

**AGRICULTURAL LABOR RELATIONS BOARD
CASE DIGEST SUPPLEMENT
VOLUME 37 (2011)**

- 101.04 National Labor Relations Board (NLRB) decisions with respect to the policy of excluding student-workers who are primarily students from the category of statutory employee are applicable NLRB precedent.
CALIFORNIA FLORIDA PLANT CO., L.P., 37 ALRB No. 2
- 101.04 The National Labor Relations Board (NLRB) decisions cited by the Regional Director as grounds for concluding that a student-worker was “primarily a student” and not a statutory employee – Brown University (2004) 342 NLRB 483, Leland Stanford Junior University (1974) 214 NLRB 621, and Adelphi University (1972) 195 NLRB 639 – were applicable precedent but inapposite on their facts. These decisions presumed the existence of an academic relationship between a student-worker and an employer, which was not the case in this matter.
CALIFORNIA FLORIDA PLANT CO., L.P., 37 ALRB No. 2
- 101.04 The language of section 1140(j) of the ALRA defining the term supervisor is virtually identical to that of section 2(11) of the National Labor Relations Act (NLRA). (29 U.S.C. § 152(11).) Under section 1148 of the ALRA, the Board shall follow applicable precedents of the NLRA with respect to determining supervisor status.
KAWAHARA NURSERIES, INC., 37 ALRB No. 4
- 102.01 Three employees of a nursery who work as “merchandisers” at various retail stores not owned by the nursery, organize, display, water, maintain and care for their employer’s plants before they are sold, and do not regularly handle plants not owned by their employer, are 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., 37 ALRB No. 4
- 105.6 The ALRA, prior Board decisions, and Board regulations do not confer such broad authority on the Regional Director to dismiss an election petition after an election; to do so would override the mandate of Labor Code section 1156.3, which requires the Board to certify an election unless there are sufficient grounds to do so. Without an evidentiary hearing on election objections raised, there are no sufficient grounds to refuse to certify an election.
NURSERYMEN’S EXCHANGE, INC., 37 ALRB No. 1

- 105.6 Neither Section 20300(i)(1) of the Board’s regulations, nor any of the Board’s regulations or case law indicates that the authority of a Regional Director to dismiss an election petition continues after an election is held. (*Bayou Vista Dairy* (2006) 32 ALRB No. 6 at p. 6).
NURSERYMEN’S EXCHANGE, INC., 37 ALRB No. 1
- 105.6 As noted in *ConAgra Turkey Company* (1993) 19 ALRB No. 11, a Regional Director’s decision to hold an election is final and nonreviewable. Rather, any claims that the Regional Director erred in determining the validity of the election petition must be raised in the election objections process.
NURSERYMEN’S EXCHANGE, INC., 37 ALRB No. 1
- 200.01 Three employees of a nursery who work as “merchandisers” at various retail stores not owned by the nursery, organize, display, water, maintain and care for their employer’s plants before they are sold, and do not regularly handle plants not owned by their employer, are 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., 37 ALRB No. 4
- 201.09 National Labor Relations Board (NLRB) decisions with respect to the policy of excluding student-workers who are primarily students from the category of statutory employee are applicable NLRB precedent.
CALIFORNIA FLORIDA PLANT CO., L.P., 37 ALRB No. 2
- 201.09 The application of the “primarily a student” test under National Labor Relations Board (NLRB) precedent to determine whether a student-worker is a statutory employee presumes the existence of an academic relationship and an employment relationship between the student-worker and the employer.
CALIFORNIA FLORIDA PLANT CO., L.P., 37 ALRB No. 2
- 204.01 The Board makes the determination 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., 37 ALRB No. 4
- 204.01 The Board will follow and apply NLRB precedent interpreting the terms “assign,” “responsibly 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 686;
Croft Metals, Inc. (2006) 348 NLRB 717.)
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204.03 The Board overruled the challenge to the ballot of a lead worker in nursery’s maintenance department who translated for the department supervisor and directed other crew members based on overall assignments given by supervisor because he did not use independent judgment as required by the statutory definition of "supervisor."
KAWAHARA NURSERIES, INC., 37 ALRB No. 4

204.03 The Board overruled the challenge to the ballot of a lead worker at a nursery who directed other workers in her group how to pull plants from greenhouses to fill orders. Although the record supported the conclusion that she responsibly directed work, her duties involved overseeing routine, recurrent, predictable tasks that did not involve the use of independent judgment as required by the statutory definition of "supervisor."
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204.03 The Board overruled the challenge to the ballot of a “supervisor’s assistant” at a nursery who passed on daily assignments and driving routes to company truck drivers from the supervisor of the department and had limited authority to direct truck drivers to perform discrete tasks, because he did not use independent judgment as required by the statutory definition of "supervisor."
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NURSERYMEN'S EXCHANGE, INC., 37 ALRB No. 1

300.01 The ALRA, prior Board decisions, and Board regulations do not confer such broad authority on the Regional Director to dismiss an election petition after an election; to do so would override the mandate of Labor Code section 1156.3, which requires the Board to certify an election unless there are sufficient grounds to do so. Without an evidentiary hearing on election objections raised, there are no sufficient grounds to refuse to certify an election.

NURSERYMEN'S EXCHANGE, INC., 37 ALRB No. 1

300.01 Neither Section 20300(i)(1) of the Board's regulations, nor any of the Board's regulations or case law indicates that the authority of a Regional Director to dismiss an election petition continues after an election is held. (*Bayou Vista Dairy* (2006) 32 ALRB No. 6 at p. 6).

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- 311.02 The ALRA, prior Board decisions, and Board regulations do not confer such broad authority on the Regional Director to dismiss an election petition after an election; to do so would override the mandate of Labor Code section 1156.3, which requires the Board to certify an election unless there are sufficient grounds to do so. Without an evidentiary hearing on election objections raised, there are no sufficient grounds to refuse to certify an election.
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KAWAHARA NURSERIES, INC., 37 ALRB No. 4
- 323.01 The Regional Director may appear and present evidence on the propriety of his earlier peak employment determination in an election objections hearing, as he has the right to participate in representation hearings "to the extent necessary to ensure that the evidentiary record is fully developed and that the basis for the Board's action is fully substantiated." (Cal. Code Regs., tit. 8, § 20370(c); *GH & G Zysling Dairy* (2006) 32 ALRB No. 2 at p. 2, n.2.)
NURSERYMEN'S EXCHANGE, INC., 37 ALRB No. 1
- 323.05 The Board rejected Employer's counsel's argument that, because Employer had declared bankruptcy, counsel could no longer represent Employer

without prior application to and approval from the bankruptcy court. The Board granted Employer a continuance in the interest of not depriving Employer of its choice of counsel and to permit Employer's counsel to determine whether it could be compensated for his continued representation and to allow Employer and Employer's counsel to determine whether to continue the representation.

NURSERYMEN'S EXCHANGE, INC., 37 ALRB No. 1

323.08 The Board held that the IHE was correct in assigning the burden of producing evidence supporting challenges to the party asserting the challenges to voters' eligibility. The Board has stated that with respect to the evidentiary burdens upon the parties in representation proceedings, the party supporting the challenge to a voter carries a burden of production, but not of persuasion. (*Artesia Dairy* (2007) 33 ALRB No. 3; *Milky Way Dairy* (2003) 29 ALRB No. 4; *Artesia Dairy* (2006) 32 ALRB No. 3)
KAWAHARA NURSERIES, INC., 37 ALRB No. 4

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KAWAHARA NURSERIES, INC., 37 ALRB No. 4

325.04 The Board overruled the challenges to employees of a nursery who held the job title "merchandiser" where the union that challenged the employees' eligibility failed to meet its burden of producing evidence in support of the challenges.
KAWAHARA NURSERIES, INC., 37 ALRB No. 4

442.06 A breach of a union's duty of fair representation is not proven solely because a union does not pursue a meritorious grievance. There must also be a showing that the union simply ignored the grievance or acted in a manner that was arbitrary, invidious, in bad faith, or so far outside the wide range of reasonableness as to be wholly irrational
UNITED FARM WORKERS OF AMERICA, 37 ALRB No. 3

442.06 Although there is case law to the effect that it is a breach of the duty of fair representation to bargain away employees' vested rights without their consent, a "vested right" is commonly defined as "a right that so completely and definitely belongs to a person that it cannot be impaired or

taken away without that person's consent." *Newspaper Guild of St. Louis, Local 36047 v. St. Louis Post Dispatch, LLC* (8th Cir. 2011) 641 F.3d 263, 266. Wages claimed under an ambiguous contract provision are not a vested right.

UNITED FARM WORKERS OF AMERICA, 37 ALRB No. 3

- 454.0 Board granted continuance in election objections proceeding to allow Employer that had declared bankruptcy and its counsel to determine whether counsel could be compensated for its representation and whether Employer and its counsel would continue the representation. The Board offered for consideration by all parties the option of proceeding with a stipulated record.
NURSERYMEN'S EXCHANGE, INC., 37 ALRB No. 1
- 600.03 The Board held that the IHE was correct in assigning the burden of producing evidence supporting challenges to the party asserting the challenges to voters' eligibility. The Board has stated that with respect to the evidentiary burdens upon the parties in representation proceedings, the party supporting the challenge to a voter carries a burden of production, but not of persuasion. (*Artesia Dairy* (2007) 33 ALRB No. 3; *Milky Way Dairy* (2003) 29 ALRB No. 4; *Artesia Dairy* (2006) 32 ALRB No. 3)
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KAWAHARA NURSERIES, INC., 37 ALRB No. 4
- 600.05 The Board has held that in representation hearings "while hearsay evidence is admissible, mere uncorroborated hearsay evidence does not constitute substantial evidence to support a finding of the Board." (*Triple E Produce v. ALRB* (1983) 35 Cal.3d 42 at p. 52 citing *O.P. Murphy & Sons* (1977) 3 ALRB No. 26, p.6, fn. 3)
KAWAHARA NURSERIES, INC., 37 ALRB No. 4
- 600.05 Board regulation section 20370 (d) states that "hearsay evidence may be used for the purpose of supplementing other evidence, but shall not be sufficient in itself to support a finding unless it would be admissible in civil actions."
KAWAHARA NURSERIES, INC., 37 ALRB No. 4

- 600.05 The Board held that the IHE improperly relied on uncorroborated hearsay evidence in sustaining the challenges to twenty employees of a nursery with the job title “merchandiser” who did not testify at the hearing. As the record contained no other evidence to support these challenges, the Board found that the union failed to meet its burden of producing evidence to support the challenges, thus requiring that the challenges to all twenty individuals be overruled.
KAWAHARA NURSERIES, INC., 37 ALRB No. 4
- 700.01 No merit in argument that the MMC provisions are invalid because they are inconsistent with a pre-existing provision of the ALRA, section 1155.2, subdivision (a), that states in pertinent part that the bargaining obligation "does not compel either party to agree to a proposal or require the making of a concession." An identical argument was made and rejected in Pictsweet Mushroom Farms, supra, 29 ALRB No. 3, at p. 12. There the Board pointed out that the MMC provisions amended the existing provisions of the ALRA to provide for a hybrid mediation/binding interest arbitration process in specified circumstances and that reliance on the unamended statute is unavailing. The principle reflected in section 1155.2, subdivision (a), continues to control during bargaining outside the MMC process.
SAN JOAQUIN TOMATO GROWERS, INC., 37 ALRB No. 5
- 700.02 Employer can not claim that MMC unavailable because union "abandoned" bargaining unit merely based on union being absent "for years," as under the ALRA the concept of abandonment has no significance beyond a union disclaimer of interest or union defunctness. Abandonment defense has no relevance where bargaining has resumed after a period of dormancy.
SAN JOAQUIN TOMATO GROWERS, INC., 37 ALRB No. 5
- 700.08 Requirement that employer have "committed an unfair labor practice" is satisfied regardless of the remoteness in time of the violation.
SAN JOAQUIN TOMATO GROWERS, INC., 37 ALRB No. 5
- 701.02 Incorrect unit description and initial demand to bargain dates are not fatal to request for referral to MMC where the Board can simply take administrative notice of the correct information.
SAN JOAQUIN TOMATO GROWERS, INC., 37 ALRB No. 5
- 701.03 Hearing necessary where parties have made competing factual allegations that, if true, may provide the basis for estopping either party from asserting or denying the existence of a prior binding agreement that would preclude referral to mandatory mediation and conciliation.
SAN JOAQUIN TOMATO GROWERS, INC., 37 ALRB No. 5