STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of	)	Case No. 2010-RC-001-SAL
	)	
KAWAHARA NURSERIES, INC.,	)	(37 ALRB No. 4)
	)	(36 ALRB No. 3)
Employer,	)	
	)	ORDER DENYING MOTION
and	)	FOR RECONSIDERATION
	)	
UNITED FARM WORKERS OF AMERICA,	)	Admin. Order No. 2011-24
	)	
Petitioner.	)	
_____	)	

On December 5, 2011, the United Farm Workers of America (UFW) filed a Motion for Reconsideration of the decision of the Agricultural Labor Relations Board (ALRB or Board) in *Kawahara Nurseries Inc.* (2011) 37 ALRB No. 4. On December 13, 2011, Kawahara Nurseries Inc. filed a response opposing the motion. For the reasons set forth below, the Motion for Reconsideration is hereby DENIED.

Section 20393, subdivision (c), of the regulations of the Board[1] allows parties to move for reconsideration of a Board decision in representation proceedings because of "extraordinary circumstances," such as newly discovered evidence or a change in existing law that merit reconsideration of this matter. As discussed below, the UFW simply disagrees with the Board's interpretation of applicable law and its application to the facts of this case. Accordingly, the UFW “merely raise[s] arguments previously addressed by the Board and has failed to cite any extraordinary

[1] The Board's regulations are codified at Title 8, California Code of Regulations, section 20100, et seq.

circumstances justifying reconsideration." (*Mario Saikhon, Inc.* (1991) 17 ALRB No. 6 at pp. 4-5).

First, the UFW asserts the Board should reconsider its conclusion, fully explained in *Kawahara Nurseries Inc.* (2010) 36 ALRB No. 3, that the Kawahara Nursery employees known as "merchandisers" are engaged in work within the definition of "secondary agriculture" if they regularly handle only plants grown by their employer. The UFW asserts that they are instead commercial workers outside the ALRB's jurisdiction. We have previously considered and rejected the UFW's arguments in this regard and need not address them again here. The Board's detailed analysis of whether the merchandisers are engaged in "agriculture" may be found in Kawahara Nurseries, Inc. (2010) 36 ALRB No. 3, at pp. 9-16.

Next, the UFW argues the Board should require the employer in all challenged ballot cases to carry the burden of proof because the employer has greater access to pertinent evidence, such as payroll records. The approach previously adopted by the Board as far back as 1978 and applied in this case is that in representation proceedings, while no party bears a burden of proof, the party supporting the challenge to the voter carries a burden of production. (See *Artesia Dairy* (2006) 32 ALRB No. 3; *Milky Way Dairy (2003) 29 ALRB No. 4; Rod McLellan Co.* (1978) 4 ALRB No. 22 at p. 2, fn 1.) The National Labor Relations Board imposes a higher standard, requiring a party challenging jurisdiction to bear the burden of proof. (See *Camsco Produce* (1990) 297 NLRB 905, 908.) It is true that employers generally are in control of most records that would be pertinent to voter eligibility. But it is common in litigation that one party has control of the bulk of the relevant evidence and in employment litigation

of all kinds it is typical that the employer controls most of the pertinent records. We are aware of no instance where the burden of proof is allocated solely on that basis. On the contrary, this is the reason for discovery rights. The Board's regulations provide all parties with the right to subpoena all necessary witnesses and relevant documentary evidence, and provide for sanctions in the event of failure to comply. (Tit. 8, Cal. Code Regs., §§ 20250, 20370, subdiv. (m).) Under the approach urged by the UFW, a mere allegation of ineligibility, regardless of merit, would shift to the employer the burden of disproving the allegation. For these reasons, we believe the existing allocation of evidentiary burdens should not be altered.

Next, the UFW argues that the Board applied an improperly rigid application of precedent under the National Labor Relations Board (NLRB) for determining supervisory status. In particular, the UFW argues that *Oakwood Healthcare, Inc.* (2006) 348 NLRB 686 is not applicable to agriculture under the Agricultural Labor Relations Act (ALRA) because that case involved the specific context of the nursing profession. However, the UFW fails to explain why a different approach is necessary, what that approach would be, and how the Board could lawfully deviate from NLRB precedent in this instance. While *Oakwood Healthcare, Inc.* involved nurses, that case and its progeny simply represent a fuller explication of the statutory elements of supervisory status, elements which are identical in the ALRA and the National Labor Relations Act (NLRA).[2] Moreover, the NLRB has relied on this line of cases across industries. In fact, *Croft Metals, Inc.* (2006) 348 NLRB 717, issued the same day as *Oakwood Healthcare, Inc.* and employing the same analysis, involved

[2] Labor Code section 1140.4, subdivision (j); 29 U.S.C. section 152, subdivision (11). Pursuant to Labor Code section 1148, the ALRB must follow applicable precedents under the NLRA, as amended.

the manufacture of aluminum and vinyl doors and windows.[3] In the present case, the Board carefully and properly applied the statutory criteria to the evidence in the record, taking into account the nature of the work of the alleged supervisors.[4] Therefore, there was no misapplication of controlling precedent.

Lastly, the UFW argues that the Board should have ruled, in this challenged ballot proceeding, that the merchandisers should be in a separate bargaining unit from those who work in the employer's nursery locations. As the Board explained in its decision, this issue is pending in a separate election objections proceeding where it will be fully explored. Further, because the challenged ballots and election objections were not consolidated for hearing in this case, the scope of the bargaining unit was neither set for hearing nor litigated at the hearing. The issue was not raised until the submission of the UFW's post-hearing brief. Therefore, resolution of that issue at this time would not be appropriate.

By Direction of the Board.

Dated: December 21, 2011

J. ANTONIO BARBOSA
Executive Secretary, ALRB

[3] See, also, *RCC Fabricators, Inc.* (2008) 352 NLRB 701 (railroad equipment and structural steel component manufacturing); *PPG Aerospace Industries, Inc.* (2008) 353 NLRB 223 (production and maintenance employees); *Shaw, Inc.* (2007) 350 NLRB 354 (pipeline construction).

[4] The Board is, of course, constrained by the evidence offered by the parties at hearing.