first impression for the Board. In order to assist the Board in resolving this matter, the parties are requested to submit briefs analyzing the following questions:

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<sup>2</sup> Employer’s petition for review was summarily denied by the Court on December 28, 2009. The Court did not address the merits of Employer’s argument regarding the interpretation of the statute.

<sup>3</sup> The Employer did not avail itself of the opportunity to file a motion for reconsideration of the Board’s Decision and Order referring the parties to the MMC process prior to filing a petition for review in the Court of Appeal.

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”?

Briefs addressing this issue must be filed and served with the Executive Secretary on or before February 16, 2010. Reply briefs, if any, shall be filed and served with the Executive Secretary on or before February 23, 2010.

The parties are further asked to stipulate that the electronic time records and Excel spreadsheet report generated from Employer’s payroll records and submitted to the Board on CD ROM in support of Employer’s September 22, 2009 Answer to the Request for Mediation are complete records and contain the names and payroll data of all agricultural employees employed by Employer during the relevant 12 month time period. If the parties are unwilling or unable to reach a stipulation concerning the veracity of the payroll records, the Board requests the following: 1) the Employer shall submit a declaration verifying that the records submitted on CD ROM on September 22, 2009 are complete, accurate, and contain the names of all agricultural employees employed from September 8, 2008 to September 7, 2009; 2) the UFCW shall submit a declaration stating its position as to whether the records on the September 22, 2009 CD ROM are complete, accurate, and contain the names of all agricultural employees employed from September 8, 2008 to September 7, 2009.

The stipulation or declarations described above must also be filed and served with the Executive Secretary on or before February 16, 2010.

By Direction of the Board.

Dated: February 3, 2010

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J. ANTONIO BARBOSA  
Executive Secretary, ALRB