

AGRICULTURAL LABOR RELATIONS BOARD
CASE DIGEST SUPPLEMENT
VOLUME 35 (2009)*

- 104.04 The ALRB has primary jurisdiction over matters arising under the ALRA. Section 1160.9 of the ALRA provides that “[T]he procedures set forth in this chapter shall be the exclusive method of redressing unfair labor practices.” In *Belridge Farms v. ALRB* (1978) 21 Cal.3d 551, 558, the California Supreme Court held that this was a codification of the federal law approach recognizing the primary jurisdiction of the NLRB. This was affirmed in *Vargas v. Municipal Court* (1978) 22 Cal.3d 902, 916 and *Kaplan’s Fruit & Produce Co. v. Superior Court* (1979) 26 Cal.3d 60, 67-68. Therefore, prior decision by Labor Commissioner does not have collateral estoppel effect in ALRB proceeding.
LASSEN DAIRY, INC., 35 ALRB No. 7
- 106.02 The Board held that because the parties’ private settlement agreement sought to compromise a final Board order over which the Board retained jurisdiction to enforce, the parties were required to present their resolution of the matter as a formal settlement agreement pursuant to the provisions of Board Regulation section 20298(f).
HESS COLLECTION WINERY, 35 ALRB No. 3
- 106.02 It is the policy of the Board to encourage voluntary settlement agreements; however, the Board’s jurisdiction over settlement agreements requires it to enforce public interests, not private rights, and to reject settlement agreements that are repugnant to the Act.
HESS COLLECTION WINERY 35 ALRB No. 3
- 202.01 An entity that does not engage labor on another’s behalf for a fee is not a labor contractor and not exempt from the definition of statutory employer under Section 1140.4(c).
HENRY HIBINO FARMS, LLC, 35 ALRB No. 9
- 202.01 The factors cited in TONY LOMANTO, (1982) 8 ALRB No. 44, to differentiate between labor contractors and custom harvesters, are also relevant in determining which of two possible statutory employers should have collective bargaining responsibility.
HENRY HIBINO FARMS, LLC, 35 ALRB No. 9

- 202.01 An entity to which collective bargaining responsibility should attach that was not a party to the proceedings in which such a finding was made may not be bound by that finding in subsequent proceedings. HENRY HIBINO FARMS, LLC, 35 ALRB No. 9
- 202.06 When determining which of two possible statutory employers should have collective bargaining responsibility, the Board looks to which has the more substantial long-term interest in the agricultural operation. HENRY HIBINO FARMS, LLC, 35 ALRB No. 9
- 202.06 The factors cited in *Tony Lamanto* (1982) 8 ALRB No. 44, to differentiate between labor contractors and custom harvesters, are also relevant in determining which of two possible statutory employers should have collective bargaining responsibility. HENRY HIBINO FARMS, LLC, 35 ALRB No. 9
- 202.07 An entity that does not engage labor on another's behalf for a fee is not a labor contractor and not exempt from the definition of statutory employer under Section 1140.4 (c). HENRY HIBINO FARMS, LLC, 35 ALRB No. 9
- 306.01 There was no contract bar to a decertification petition where the only reasonable conclusion from the documents presented was that the agreement between the parties in existence at the time the petition was filed had a duration of one year. A petition filed any time during the term of a one-year collective bargaining agreement is timely. L. E. COOKE COMPANY, 35 ALRB No. 1
- 306.01 Under well-settled precedent, effective and expiration dates must be apparent from the face of a collective bargaining agreement for the agreement to serve as a bar to a decertification petition. L. E. COOKE COMPANY, 35 ALRB No. 1
- 310.01 The setting aside of an election under the ALRA results in the dismissal of the election petition. Consistent with the prescription of prompt elections set forth in Labor Code section 1156.3, section 20372 of the Board's regulations allows the Board to direct a rerun election only where circumstances make it physically impossible to determine the outcome of the first election. Alternatively, the Regional Director may order a rerun election with the consent of all parties if an objection or objections to an election are filed and the

Regional Director determines that it will further the purpose of the Act to nullify the first election and conduct a rerun election.
GALLO VINEYARDS, INC., 35 ALRB No. 6

312.02 The eligibility list requirement adopted by the NLRB in *Excelsior Underwear* and by the ALRB in *Yoder Bros.*, serves several functions, one of which is enabling communication between the union and employees eligible to vote. It is the communication function between the employees and the union that Regulations 20310 and 20390 seek to protect as a means of enforcing employees' Section 1152 rights of self-organization. *Laflin & Laflin* (1978) 4 ALRB No. 28 at p. 4 (“[I]mplied in these [Section 1152] rights is the opportunity of workers to communicate with and receive communication from labor organizers about self-organization.”).
GALLO VINEYARDS, INC., 35 ALRB No. 6

312.02 Where change of 22 votes necessary to affect outcome, election set aside due to 75 undisputed facially incorrect addresses on the eligibility list, coupled with the evidence that the union relied heavily on the deficient eligibility list and lack of convincing evidence that the deficiencies were mitigated.
GALLO VINEYARDS, INC., 35 ALRB No. 6

312.02 In light of outcome determinative standard applied to defective address list cases, the Board will not refuse to entertain evidence of the actual effect of the faulty list and showing such effect is the burden of the objecting party. Therefore, regardless of whether the number of inadequate addresses “dwarfs” or merely exceeds the shift in the number of votes needed to change the outcome, some inquiry into the effect of the list’s deficiencies on the utility of the list is necessary before concluding that there are sufficient grounds to set aside an election. A high number of facially inadequate addresses relative to the number of votes necessary to change the outcome will normally weigh significantly in favor of inferring an outcome determinative effect on the election, but is not in and of itself conclusive.
GALLO VINEYARDS, INC., 35 ALRB No. 6

312.02 While lack of due diligence may be relevant in determining whether an address list is deficient, under an outcome determinative standard it is of no import whether the deficient list was the result of gross negligence or bad faith. Therefore, it does not provide any basis for setting aside an election where the deficiencies in the list and the

consequent effect on the union's ability to communicate with employees are not themselves sufficient to warrant setting it aside. GALLO VINEYARDS, INC., 35 ALRB No. 6

- 314.04 Although employer delayed workers' entry into the polling area by telling them that they had to "punch in" prior to voting instead of proceeding directly to the polling area as had been previously agreed, the Board affirmed the dismissal of the union's election objection. There was no evidence that any workers were unable to vote, nor were there facts supporting the conclusion that the delay was coercive enough to have affected free choice in the election. L. E. COOKE COMPANY, 35 ALRB No. 1
- 315.02 While lack of due diligence may be relevant in determining whether an address list is deficient, under an outcome determinative standard it is of no import whether the deficient list was the result of gross negligence or bad faith. Therefore, it does not provide any basis for setting aside an election where the deficiencies in the list and the consequent effect on the union's ability to communicate with employees are not themselves sufficient to warrant setting it aside. GALLO VINEYARDS, INC., 35 ALRB No. 6
- 315.02 In light of outcome determinative standard applied to defective address list cases, the Board will not refuse to entertain evidence of the actual effect of the faulty list and showing such effect is the burden of the objecting party. Therefore, regardless of whether the number of inadequate addresses "dwarfs" or merely exceeds the shift in the number of votes needed to change the outcome, some inquiry into the effect of the list's deficiencies on the utility of the list is necessary before concluding that there are sufficient grounds to set aside an election. A high number of facially inadequate addresses relative to the number of votes necessary to change the outcome will normally weigh significantly in favor of inferring an outcome determinative effect on the election, but is not in and of itself conclusive. GALLO VINEYARDS, INC., 35 ALRB No. 6
- 315.02 In cases involving defective eligibility lists, the Board has applied an outcome-determinative standard under which an election will be set aside only if the eligibility list was so deficient that its utility was impaired and it tended to interfere with the employees' free choice to

an extent that the outcome of the election could have been affected. (See *Silva Harvesting, Inc.* (1985) 11 ALRB No. 12 at pp. 5-6. GALLO VINEYARDS, INC., 35 ALRB No. 6

- 315.02 Although employer delayed workers' entry into the polling area by telling them that they had to "punch in" prior to voting instead of proceeding directly to the polling area as had been previously agreed, the Board affirmed the dismissal of the union's election objection. There was no evidence that any workers were unable to vote, nor were there facts supporting the conclusion that the delay was coercive enough to have affected free choice in the election. L. E. COOKE COMPANY, 35 ALRB No. 1
- 315.02 Although employer delayed ALRB agents' entry into the property on the day of the election by five minutes in the presence of 20 employees, the Board affirmed the dismissal of the union's objection where the union failed to demonstrate coercive or intimidating circumstances that restrained workers in their right to freely cast ballots. L. E. COOKE COMPANY, 35 ALRB No. 1
- 316.01 Although employer delayed workers' entry into the polling area by telling them that they had to "punch in" prior to voting instead of proceeding directly to the polling area as had been previously agreed, the Board affirmed the dismissal of the union's election objection. There was no evidence that any workers were unable to vote, nor were there facts supporting the conclusion that the delay was coercive enough to have affected free choice in the election. L. E. COOKE COMPANY, 35 ALRB No. 1
- 316.01 Although employer delayed ALRB agents' entry into the property on the day of the election by five minutes in the presence of 20 employees, the Board affirmed the dismissal of the union's objection where the union failed to demonstrate coercive or intimidating circumstances that restrained workers in their right to freely cast ballots. L. E. COOKE COMPANY, 35 ALRB No. 1
- 414.01 Finding that company managers suspected that charging party was involved in anonymous letter protesting supervisor's conduct sufficient to establish employer knowledge of protected activity. WOOLF FARMING CO. OF CA, INC., 35 ALRB No. 2

- 414.01 Despite evidence from which to infer a causal relationship between employee's protected activity and his discharge, allegation must fail where employer knowledge element of prima facie case is not proven by a preponderance of the evidence.
TULE RIVER DAIRY and P&M VANDERPOEL DAIRY, 35 ALRB No. 4
- 414.03 Employer met its burden of showing it would have discharged employee even in the absence of employee's protected concerted activity where it was shown that the reason for the discharge was the employee's unprotected act of concealing baskets of mushrooms on the picking room floor.
MUSHROOM FARMS, 35 ALRB No. 8
- 414.04 Employee's act of hiding baskets of mushrooms on the floor with the intent that no one see them did not communicate in a reasonably clear way to management that the employee was taking an action to enforce a provision of a collective bargaining agreement. Therefore, this aspect of employee's conduct was not protected concerted activity.
MUSHROOM FARMS, 35 ALRB No. 8
- 417.02 Even if supervisor did not intend to discharge employee, his conduct reasonably caused employee to believe he was discharged; therefore the employer had the obligation to clarify the employment status, which it failed to do.
LASSEN DAIRY, INC., 35 ALRB No. 7
- 419.05 Assignment to more arduous work in hospital barn constitutes a negative change in terms and conditions of employment which is unlawful if done in response to protected activity.
LASSEN DAIRY, INC., 35 ALRB No. 7
- 420.03 Prima facie case of discrimination rebutted where employer showed legitimate grounds for discharge, as employee had received several warnings, including for repeatedly leaving work early, and where there was no showing of disparate treatment.
LASSEN DAIRY, INC., 35 ALRB No. 7
- 420.08 Discharge lawful where, even under employee's version of events, he would have given supervisor the impression that he had stolen herbicide from the employer.
WOOLF FARMING CO. OF CA, INC., 35 ALRB No. 2

- 420.20 In light of prior violation of safety rules and history of insubordination, employee would have been discharged even in absence of his protected activity.
WOOLF FARMING CO. OF CA, INC., 35 ALRB No. 2
- 421.04 Prima facie case established even though discharge occurred seven months after protected activity where, in the interim, supervisor exhibited unwarranted hostility and unlawfully assigned employee to more arduous work and employer exhibited undue haste in discharging employee.
LASSEN DAIRY, INC., 35 ALRB No. 7
- 421.04 Passage of seven months between protected activity and discharge weighs against inference of unlawful motive.
WOOLF FARMING CO. OF CA, INC., 35 ALRB No. 2
- 421.05 While not determinative, it is appropriate to consider that the Employer took no disciplinary action against another employee who was at least equally suspected of engaging in protected activity.
WOOLF FARMING CO. OF CA, INC., 35 ALRB No. 2
- 421.07 “Small plant doctrine” is not a presumption, but merely reflects the principle that the small size of an operation is a circumstance that may be considered in inferring employer knowledge. The doctrine may be applied where the facility is small and open, the work force is small, the employees made no great effort to conceal their union conversations, and management personnel are located in the immediate vicinity of the protected activity. (*Health Care Logistics* (6th Cir. 1986) 784 F.2d 232.) The mere fact that an employer's plant is of a small size does not permit a finding that the employer had knowledge of the union activities of specific employees, absent supporting evidence that the union activities were carried on in such a manner, or at times that in the normal course of events, the employer must have known about them. (See e.g., *NLRB v. Mid States Sportswear* (5th Cir. 1969) 412 F. 2d 537, at 540, quoting *NLRB v. Joseph Antell, Inc.* (1st Cir. 1966) 358 F.2d 880.)
TULE RIVER DAIRY and P&M VANDERPOEL DAIRY, 35 ALRB No. 4
- 421.07 Despite small size of workplace, employer knowledge of protected activity not proven where witnesses testified that no manager or supervisor was present when employee engaged in union activity, or that they otherwise learned of it or suspected it, where there was no

evidence of employer knowledge that an incipient union organizing campaign had begun or that such an effort was suspected or rumored, where employee's testimony that he made no effort to conceal his actions was contradicted by a witness who otherwise testified in his favor, and where it was not clear how much of work area could be viewed on single video monitor (without audio) or how often manager or supervisor viewed monitor.

TULE RIVER DAIRY and P&M VANDERPOEL DAIRY, 35 ALRB No. 4

421.10 Unlawful discharge found where employer's assertion that employee failed to return from medical leave contradicted by credited testimony and payroll records indicating he was discharged on the day he brought note from doctor excusing him from work.

LASSEN DAIRY, INC., 35 ALRB No. 7

421.11 Employer's reaction to protected activity weighs against inference of unlawful motive where, after receiving letter protesting supervisor's treatment of employees, the employer had a consultant speak to employees in a noncoercive manner to ascertain if the protest had merit.

WOOLF FARMING CO. OF CA, INC., 35 ALRB No. 2

421.11 Failure to interview employee prior to suspension and tentative decision to discharge and supervisor's delay in reporting incident leading to discharge do not raise inference of unlawful motive where both were sufficiently explained as benign.

WOOLF FARMING CO. OF CA, INC., 35 ALRB No. 2

421.23 Unlawful discharge found where employer's assertion that employee failed to return from medical leave contradicted by credited testimony and payroll records indicating he was discharged on the day he brought note from doctor excusing him from work.

LASSEN DAIRY, INC., 35 ALRB No. 7

423.01 Employee's act of hiding baskets of mushrooms on the floor with the intent that no one see them did not communicate in a reasonably clear way to management that the employee was taking an action to enforce a provision of a collective bargaining agreement. Therefore, this aspect of employee's conduct was not protected concerted activity.

MUSHROOM FARMS, 35 ALRB No. 8

- 423.01 Where there was an existing collective bargaining agreement providing that mushroom pickers were to receive overtime pay after nine hours of work, verbal complaints by a worker to a foreman that he was not giving proper credit for baskets of mushrooms picked in overtime were protected and concerted because an action taken by a single employee to enforce the provisions of an existing collective bargaining agreement is considered to be an extension of the concerted activity that produced the agreement in the first place. Further, the assertion of such a right affects the rights of all employees covered by the agreement. (*NLRB v. City Disposal Systems, Inc.* (1984) 465 U.S. 822; *Interboro Contractors, Inc.* (1966) 157 NLRB 1295.)
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MUSHROOM FARMS, 35 ALRB No. 8
- 423.07 Participation in wage protest with other employees constitutes protected concerted activity.
LASSEN DAIRY, INC., 35 ALRB No. 7
- 423.07 Anonymous letter to management instigated by at least two employees protesting conduct of supervisor constitutes protected concerted activity, as does later individual complaint directly related to the protest letter.
WOOLF FARMING CO. OF CA, INC., 35 ALRB No. 2

- 455.02 Failure to comply with Regulation 20282 is grounds for dismissing exceptions. (See, e.g., *S & J Ranch, Inc.* (1992) 18 ALRB No. 2.) However, the Board has declined to dismiss exceptions where compliance with the regulation is sufficient to allow the Board to identify the exceptions and the grounds therefore and address them on their merits. (*Warmerdam Packing Company* (1998) 24 ALRB No. 2; *Olson Farms/Certified Egg Farms, Inc.* (1993) 19 ALRB No. 20; *Oasis Ranch Management, Inc.* (1992) 18 ALRB No. 11.) Exceptions accepted only to the extent that the grounds therefor could be identified.
LASSEN DAIRY, INC., 35 ALRB No. 7
- 455.03 Even assuming witnesses were not disinterested and could be expected to testify only in a manner supportive of their employer's case, they cannot be discredited simply on that basis. Rather, only if their demeanor had reflected a lack of veracity and/or their testimony was inconsistent or implausible, or it did not fit with other evidence in the record, would it have been proper to discredit their testimony.
WOOLF FARMING CO. OF CA, INC., 35 ALRB No. 2
- 502.01 The Board concluded that the 60-day enforcement provision in ALRA section 1164.3, subdivision (f) was intended to apply only in cases where no review is sought in the Court of Appeal. In contrast, in matters where court review of the Board's order is sought, and the Court of Appeal issues a decision affirming the Board's order, it is not necessary to use the enforcement procedure set forth in section 1164.3, subdivision (f), as the Court's decision constitutes a judgment that can later be enforced through contempt or other enforcement proceedings in the appropriate court.
HESS COLLECTION WINERY, 35 ALRB No. 3
- 509.01 The Board concluded that the 60-day enforcement provision in ALRA section 1164.3, subdivision (f) was intended to apply only in cases where no review is sought in the Court of Appeal. In contrast, in matters where court review of the Board's order is sought, and the Court of Appeal issues a decision affirming the Board's order, it is not necessary to use the enforcement procedure set forth in section 1164.3, subdivision (f), as the Court's decision constitutes a judgment that can later be enforced through contempt or other enforcement proceedings in the appropriate court.
HESS COLLECTION WINERY, 35 ALRB No. 3

- 600.05 Hearsay statement not admissible under Evidence Code section 1202 to impeach earlier admitted hearsay statement of declarant where it was not necessarily inconsistent with the earlier hearsay statement, where the witness was not shown to be unavailable, and where the first hearsay statement was not necessarily adverse to the party seeking to impeach it.
TULE RIVER DAIRY and P&M VANDERPOEL DAIRY, 35 ALRB No. 4
- 600.15 In addition to the question of its admissibility, the reliability of a witness's hearsay testimony concerning an alleged statement by a former supervisor was placed in further doubt because the witness did not mention the subject matter in a declaration taken two months after the alleged statement.
TULE RIVER DAIRY and P&M VANDERPOEL DAIRY, 35 ALRB No. 4
- 606.01 The ALRB has primary jurisdiction over matters arising under the ALRA. Section 1160.9 of the ALRA provides that "[T]he procedures set forth in this chapter shall be the exclusive method of redressing unfair labor practices." In *Belridge Farms v. ALRB* (1978) 21 Cal.3d 551, 558, the California Supreme Court held that this was a codification of the federal law approach recognizing the primary jurisdiction of the NLRB. This was affirmed in *Vargas v. Municipal Court* (1978) 22 Cal.3d 902, 916 and *Kaplan's Fruit & Produce Co. v. Superior Court* (1979) 26 Cal.3d 60, 67-68. Therefore, prior decision by Labor Commissioner does not have collateral estoppel effect in ALRB proceeding.
LASSEN DAIRY, INC., 35 ALRB No. 7
- 606.01 An entity to which collective bargaining responsibility should attach that was not a party to the proceedings in which such a finding was made may not be bound by that finding in subsequent proceedings.
HENRY HIBINO FARMS, LLC, 35 ALRB No. 9
- 608.01 The Board construed the 60-day provision on enforcement actions in Labor Code section 1164.3, subdivision (f) as pertaining only to situations where no court review of the Board's order is sought. The Board found this construction was supported by several textual factors. First, section 1164.3, subdivision (f) is contained in the section of the statute dealing with the Board's review of the mediator's report, not in section 1164.5 which is the section covering court review of the Board's order. Second, this provision is

analogous to the provision of Labor Code section 1160.8, and both provisions establish procedures for reducing a Board order to a judgment where no appellate court review has been sought. Finally, section 1164.7, subsection (a) provides that “the court of appeal or the Supreme Court shall enter judgment either affirming or setting aside the order of the board.” Therefore, in a case where a judgment of the Court of Appeal affirming the Board’s order has been entered, it would be unnecessary to bring a separate proceeding in superior court under 1164.3, subdivision (f) in order to transform the Board’s order into a judgment.

HESS COLLECTION WINERY, 35 ALRB No. 3

608.03

The Board construed the 60-day provision on enforcement actions in Labor Code section 1164.3, subdivision (f) as pertaining only to situations where no court review of the Board’s order is sought. The Board found this construction was supported by several textual factors. First, section 1164.3, subdivision (f) is contained in the section of the statute dealing with the Board’s review of the mediator’s report, not in section 1164.5 which is the section covering court review of the Board’s order. Second, this provision is analogous to the provision of Labor Code section 1160.8, and both provisions establish procedures for reducing a Board order to a judgment where no appellate court review has been sought. Finally, section 1164.7, subsection (a) provides that “the court of appeal or the Supreme Court shall enter judgment either affirming or setting aside the order of the board.” Therefore, in a case where a judgment of the Court of Appeal affirming the Board’s order has been entered, it would be unnecessary to bring a separate proceeding in superior court under 1164.3, subdivision (f) in order to transform the Board’s order into a judgment.

HESS COLLECTION WINERY, 35 ALRB No. 3

608.04

The Mandatory Mediation and Conciliation legislation (California Labor Code section 1164 et seq.) sought to accomplish the stated purpose of achieving a more effective collective bargaining process between agricultural employers and agricultural employees by creating a process to jump-start negotiations that have not been productive. The Legislature provided that if no Board review of a mediator’s report is sought, or if the mediator’s report is upheld, the report becomes a “final order of the board.” Accordingly, the Board has a legal obligation to ensure that its order is carried out.

HESS COLLECTION WINERY, 35 ALRB No. 3

- 703.02 The Board concluded that the 60-day enforcement provision in ALRA section 1164.3, subdivision (f) was intended to apply only in cases where no review is sought in the Court of Appeal. In contrast, in matters where court review of the Board's order is sought, and the Court of Appeal issues a decision affirming the Board's order, it is not necessary to use the enforcement procedure set forth in section 1164.3, subdivision (f), as the Court's decision constitutes a judgment that can later be enforced through contempt or other enforcement proceedings in the appropriate court.
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- 703.02 The Mandatory Mediation and Conciliation legislation (California Labor Code section 1164 et seq.) sought to accomplish the stated purpose of achieving a more effective collective bargaining process between agricultural employers and agricultural employees by creating a process to jump-start negotiations that have not been productive. The Legislature provided that if no Board review of a mediator's report is sought, or if the mediator's report is upheld, the report becomes a "final order of the board." Accordingly, the Board has a legal obligation to ensure that its order is carried out.
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- 703.02 The Board construed the 60-day provision on enforcement actions in Labor Code section 1164.3, subdivision (f) as pertaining only to situations where no court review of the Board's order is sought. The Board found this construction was supported by several textual factors. First, section 1164.3, subdivision (f) is contained in the section of the statute dealing with the Board's review of the mediator's report, not in section 1164.5 which is the section covering court review of the Board's order. Second, this provision is analogous to the provision of Labor Code section 1160.8, and both provisions establish procedures for reducing a Board order to a judgment where no appellate court review has been sought. Finally, section 1164.7, subsection (a) provides that "the court of appeal or the Supreme Court shall enter judgment either affirming or setting aside the order of the board." Therefore, in a case where a judgment of the Court of Appeal affirming the Board's order has been entered, it would be unnecessary to bring a separate proceeding in superior court under 1164.3, subdivision (f) in order to transform the Board's order into a judgment.
HESS COLLECTION WINERY, 35 ALRB No. 3

*Please note that as of the date of issuance of this supplement review of *Gallo Vineyards, Inc.*, 35 ALRB No. 6 and *Lassen Dairy, Inc.*, 35 ALRB No. 7 are pending before the Courts of Appeal. Also please note that there are no entries for *Frank Pinheiro Dairy*, 35 ALRB No. 5 because the Board vacated and reconsidered that decision (see 36 ALRB No. 1)."