

AGRICULTURAL LABOR RELATIONS BOARD
CASE DIGEST SUPPLEMENT
VOLUME 36 (2010)

- 100.03 The federal Worker Adjustment and Retraining Notification Act (“WARN” Act, 29 U.S.C. §§ 2101 et seq.) 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 during that notice period is a strained construction of *both* acts.
NURSERYMEN’S EXCHANGE, INC., 36 ALRB No. 6
- 101.01 The Board has consistently rejected use of the NLRB’s “reasonable expectation of employment” standard in determining the existence of an employer-employee relationship. 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.
NURSERYMEN’S EXCHANGE, INC., 36 ALRB No. 6
- 101.03 The Board has consistently rejected use of the NLRB’s “reasonable expectation of employment” standard in determining the existence of an employer-employee relationship. 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.
NURSERYMEN’S EXCHANGE, INC., 36 ALRB No. 6
- 101.06 The federal Worker Adjustment and Retraining Notification Act (“WARN” Act, 29 U.S.C. §§ 2101 et seq.) 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 during that notice period is a strained construction of *both* acts.
NURSERYMEN’S EXCHANGE, INC., 36 ALRB No. 6
- 102.01 Employees of a nursery who work as “merchandisers” at various retail stores which are not owned by the nursery, and who organize, display, water, maintain and care for their employer’s plants before

they are sold, may be engaged in secondary agriculture because their work can properly be viewed in connection with and incident to the nursery's general enterprise rather than in connection with a separate commercial enterprise.

KAWAHARA NURSERIES, INC., 36 ALRB No. 3

102.01 Employees of a nursery who work as “merchandisers” at various retail stores which are not owned by the nursery, and who regularly merchandise plants from sources other than their employer will fall outside of the Board’s jurisdiction and the challenges to the eligibility of these employees to vote in a representation election will be sustained.

KAWAHARA NURSERIES, INC., 36 ALRB No. 3

102.01 Employees of a nursery who work as “merchandisers” at various retail stores which are not owned by the nursery, and who organize, display, water, maintain and care for plants grown only by their employer may be engaged in secondary agriculture. However, if such employees are found to engage in both agricultural and non-agricultural work, it will need to be determined whether these individuals engage in agricultural work a substantial amount of the time to determine whether they fall within the ALRB’s jurisdiction.

KAWAHARA NURSERIES, INC., 36 ALRB No. 3

200.01 Employees of a nursery who work as “merchandisers” at various retail stores which are not owned by the nursery, and who organize, display, water, maintain and care for their employer’s plants before they are sold, may be engaged in secondary agriculture because their work can properly be viewed in connection with and incident to the nursery’s general enterprise rather than in connection with a separate commercial enterprise.

KAWAHARA NURSERIES, INC., 36 ALRB No. 3

200.01 Employees of a nursery who work as “merchandisers” at various retail stores which are not owned by the nursery, and who regularly merchandise plants from sources other than their employer will fall outside of the Board’s jurisdiction and the challenges to the eligibility of these employees to vote in a representation election will be sustained.

KAWAHARA NURSERIES, INC., 36 ALRB No. 3

200.01 Employees of a nursery who work as “merchandisers” at various retail stores which are not owned by the nursery, and who organize,

display, water, maintain and care for plants grown only by their employer may be engaged in secondary agriculture. However, if such employees are found to engage in both agricultural and non-agricultural work, it will need to be determined whether these individuals engage in agricultural work a substantial amount of the time to determine whether they fall within the ALRB's jurisdiction. KAWAHARA NURSERIES, INC., 36 ALRB No. 3

204.01 The Board makes the determination of whether individuals are supervisors as defined in Labor Code section 1140.4 (j) on the basis of the actual job duties of each employee in question. KAWAHARA NURSERIES, INC., 36 ALRB No. 3

204.01 The Board will follow and apply recent NLRB precedent interpreting the terms "assign," "responsibility to direct," and "independent judgment" in determining whether or not individuals are supervisors as defined in Labor Code section 1140.4 (j). (*Oakwood Healthcare, Inc.* (2006) 348 NLRB No. 37; *Croft Metals, Inc.* (2006) 348 NLRB No. 38.) KAWAHARA NURSERIES, INC., 36 ALRB No. 3

204.01 The Board makes the determination of whether individuals are supervisors as defined in Labor Code section 1140.4 (j) on the basis of the actual job duties of each employee in question. SOUTH LAKES DAIRY FARMS., 36 ALRB No. 5

204.01 The Board will follow and apply recent NLRB precedent interpreting the terms "assign," "responsibility to direct," and "independent judgment" in determining whether or not individuals are supervisors as defined in Labor Code section 1140.4 (j). (*Oakwood Healthcare, Inc.* (2006) 348 NLRB No. 37; *Croft Metals, Inc.* (2006) 348 NLRB No. 38.) SOUTH LAKES DAIRY FARMS., 36 ALRB No. 5

204.03 The Board will follow and apply recent NLRB precedent interpreting the terms "assign," "responsibility to direct," and "independent judgment" in determining whether or not individuals are supervisors as defined in Labor Code section 1140.4 (j). (*Oakwood Healthcare, Inc.* (2006) 348 NLRB No. 37; *Croft Metals, Inc.* (2006) 348 NLRB No. 38.) SOUTH LAKES DAIRY FARMS., 36 ALRB No. 5

- 204.03 The Board will follow and apply recent NLRB precedent interpreting the terms “assign,” “responsibility to direct,” and “independent judgment” in determining whether or not individuals are supervisors as defined in Labor Code section 1140.4 (j). (*Oakwood Healthcare, Inc.* (2006) 348 NLRB No. 37; *Croft Metals, Inc.* (2006) 348 NLRB No. 38.)
KAWAHARA NURSERIES, INC., 36 ALRB No. 3
- 311.01 Federal Worker Adjustment and Retraining Notification Act (“WARN” Act, 29 U.S.C. §§ 2101 et seq.) does not require provision of 60 days’ notice of an impending layoff while simultaneously disenfranchising employees under the ALRA who remain employed during that notice period.
NURSERYMEN’S EXCHANGE, INC., 36 ALRB No. 6
- 204.01 Questions of supervisory status are deeply fact-intensive. In determining whether an individual is a statutory supervisor, the Board will inquire into actual duties, not merely titles or job classifications.
FRANK PINHEIRO DAIRY, 36 ALRB No. 1
- 204.04 The Board will follow and apply recent NLRB precedent interpreting the terms “assign,” “responsibility to direct,” and “independent judgment” in determining whether or not individuals are supervisors as defined in Labor Code section 1140.4 (j). (*Oakwood Healthcare, Inc.* (2006) 348 NLRB No. 37; *Croft Metals, Inc.* (2006) 348 NLRB No. 38.)
SOUTH LAKES DAIRY FARMS., 36 ALRB No. 5
- 204.07 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.
SOUTH LAKES DAIRY FARMS., 36 ALRB No. 5
- 312.01 The Board has consistently rejected use of the NLRB’s “reasonable expectation of employment” standard in determining the existence of an employer-employee relationship. 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.

NURSERYMEN'S EXCHANGE, INC., 36 ALRB No. 6

312.01 Requirements for voter eligibility were met when employees who received 60-day notice of layoff pursuant to the federal Worker Adjustment and Retraining Notification Act ("WARN" Act, 29 U.S.C. §§ 2101 et seq.) but remained on employer's payroll on paid administrative leave were considered eligible to vote in representation election.

NURSERYMEN'S EXCHANGE, INC., 36 ALRB No. 6

312.01 Federal Worker Adjustment and Retraining Notification Act ("WARN" Act, 29 U.S.C. §§ 2101 et seq.) does not require provision of 60 days' notice of an impending layoff while simultaneously disenfranchising employees under the ALRA who remain employed during that notice period.

NURSERYMEN'S EXCHANGE, INC., 36 ALRB No. 6

312.01 The Board need not inquire further into the circumstances of the employer-employee relationship, nor has it, in cases where employees *were* on the payroll and on some form of paid leave during the applicable payroll period.

NURSERYMEN'S EXCHANGE, INC., 36 ALRB No. 6

312.01 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.

NURSERYMEN'S EXCHANGE, INC., 36 ALRB No. 6

312.01 The fact that a challenged voter 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.)

SOUTH LAKES DAIRY FARMS., 36 ALRB No. 5

312.04 The Board makes the determination of whether individuals are supervisors as defined in Labor Code section 1140.4 (j) on the basis of the actual job duties of each employee in question.

KAWAHARA NURSERIES, INC., 36 ALRB No. 3

- 312.04 The Board makes the determination of whether individuals are supervisors as defined in Labor Code section 1140.4 (j) on the basis of the actual job duties of each employee in question.
KAWAHARA NURSERIES, INC., 36 ALRB No. 3
- 312.04 The Board makes the determination of whether individuals are supervisors as defined in Labor Code section 1140.4 (j) on the basis of the actual job duties of each employee in question.
SOUTH LAKES DAIRY FARMS., 36 ALRB No. 5
- 312.04 The notation "supervisor" on a challenged voter's pay stub is telling, however, 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.)
SOUTH LAKES DAIRY FARMS., 36 ALRB No. 5
- 312.06 Employees of a nursery who work as "merchandisers" at various retail stores which are not owned by the nursery, and who organize, display, water, maintain and care for their employer's plants before they are sold, may be engaged in secondary agriculture because their work can properly be viewed in connection with and incident to the nursery's general enterprise rather than in connection with a separate commercial enterprise.
KAWAHARA NURSERIES, INC., 36 ALRB No. 3
- 312.06 Employees of a nursery who work as "merchandisers" at various retail stores which are not owned by the nursery, and who regularly merchandise plants from sources other than their employer will fall outside of the Board's jurisdiction, and the challenges to the eligibility of these employees to vote in a representation election will be sustained.
KAWAHARA NURSERIES, INC., 36 ALRB No. 3
- 312.06 Employees of a nursery who work as "merchandisers" at various retail stores which are not owned by the nursery, and who organize, display, water, maintain and care for plants grown only by their employer may be engaged in secondary agriculture. However, if such employees are found to engage in both agricultural and non-agricultural work, it will need to be determined whether these individuals engage in agricultural work a substantial amount of the time to determine whether they fall within the ALRB's jurisdiction.

KAWAHARA NURSERIES, INC., 36 ALRB No. 3

312.08 The federal Worker Adjustment and Retraining Notification Act (“WARN” Act, 29 U.S.C. §§ 2101 et seq.) 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 during that notice period is a strained construction of *both* acts.

NURSERYMEN’S EXCHANGE, INC., 36 ALRB No. 6

312.08 Requirements for peak and voter eligibility were met when employees who received 60-day notice of layoff pursuant to the federal Worker Adjustment and Retraining Notification Act (“WARN” Act, 29 U.S.C. §§ 2101 et seq.) but remained on employer’s payroll on paid administrative leave were considered eligible to vote in representation election.

NURSERYMEN’S EXCHANGE, INC., 36 ALRB No. 6

312.08 The Board has consistently rejected use of the NLRB’s “reasonable expectation of employment” standard in determining the existence of an employer-employee relationship. 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

NURSERYMEN’S EXCHANGE, INC., 36 ALRB No. 6

312.11 The Board need not inquire further into the circumstances of the employer-employee relationship, nor has it, in cases where employees *were* on the payroll and on some form of paid leave during the applicable payroll period.

NURSERYMEN’S EXCHANGE, INC., 36 ALRB No. 6

312.11 Requirements for peak and voter eligibility were met when employees who received 60-day notice of layoff pursuant to the federal Worker Adjustment and Retraining Notification Act (“WARN” Act, 29 U.S.C. §§ 2101 et seq.) but remained on employer’s payroll on paid administrative leave were considered eligible to vote in representation election.

NURSERYMEN’S EXCHANGE, INC., 36 ALRB No. 6

- 312.11 The Board has consistently rejected use of the NLRB’s “reasonable expectation of employment” standard in determining the existence of an employer-employee relationship. 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.
NURSERYMEN’S EXCHANGE, INC., 36 ALRB No. 6
- 325.01 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.
NURSERYMEN’S EXCHANGE, INC., 36
- 325.01 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
SOUTH LAKES DAIRY FARMS., 36 ALRB No. 5
- 325.04 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
SOUTH LAKES DAIRY FARMS., 36 ALRB No. 5
- 325.04 Board Regulation section 20360 states that when considering exceptions to a regional director’s challenged ballot report the Board will not consider, absent extraordinary circumstances, evidence that was not submitted timely to the regional director during the challenged ballot investigation.
SOUTH LAKES DAIRY FARMS., 36 ALRB No. 5
- 325.05 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

SOUTH LAKES DAIRY FARMS., 36 ALRB No. 5

- 416.01 Record evidence insufficient to establish any of the recognized exceptions to the general rule in failure to rehire cases that the employee must apply for rehire at a time when work is available. It was not proven that the employer failed to follow an established rehire practice or otherwise made an effort to conceal the job openings so that the charging party would not learn of them.
TEMPLE CREEK DAIRY, INC., 36 ALRB No. 4
- 416.03 Record evidence insufficient to establish any of the recognized exceptions to the general rule in failure to rehire cases that the employee must apply for rehire at a time when work is available. It was not proven that the employer failed to follow an established rehire practice or otherwise made an effort to conceal the job openings so that the charging party would not learn of them.
TEMPLE CREEK DAIRY, INC., 36 ALRB No. 4
- 420.06 No prima facie case where facts demonstrated that employee discharged primarily for pushing supervisor, along with other misconduct, and where no factors other than timing were indicative of unlawful motive. Even if failure to do a more complete investigation warranted finding prima facie case, employer successfully showed that it would have discharged employee even in the absence of his protected activity.
HERBTHYME FARMS, INC., 36 ALRB No. 2
- 420.12 No prima facie case established where facts demonstrated that employee discharged for repeatedly refusing lawful assignment, lack of progressive discipline was consistent with employee manual, and where no other factors other than timing were indicative of unlawful motive.
HERBTHYME FARMS, INC., 36 ALRB No. 2
- 421.04 No prima facie case where facts demonstrated that employee discharged primarily for pushing supervisor, along with other misconduct, and where no factors other than timing were indicative of unlawful motive. Even if failure to do a more complete investigation warranted finding prima facie case, employer successfully showed that it would have discharged employee even in the absence of his protected activity.
HERBTHYME FARMS, INC., 36 ALRB No. 2

- 421.04 No prima facie case established where facts demonstrated that employee discharged for repeatedly refusing lawful assignment, lack of progressive discipline was consistent with employee manual, and where no other factors other than timing were indicative of unlawful motive.
HERBTHYME FARMS, INC., 36 ALRB No. 2
- 423.03 Acting as union's election observer is protected activity.
HERBTHYME FARMS, INC., 36 ALRB No. 2
- 423.05 Acting as union's crew representative is protected activity.
HERBTHYME FARMS, INC., 36 ALRB No. 2
- 423.06 Appearing at ALRB hearing is protected activity.
HERBTHYME FARMS, INC., 36 ALRB No. 2
- 457.02 A Board decision referring parties to the mandatory mediation and conciliation process set forth in Labor Code sections 1164 to 1164.13 is an interim non-final Board order that is non-reviewable. The Board retains its jurisdiction to reconsider or modify such a decision until a party seeks review of a final Board order confirming a mediator's report under Labor Code section 1164.5
FRANK PINHEIRO DAIRY, 36 ALRB No. 1
- 457.12 A Board decision referring parties to the mandatory mediation and conciliation process set forth in Labor Code sections 1164 to 1164.13 is an interim non-final Board order that is non-reviewable. The Board retains its jurisdiction to reconsider or modify such a decision until a party seeks review of a final Board order confirming a mediator's report under Labor Code section 1164.5
FRANK PINHEIRO DAIRY, 36 ALRB No. 1
- 502.03 A Board decision referring parties to the mandatory mediation and conciliation process set forth in Labor Code sections 1164 to 1164.13 is an interim non-final Board order that is non-reviewable. The Board retains its jurisdiction to reconsider or modify such a decision until a party seeks review of a final Board order confirming a mediator's report under Labor Code section 1164.5
FRANK PINHEIRO DAIRY, 36 ALRB No. 1
- 700.05 The Board interprets Labor Code section 1164(a) as requiring that an employer employ or engage 25 or more agricultural employees throughout the duration of a calendar week in the year preceding the

request for a referral to mandatory mediation and conciliation (MMC) in order to qualify for the MMC process
FRANK PINHEIRO DAIRY, 36 ALRB No. 1

- 700.05 Statutory supervisors are not counted toward the 25 agricultural employee threshold set forth in Labor Code section 1164(a).
FRANK PINHEIRO DAIRY, 36 ALRB No. 1
- 700.05 Agricultural employees who have regularly scheduled days off within a calendar week in the year preceding the request for a referral to mandatory mediation and conciliation (MMC) will count toward the 25 agricultural employee threshold set forth in Labor Code section 1164(a), as will employees on vacation, sick leave, or other type of absence where the employment relationship is not severed.
FRANK PINHEIRO DAIRY, 36 ALRB No. 1
- 700.05 An employee on seasonal layoff cannot be counted toward the 25 agricultural employee threshold set forth in Labor Code section 1164(a) as a layoff terminates the employment relationship.
FRANK PINHEIRO DAIRY, 36 ALRB No. 1
- 700.05 Questions of supervisory status are deeply fact-intensive. In determining whether an individual is a statutory supervisor, the Board will inquire into actual duties, not merely titles or job classifications.
FRANK PINHEIRO DAIRY, 36 ALRB No. 1
- 701.02 A Board decision referring parties to the mandatory mediation and conciliation process set forth in Labor Code sections 1164 to 1164.13 is an interim non-final Board order that is non-reviewable. The Board retains its jurisdiction to reconsider or modify such a decision until a party seeks review of a final Board order confirming a mediator's report under Labor Code section 1164.5
FRANK PINHEIRO DAIRY, 36 ALRB No. 1
- 703.01 A Board decision referring parties to the mandatory mediation and conciliation process set forth in Labor Code sections 1164 to 1164.13 is an interim non-final Board order that is non-reviewable. The Board retains its jurisdiction to reconsider or modify such a decision until a party seeks review of a final Board order confirming a mediator's report under Labor Code section 1164.5
FRANK PINHEIRO DAIRY, 36 ALRB No. 1