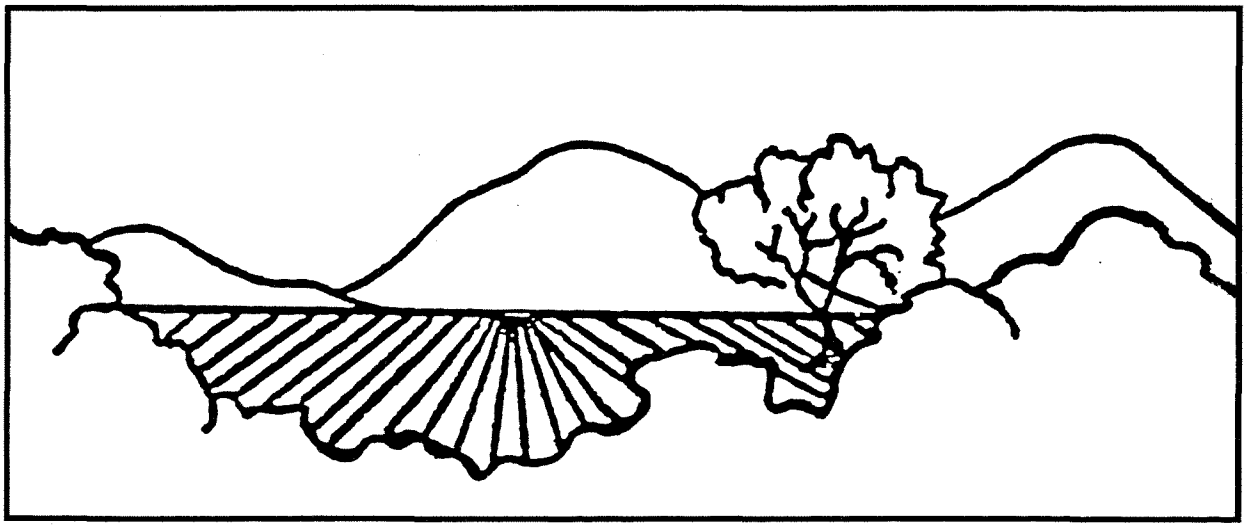
1996

Annual Report to the Legislature 1994-1995, 1995-1996

Agricultural Labor Relations Board

AGRICULTURAL LABOR RELATIONS BOARD

ANNUAL REPORT
TO THE
LEGISLATURE



1994 — 1995
1995 — 1996

NINETEENTH and TWENTIETH

ANNUAL REPORTS

OF THE

AGRICULTURAL LABOR RELATIONS BOARD

FOR THE FISCAL YEARS ENDING

JUNE 30, 1995

AND

JUNE 30, 1996

Members of the Board

BRUCE J. JANIGIAN, Chairman[1]/
MICHAEL B. STOKER, Chairman[2]/
IVONNE RAMOS RICHARDSON
LINDA A. FRICK

J. ANTONIO BARBOSA, Executive Secretary

PAUL RICHARDSON, General Counsel[3]/

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[1]Term expired January 1, 1995.

[2]Appointed to the Board June 14, 1995.

[3]Appointed General Counsel July 25, 1995.

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INTRODUCTION

Labor Code section 1143 requires the Agricultural Labor Relations Board (ALRB or Board) to report in writing to the Legislature and to the Governor stating in detail the cases it has heard, the decisions it has rendered, the names, salaries, and duties of all employees and officers in the employ or under the supervision of the Board, and an account of all moneys (backpay) it has disbursed. This Annual Report combines the fiscal years 1994-95 and 1995-96.

The Annual Report provides the information required by statute and, in addition, a report on litigation involving the Board.

A report of the names, salaries, and duties of ALRB employees has been provided to the Governor, the Speaker of the Assembly, the President pro Tempore of the Senate, and members of the Legislature. Any other readers wishing to know such data are asked to make a separate request to the Board's Executive Secretary.

I

THE AGRICULTURAL LABOR RELATIONS BOARD

A. Mission

Our mission is to assure that the Agricultural Labor Relations Act (ALRA or Act) is carried out "to ensure peace in the fields by guaranteeing justice for all agricultural employees and stability in agricultural labor relations." The Agricultural Labor Relations Board (ALRB or Board) is committed to making California a showcase for the sound and equitable administration of agricultural labor relations by improving the expeditious handling of all election and unfair labor practice cases through rigorous management, assuring accuracy, fairness, impartiality and timeliness. We will continue to improve the predictability and clarity of application of the law through our decisions, regulations and manuals. We will increase public outreach to inform and educate agricultural employees and employers regarding the ALRA and recent Board and court decisions, as well as improve public credibility and assist in the proactive avoidance of disputes wherever possible.

B. Organization

The ALRB strives to meet and exceed all public requirements and expectations and to earn the highest public

confidence, credibility and trust, through a proactive and dynamic organization which fosters commitment and inspires loyalty through competence and challenge, and which supports individual initiative through mutual cooperation, respect and a harmonious work environment.

C. Administration

The Agricultural Labor Relations Act was enacted in 1975 to recognize the right of agricultural employees to form, join or assist a labor organization in order to improve the terms and conditions of their employment and the right to engage in other concerted activity for their mutual aid and protection; to provide for secret ballot elections through which employees may freely choose whether they wish to be represented by a labor organization; to impose an obligation on the part of employers to bargain with any labor organization so chosen; and to declare unlawful certain practices which either interfere with, or are otherwise destructive of, the free exercise of the rights guaranteed by the Act.

The agency's authority is divided between a Board composed of five members and a General Counsel, all of whom are appointed by the Governor and subject to confirmation by the Senate. Together, they are responsible for the prevention of

those practices which the Act declares to be impediments to the free exercise of employee rights. When a charge is filed, the General Counsel conducts an investigation to determine whether an unfair labor practice has been committed. If he believes that there has been a violation, he issues a complaint. The Board provides for a hearing to determine whether a respondent has committed the unfair labor practice alleged in the complaint.

Under the statute, the Board may delegate, and in practice has delegated, its authority to hear such cases to Administrative Law Judges (ALJ's) who take evidence and make initial recommendations in the form of written decisions with respect to issues of fact or law raised by the parties. Any party may appeal any of the findings, conclusions or recommendations of the ALJ to the Board, which then reviews the record and issues its own decision and order in the case. Parties dissatisfied with the Board's order may petition for review in the Court of Appeal. Attorneys for the Board defend the decisions rendered by the Board. If review is not sought or is denied, the Board may seek enforcement of its order in superior court.

When a final remedial order requires that parties be made whole for unfair labor practices committed against them, the

Board has followed the practice of the National Labor Relations Board (NLRB) in holding supplemental proceedings to determine the amount of liability. These hearings, called compliance hearings, are also typically held before ALJ's who write recommended decisions for review by the Board. Once again, parties dissatisfied with the decision and order issued by the Board upon review of the ALJ's decision may petition for review of the Board's decision in the Court of Appeal. If the court denies the petition for review or orders the Board's order in a compliance case enforced, the Board may seek enforcement in superior court.

In addition to the Board's authority to issue decisions in unfair labor practice cases, the Board, through personnel in various regional offices, is responsible for conducting elections to determine whether a majority of the employees of an agricultural employer wishes to be represented by a labor organization or, if the employees are already so represented, to determine whether they wish to continue to be represented by that labor organization, a rival labor organization or no labor organization at all. Chapter 5 of the ALRA empowers the Board to direct an election provided that Board investigation reveals the existence of a bona fide question concerning such representation.

Because of the seasonal nature of agriculture and the

relatively short periods of peak employment, the Act provides for a speedy election process, mandating that elections be held within seven days from the date an election petition is filed, and within 48 hours after a petition has been filed in the case of a strike. Any party believing that an election ought not to have been conducted, or that it was conducted in an inappropriate unit, or that misconduct occurred which tended to affect the outcome of the election, or that the election was otherwise not fairly conducted, may file objections to the election. The objections are reviewed by the Board's Executive Secretary, who determines whether they establish a prima facie case that the election should not have been held or that the conduct complained of affected its outcome. If such a prima facie case is found, a hearing is held before an Administrative Law Judge acting in the capacity of an Investigative Hearing Examiner to determine whether the Board should refuse to certify the election as a valid expression of the will of the employees. The Investigative Hearing Examiner's conclusions may be appealed to the Board. Except in very limited circumstances, court review of any decision of the Board in representation matters may be had only in connection with an order in an unfair labor practice case which is based upon the Board's certification.

In addition to, and as part of the agency's processing of unfair labor practices, elections and compliance matters, the Executive Secretary and the Board are frequently called upon to process and decide a variety of motions filed by the parties. These motions may concern novel legal issues or requests for reconsideration of prior Board action, as well as more common requests for continuance of hearings, requests for extensions of filing deadlines for exceptions and briefs, motions to change the location of a hearing, requests by the parties to take a case off calendar because of a proposed settlement agreement, and approvals of proposed settlements.

The agency also receives frequent requests for information regarding the ALRA itself, the enforcement procedures used by the agency to seek compliance with the law, and case processing statistics. Such requests are routinely received from the media, trade associations, growers, unions, parties to particular cases, the Legislature, other state agencies, colleges and universities, and sister state agencies considering the enactment of similar legislation.

D. Review of Accomplishments and Goals

The greatest challenge facing the Agricultural Labor Relations Board continues to be consistently improving its

performance in the face of diminishing resources and a dramatically changing farm labor environment. The Board's strategy has been not only to meet public expectations, but to surpass and exceed them. We have identified problems, developed solutions, and made effective changes to our procedures and operations, guided throughout by a philosophy that proactive dispute avoidance, or resolution at its earliest stages, is far better than the exhausting process of litigation, which rewards only legal counsel at the expense of both management and labor. We are guided also by the reality that justice delayed is justice denied.

Examples of recent changes include combining liability and compliance proceedings into a single hearing, saving literally years of litigation and appeals, and associated expenses in nearly every case. They include simultaneous processing of challenged ballots and election objections, which drastically speeds up our certification process, and the elimination of unnecessary legal briefs and numerous other modifications that speed up resolutions at every stage without sacrificing quality or accuracy.

When we have had to absorb drastic budget reductions, we have done so in a manner preserving, as best we could, our

field offices and our operations. We gave up headquarters office space and staff and procured computers and software so that those who remained could work smarter and more efficiently. We cross-trained counsel and staff for functions previously performed, in some cases, by three or four individuals.

To meet the challenges posed by a dynamic farm employment environment, and to continue to operate as proactively as possible, the Board is expanding its outreach and educational activities. With assistance from the Governor's Task Force on Quality Government, we have developed an innovative and exciting approach to educating both farm laborers and growers about their rights and responsibilities under the Agricultural Labor Relations Act.

The simple reality is that many disputes are attributable to public ignorance of rights and responsibilities. For example, the right of workers to engage in concerted protected activity exists whenever workers act together to seek improvements in their working conditions, pay, or benefits. This right exists wholly apart from any union activity or union presence, and it is generally unknown among farm workers and their employers.

The Board's Outreach Program aims to establish a partnership of cooperation and support among farm labor and employer groups. Utilizing new materials prepared during the last two fiscal years, Board members and staff have made presentations in rural communities.

While pursuing outreach, we also undertook a comprehensive review of our regulations. As part of this process, we conducted public hearings throughout the state and heard extensive comment by worker and grower representatives. The great amount of interest evinced by both farm workers and employer groups in our regulatory reform demonstrated the continuing importance of this Board. We believe our efforts to improve and expedite Board operations, our outreach to farm workers and employers concerning their respective rights and responsibilities, and our ongoing efforts to depoliticize the Board and increase credibility with the public we serve demonstrate how we are continuing to earn California's trust.

E. Operational Summary for Fiscal Years 1994-95 and 1995-96

1. Unfair Labor Practices

During the 1994-95 fiscal year, 331 unfair labor practice (ULP) charges were filed with the ALRB (Chart I). Of

the 331 charges, 292 were filed against employers and 39 were filed against labor organizations.

During the 1995-96 fiscal year, 345 unfair labor practice charges were filed with the ALRB, almost exactly the number of charges filed the previous fiscal year. Of the 345 total charges, 322 were filed against employers and 23 were filed against labor organizations.

Chart I: ULP Charges filed

Type of Charge	Fiscal 1994-95	Fiscal 1995-96
Against Unions	39	23
Against Employers	292	322
Total	332	345

The General Counsel closed 333 charges in 1994-95. Of the 333 charges processed (Chart II), the General Counsel sent 48 charges to complaint and issued 18 complaints. In addition to the 48 charges to complaint in 1994-95, the General Counsel dismissed 204 charges, settled 5, and permitted the withdrawal of 76 others. Five complaints were withdrawn before hearing, 6 complaints were settled before hearing, and 7 complaints were settled at hearing. (Chart III.)

The General Counsel closed 323 charges in 1995-96. Of the 323 charges processed (Chart II), the General Counsel sent 59 charges to complaint and issued 26 complaints. In addition to the 59 charges to complaint in 1995-96, the General Counsel dismissed 190 charges, settled 16, and permitted the withdrawal of 58 others. Two complaints were withdrawn before hearing, 6 were settled before hearing, and 8 complaints were settled at hearing. (Chart III.)

Chart II: ULP charges closed

Type of Closure	Fiscal 1994-95	Fiscal 1995-96
Dismissed	204	190
Withdrawn	76	26
Into Complaint	48	59
Settled	5	16
Total	333	291

Chart III: Disposition of complaints

(Prior to ALJ or Board decision)

Disposition	Fiscal 1994-95	Fiscal 1995-96
Withdrawn before hearing	5	2
Settled before hearing	6	6
Settled at hearing	7	8
Total	18	26

Administrative Law Judges commenced 22 ULP hearings in 1994-95. They issued 8 decisions in ULP cases, including 2 in compliance cases. (Chart IV.)

Administrative law judges commenced 17 hearings in 1995-96. They issued 10 decisions in ULP cases, including 2 in compliance cases. (Chart IV.)

Chart IV: ULP Hearings and ALJ Decisions

Hearings and Decisions	Fiscal 1994-95	Fiscal 1995-96
Hearings	22	17
Decisions	10	12

2. Elections

Nineteen elections were held in 1994-95. The Board certified that a majority had voted for a union in 12 elections and no union was certified in 7 elections. One election was set aside and ballots were impounded in 1 election.

Six elections were held in 1995-96. The Board certified that a majority had voted for a union in 4 cases, and no union was certified in 3 cases. One election was set aside.

Investigative Hearing Examiners (IHE's) commenced four hearings involving election-related matters in fiscal year 1994-95 and issued 4 decisions.

A total of 2,638 votes were cast in the Board's three regions in 1994-95 (Chart VI). Salinas held 10 elections with 1,204 votes counted; El Centro had no elections; and Visalia had 1,434 votes counted in 9 elections.

IHE's commenced 3 hearings in election-related matters in 1995-96 and issued 2 decisions.

A total of 917 votes were cast in the Board's three regions. Salinas held 1 election with 390 votes; El Centro had 1 election with 136 votes cast; and Visalia had 4 elections with 341 votes cast.

3. Board Decisions Issued The Board issued a total of 12 decisions involving allegations of ULP's and matters relating to employee representation during fiscal year 1994-95. Of the 12 decisions, 4 involved ULP's, and 8 were related to elections. A summary of each decision is contained in Attachment B

The Board issued a total of 19 decisions involving allegations of ULP's and matters relating to employee representation during fiscal year 1995-96. Of the 19 decisions, 12 involved ULP's and 7 were related to elections.

4. Board Orders

The Board issued 14 numbered orders in fiscal year 1994-95. A description of each order is contained in Attachment C.

The Board issued 15 numbered orders in fiscal year 1995-96. A description of each order is contained in Attachment C.

5. Compliance Activity

At the beginning of 1994-95, 47 cases were ready for compliance action. This included Board orders and ALJ decisions which had become final. Of these 47 cases, 7 were closed. In addition, prior to closure of these cases, compliance was achieved with regard to the non-monetary remedies ordered by the Board.

At the beginning of 1995-96, 44 cases were ready for compliance action. This included Board orders and ALJ decisions which had become final. Of these 44 cases, 6 were closed. In addition, prior to closure of these cases, compliance was achieved with regard to the non-monetary remedies ordered by the Board.

During the 1994-95 fiscal year, a total of $542,581 was distributed to 658 agricultural employees. During the 1995-96

fiscal year, a total of $709,223 was distributed to 885 agricultural employees.

II

LITIGATION

A. Introduction

As in previous years, petitions to review Board decisions pursuant to Labor Code section 1160.8 have continued to be filed with regularity, and defending those decisions has continued to comprise a substantial portion of the Board's litigation activity.

The Board has also been involved in superior court proceedings to enforce its previously issued orders against parties, and to collect from other entities which were derivatively liable for the debts of parties. The Board continues to be engaged in complex and extended litigation both in the federal courts and before the National Labor Relations Board over the allocation of jurisdiction between the ALRB and the NLRB.

1. 1994-95

During the 1994-95 fiscal year, the California courts of appeal acted upon 7 cases involving the ALRB, six of which were petitions for review of final Board decisions and one of

which involved a writ taken from a decision of the superior court involving derivative liability. In all six petitions for review cases, the courts upheld the Board's decision, five by summary dismissal and one by unpublished opinion. In two of those cases, a petition for hearing was then filed with the California Supreme Court. Both were denied. In the derivative liability case, the court, in a published opinion affirmed the propriety of the Board's holding a compliance hearing to determine if it was appropriate to hold a previously unnamed but allegedly related employer liable for the remedy ordered by the Board.

The Board also filed an amicus brief in the Arizona Court of Appeal in order to aid the court in its application of California law, in particular, the parameters of lawful secondary activity under the ALRA. The Arizona court later reversed the lower court's decision which had misconstrued California law and the case was thereafter settled. In a federal action involving the dividing line between the jurisdiction of the ALRB and that of the National Labor Relations Board, the Ninth Circuit Court of Appeals reversed the lower court and held the ALRB was preempted from asserting jurisdiction. The Board filed a petition for certiorari with the United States Supreme Court, but the petition was denied.

2. 1995-96

In the 1995-96 fiscal year, the Board had eight cases actively before the California courts, six of which involved petitions for review of final Board decisions. In one of those cases, the petition was summarily denied, in two others the petition was later withdrawn, and in another the respondent later agreed to comply with the Board's decision and to withdraw its petition for review. In another case, both the employer and the union filed petitions for review, but the union later withdrew its petition and the Court has not yet ruled on the employer's petition. In yet another case in which both parties filed petitions for review, the Board's decision was later reversed by the court of appeal due to a finding that the charging party lacked standing to file a charge with the Board. The California Supreme Court declined to review the decision.

In two cases, writs were filed in the superior courts seeking to challenge nonfinal decisions of the Board. In one, the superior court denied the petition. In the other, the superior court ruled that the Board's certification of an election was invalid, but the Board was successful in having the ruling overturned by the court of appeal. The California Supreme Court declined to review the case.

The Board was also involved in substantial litigation in the federal courts. The National Labor Relations Board denied the ALRB's Motion for Reconsideration of a decision which had blurred the lines between the two boards' jurisdictions. In a case before the United States Supreme Court which raised some of the same issues, the Board filed an amicus brief. The NLRB's decision was upheld in a 5-4 decision. As of June 30, 1996, pending before the Ninth Circuit Court of Appeals was the employer's appeal of a dismissal of its complaint seeking damages and attorneys fees from the Board because it had erroneously asserted jurisdiction over the employer's employees. In another case involving jurisdiction, pending before the Ninth Circuit is an appeal of the District Court's dismissal of an action challenging the Board's assertion of jurisdiction in a case earlier upheld by the California courts. In another federal action, the court dismissed the suit on the plaintiff's own motion after authority was provided to plaintiff's counsel which demonstrated that the action constituted an improper collateral attack on a final state court judgment. In a case before the United States Bankruptcy Court, the Board is awaiting final payment (on behalf of four unlawfully discharged employees) as

ordered by the court. Descriptive summaries of the Board's litigation docket appears as Attachment D.

III

REGULATORY ACTIVITY

During the 1993-94 fiscal year, the Board undertook a major revision of our regulations. The Board had twin goals in undertaking the task: first, we sought to simplify and to clarify some of our procedures and, second, we took the opportunity to reconsider aspects of Board policy in four major areas: 1) regulation of access to an employer's property by labor organizations; 2) the problem of so-called "dormant certifications" caused by the failure of a labor organization to actively represent unit employees for an extended period of time; 3) clarification of the proper means for estimating future levels of peak employment in election cases; and 4) eliminating the difference between the showing of interest required for decertification elections in the absence of a collective bargaining agreement and the showing required in the last year of a collective bargaining agreement.

In August, 1994, the Board held the last of three public hearings to receive comment on the proposed revisions. On November 7, 1994, the Board held a public meeting to consider its

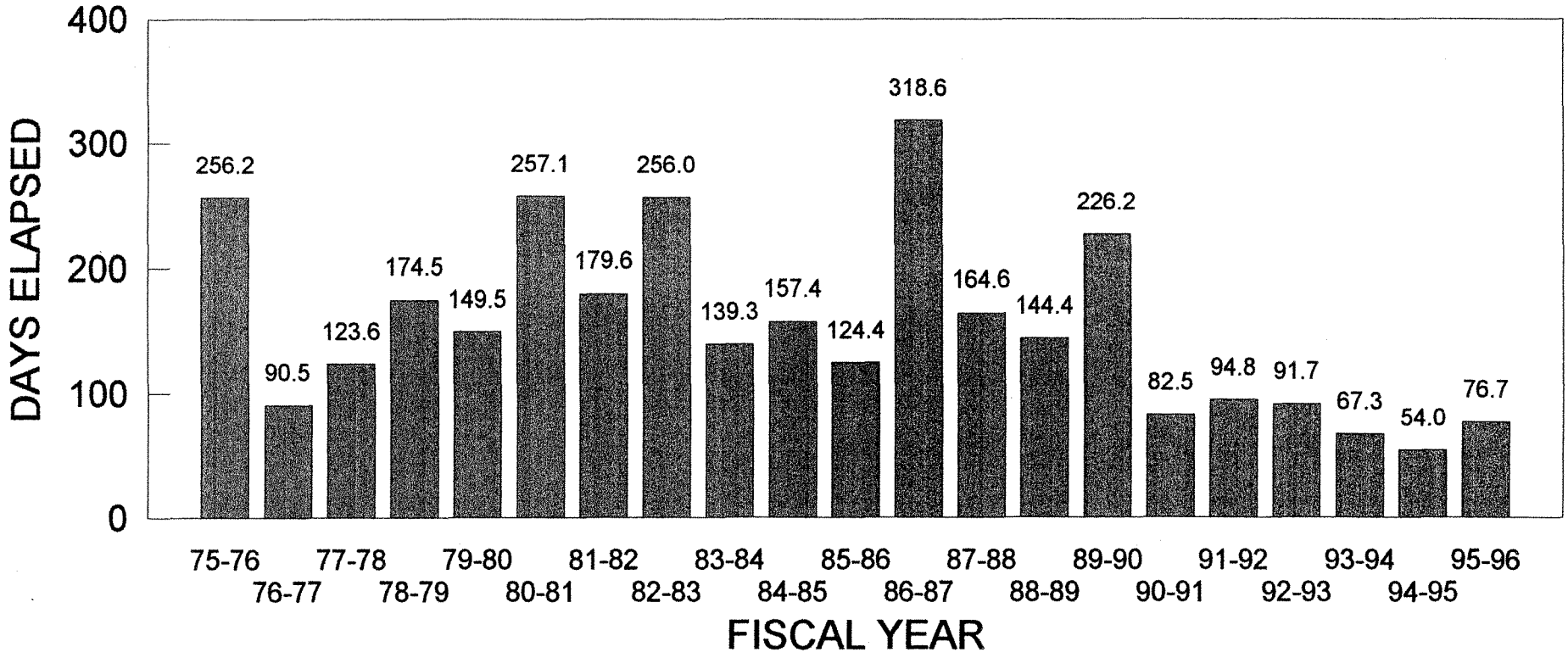
response to the public comments it had received, and on November 30, 1994, the Board adopted its final statement of reasons and response to the comments and decided to delete the proposals concerning the regulation of access, but to adopt the rest of the proposed revisions. On January 31, 1995, the Board submitted its proposed regulatory package to the Office of Administrative Law (OAL) for its review. The OAL disapproved the package on March 6, 1995 on a number of grounds which the Board subsequently addressed in its Final Comments. The Board held another public hearing on August 2, 1995 to formally adopt its response to the concerns of OAL and to consider additional comments received after OAL's disapproval. At this meeting, the Board received considerable comments from concerned labor organizations and employer representatives with respect to the three proposed regulations concerning so-called "dormant certifications", the showing of interest required for decertification elections, and the proper method for estimating peak employment. In light of the public comment, the Board decided to delete these proposed revisions, but to submit the remainder of the regulatory package to OAL for its approval. While the Board felt that the proposed regulatory changes in the areas of peak, dormant certifications, and showing of interest were well within the scope of its

authority, consistent with the ALRA, and, with respect to both the method for estimating peak employment and the matter of dormant certifications, merely a codification of existing case law, the Board concluded that the depth of public concern warranted the withdrawal of these three proposals. The final package was sent to OAL for its review and was approved on October 19, 1995. A complete description of the changes in our regulations appears as Attachment E.

ATTACHMENT A

PETITION TO CERTIFICATION

AVERAGE DAYS ELAPSED FOR FILINGS PER FISCAL YEAR



ATTACHMENT B

DECISIONS ISSUED BY THE BOARD

Fiscal Year 1994-1995

Case Name	Opinion Number
OCEANVIEW PRODUCE COMPANY, a division of Dole Fresh Vegetables Company, Inc.	20 ALRB No. 10
CALIFORNIA REDI-DATE, INC.	20 ALRB No. 11
WARMERDAM PACKING COMPANY	20 ALRB No. 12
SAN JOAQUIN TOMATO GROWERS, INC.	20 ALRB No. 13
ROYAL PACKING COMPANY	20 ALRB No. 14
COKE FARMS, INC.	20 ALRB No. 15
OCEANVIEW PRODUCE COMPANY	20 ALRB No. 16
NICHOLS FARMS, a California Corporation	20 ALRB No. 17
P-H RANCH, INC., R-V DAIRY, and VELDHUIS DAIRY	20 ALRB No. 18
OASIS RANCH MANAGEMENT, INC., a California Corporation	20 ALRB No. 19
BRIGHTON FARMING CO., INC., and FELIZ VINEYARDS, INC.	20 ALRB No. 20
OCEANVIEW PRODUCE COMPANY, a division of Dole Fresh Vegetable Company, Inc.	21 ALRB No. 1

DECISIONS ISSUED BY THE BOARD

Fiscal Year 1995-1996

Case Name	Opinion Number
MONTEREY MUSHROOMS, INC.	21 ALRB No. 2
GALLO VINEYARDS, INC.	21 ALRB No. 3
BOYD BRANSON FLOWERS, INC.	21 ALRB No. 4
D'ARRIGO BROTHERS CO. OF CALIFORNIA	21 ALRB No. 5
RAY M. GERAWAN and STAR R. GERAWAN, A Married Couple, dba GERAWAN RANCHES and GERAWAN ENTERPRISES; GERAWAN CO., INC., A California Corporation; GERAWAN FARMING, INC., A California Corporation	21 ALRB No. 6
LEWIS FARMS	21 ALRB No. 7
OCEANVIEW PRODUCE COMPANY	21 ALRB No. 8
VCNM FARMS	21 ALRB No. 9
SCHEID VINEYARDS AND MANAGEMENT COMPANY, INC.	21 ALRB No. 10
OASIS RANCH MANAGEMENT, INC., a California Corporation	21 ALRB No. 11
TANIMURA AND ANTLE, INC.	21 ALRB No. 12
P. H. RANCH, INC., a California Corporation; RAY GENE VELDHUIS, Individually and Doing Business as R-V DAIRY, a Sole Proprietorship; and VELDHUIS DAIRY	21 ALRB No. 13
SUN GOLD, INC.	21 ALRB No. 14
P. H. RANCH, INC., a California Corporation; RAY GENE VELDHUIS, Individually and Doing Business as R-V DAIRY, a Sole Proprietorship; and VELDHUIS DAIRY	22 ALRB No. 1
SUNRISE MUSHROOMS, INC.	22 ALRB No. 2
LEMINOR, INC., SEQUOIA ORANGE CO.; SEQUOIA ENTERPRISES; SEQUOIA DEHYDRATOR, INC.; TEE DEE RANCH, INC.; MERRYMAN RANCH, INC., a California Corporation; CAMEO RANCHES; CANAL RANCH; CANYON RANCH, COUNTY LINE RANCH, ENTERPRISES II RANCH, J&W RANCH, a California Partnership, a Single Agricultural Employer	22 ALRB No. 3
DOLE FRESH FRUIT COMPANY/DOLE FARMING COMPANY, INC.	22 ALRB No. 4
DUTRA FARMS (96-PM-1-SAL)	22 ALRB No. 5
DUTRA FARMS (96-NO-10-SAL)	22 ALRB No. 6

CASE SUMMARY

Oceanview Produce Company, A Division of Dole Fresh Vegetables, Inc. (UFW)

20 ALRB No. 10
Case No. 94-RC-1-EC(OX)

Regional Director's Report

The initial tally of ballots showed 275 votes for UFW, 231 no votes, and 87 challenged ballots. The Regional Director's Report recommended that challenges to 70 ballots be overruled, fifteen be sustained, and that two challenges to individuals named as discriminatees in an outstanding unfair labor practice complaint be resolved in the unfair labor practice hearing should they be determinative at the time of the hearing.

Board Decision

The Employer filed exceptions to the Regional Director's Report only as to its recommendations to sustain challenges to the eight voters challenged for not providing identification and four challenged as supervisors (surqueros). The Board adopted the Regional Director's recommendations not excepted to, and directed that the Regional Director count the overruled challenges and issue a revised tally as soon as possible.

The Board found that the declarations filed with it exceptions by the Employer as to the surqueros' supervisory status raised substantial issues of fact, and directed that they be set for hearing before an investigative hearing examiner if they were determinative following the issuance of the revised tally.

The Board adopted the Regional Director's recommendation that the eight challenges for failure to present identification be sustained. The Board noted that the voters had not presented any identification at the election, and had not come forward as requested in a letter directed from the Regional Director requesting that they provide evidence as to their identity. The Regional Director in a May 20, 1994 letter requested that the parties provide evidence. The Employer never provided evidence to the Region. The Board noted that the validity of identification is within the discretion of the Board agent, and that these concerns here had not been satisfied.

* * *

CASE SUMMARY

CALIFORNIA REDI-DATE, INC.
(United Farm Workers of America, AFL-CIO)

20 ALRB No. 11
Case No. 94-RC-3-EC

Background

On June 3, 1994, a petition for certification was filed by the United Farm Workers of America, AFL-CIO (UFW) seeking to represent the agricultural employees of California Redi-Date, Inc. (Employer). An election was conducted on June 10, 1994, with the results showing 25 votes for the UFW, 9 votes for No Union, and 1 Challenged Ballot. The Employer filed six election objections alleging misconduct by union supporters and agents of the Agricultural Labor Relations Board (Board). On June 24, 1994, the Board's Executive Secretary dismissed the objections for failure to provide sufficient declaratory support to establish a prima facie case. At the Employer's request, the Acting Executive Secretary granted an extension of time until July 8, 1994, for the Employer's request for review to be received by the Board. The Board received the request by FAX on that date. The FAX was initiated at 4:04 p.m. and was completed at 4:17 p.m.

Board Decision

In its decision, the Board noted that its regulations permit the filing of documents by FAX only when, through no fault of the sending party, there is insufficient time for filing by the usual means. For a document to be considered received on the day in question, the transmission must have begun prior to 4:00 p.m. The Board found that the Employer had not strictly complied with the regulatory requirements for filing by FAX, and that it would be appropriate to dismiss the request for review as untimely filed. However, the Board affirmed the dismissal of the election objections on substantive grounds, as well.

The Board found that the Executive Secretary had properly dismissed the objection alleging intimidation of voters, because none of the described conduct could objectively be considered intimidating or coercive. The Board found that the objection alleging physical threats to employees opposed to the Union was not supported by the described facts. Objections relating to campaigning in the polling area and the photographing of voters were properly dismissed, the Board held, because it was not clear that the alleged campaigning took place within the quarantine area, the activity was brief and noncoercive, and it ended quickly after a Board agent's request. Further, there was no evidence that the photographing of voters interfered with free choice. Finally, the Board affirmed the dismissal of an objection alleging that Union agents paid money for employee support and votes, because the objection was not supported by a declaration signed under penalty of perjury.

Having concluded that the Executive Secretary had correctly dismissed all of the Employer's election objections, the Board upheld the results of the election and certified the UFW as the exclusive collective bargaining representative of the Employer's agricultural employees in the State of California.

CASE SUMMARY

WARMERDAM PACKING COMPANY
(United Farm Workers of America, AFL-CIO)

20 ALRB No. 12
Case No. 94-RC-3-VI

Background

On June 16, 1994, an election was conducted among all the agricultural employees employed in California by Warmerdam Packing Co. (Employer). The tally of ballots showed 220 votes for the United Farm Workers of America, AFL-CIO (UFW), 43 votes for No Union, and 9 Challenged Ballots. The Employer filed six election objections contending that the election petition was filed at a time when the Employer was at less than 50% of its peak agricultural employment; that the petitioned-for bargaining unit included non-agricultural employees; that the Regional Director had failed to consider information submitted in support of the Employer's peak argument; and that the UFW had engaged in misconduct by taking excess access. On July 1, 1994, the Executive Secretary dismissed the objections for failure to establish a prima facie case for setting aside the election. On July 11, 1994, the Employer filed a request for review of the dismissal of its objections relating to access and peak with the Agricultural Labor Relations Board (Board).

Board Decision

The Board affirmed the Executive Secretary's dismissal of the Employer's objections. The Board concluded that the Executive Secretary had properly found that the Regional Director correctly determined peak by comparing the actual number of employees working during the prepetition eligibility period to an average of employees working during the peak employment period, when there was high turnover. The Board also concluded that the Executive Secretary had properly dismissed the objection relating to access violations, since the Employer had made no showing that the amount of access taken would have tended to affect free choice in the election. The Board also denied the Employer's motion to censure the Regional Director for failure to consider the Employer's last-minute submission of information on the peak question.

Having concluded that the Executive Secretary had properly dismissed all of the Employer's election objections, the Board certified the results of the June 16, 1994 election.

CASE SUMMARY

San Joaquin Tomato Growers, Inc. (UFW)

20 ALRB No. 13
Case No. 93-CE-38-VI

Background

In *San Joaquin Tomato Growers, Inc./LCL Farms, Inc.* (1993) 19 ALRB No. 4, issued on May 3, 1993, the Board dismissed election objections filed by San Joaquin Tomato Growers, Inc. (SJTG) and LCL Farms, Inc. (LCL), found SJTG, not LCL, to be the employer, and certified the UFW as the exclusive bargaining representative of all of SJTG's agricultural employees in San Joaquin and Stanislaus Counties. Thereafter, the UFW requested that SJTG commence negotiations and SJTG responded by stating that it was refusing to bargain in order to obtain judicial review of the Board's decision resulting in the certification. SJTG asserted that the Board erred by not setting aside the election due to an atmosphere of violence and coercion and in not finding LCL to be a custom harvester to which the duty to bargain should attach. The UFW then filed an unfair labor practice charge and a complaint issued. The matter was placed before the Board on a stipulated record. In its brief to the Board, SJTG abandoned its challenge based on violence and coercion.

Board Decision

Observing that relitigation of representation issues in unfair labor practice proceedings has been allowed only where it is determined that the certification was manifestly in error because the election was held in an atmosphere of fear and coercion, the Board found that this matter did not fall within that very narrow exception. The Board went on to explain that SJTG's various claims of error in the analysis the Board applied in finding LCL to be a labor contractor were without merit.

Finding that SJTG's litigation posture was not reasonable, the Board concluded that SJTG was simply going through the motions of contesting the election results as an elaborate pretense to avoid bargaining and, therefore, awarded the bargaining makewhole remedy. (*J.R. Norton Co.* v. *ALRB* (1979) 26 Cal.3d 1.) Specifically, the Board concluded that the initial challenge on the basis of violence and coercion was frivolous, as the evidence in the underlying election proceeding was patently insufficient to carry the Respondents' burden of proof. The Board also found that its finding that LCL was a labor contractor was not subject to reasonable challenge. Moreover, the Board explained that, because SJTG unquestionably had the substantial long term interest in the agricultural operation, SJTG would be assigned the bargaining obligation even if LCL was found to be a custom harvester. (*Rivcom Corp.* v. *ALRB* (1983) 34 Cal.3d 743.)

* * *

CASE SUMMARY

ROYAL PACKING COMPANY
(General Teamsters, Warehousemen and Helpers Union, Local 890)

20 ALRB No. 14
Case No. 94-RC-4-SAL

Background

On July 7, 1994, an election was conducted among all of the agricultural employees of Royal Packing Company (Employer) in California. Due to the Employer's contention that some of the employees who would be allowed to vote were not agricultural employees within the jurisdiction of the Agricultural Labor Relations Board (ALRB or Board), the voters were divided into three groups and the votes for each group were segregated and tallied separately. The petitioning union, General Teamsters, Warehousemen and Helpers Union, Local 890 (Local 890), received a majority of votes in each of the three groups. The Employer timely filed objections to the election, which included claims that an outcome determinative number of nonagricultural employees were allowed to vote, as well as claims that misconduct by Local 890 and by Board agents interfered with employee free choice. The objections were dismissed by order of the Executive Secretary on August 4, 1994 for failure to submit declaratory support adequate to establish a prima facie case that, if true, would warrant the setting aside of the election. The Employer then timely filed with the Board a Request for Review of the Executive Secretary's order dismissing the election objections.

Board Decision

The Board affirmed the objections alleging misconduct by Local 890 and Board agents for the reasons stated in the Executive Secretary's order dismissing the objections. The Board dismissed the objections based on the nonagricultural status of various groups of voters based on the fact that the margin of victory for Local 890 among those employees who were admittedly engaged in at least a substantial amount of agricultural work was such that all of the No Union votes and unresolved challenged ballots, even if aggregated from the entire electorate, could not change the result among the admittedly agricultural employees. Consequently, the Board could find conclusively that Local 890 received a majority of votes cast by agricultural employees.

* * *

CASE SUMMARY

COKE FARMS, INC.
(Teamsters, Local 890)

20 ALRB No. 15
Case No. 94-RD-1-SAL

Background

On July 5, 1994, an election was held among the agricultural employees of Coke Farms, Inc. (Employer) to determine if they wanted to retain the General Teamsters, Warehousemen and Helpers Union, Local 890 (Teamsters) as their exclusive bargaining representative. The tally of ballots showed 25 votes for "No union," 2 votes for the Teamsters, and 1 unresolved challenged ballot. The Teamsters filed several objections to the election. On August 12, 1994, the Executive Secretary of the Agricultural Labor Relations Board (ALRB or Board) issued an order setting some of the objections for hearing and dismissing the remaining objections. The Teamsters then filed with the Board a request for review of the dismissal of the objections. The dismissed objections are based on various allegations of bad faith bargaining by the Employer just prior to the election. The Executive Secretary dismissed the objections on the basis that the Teamsters failed to provide evidence that the parties' bargaining history was an issue in the election campaign or was otherwise made known to employees.

Board Decision

The Board first determined that the evidence submitted in support of the objections revealed an arguable prima facie case only with regard to the allegations that the Employer failed to provide relevant information, cancelled a negotiations session and, withdrew its last offer upon the filing of the decertification petition. While recognizing that some forms of bad faith bargaining conduct just prior to an election might be of a nature that their deleterious effect upon free choice and/or upon the validity of the petition would be inherent, the Board concluded that the conduct alleged in this case was not of that nature. Specifically, the Board found that, absent a showing that the employees were aware of the conduct at issue and that it was used in some way to undermine support for the Teamsters, the alleged bad faith conduct, which was internal to negotiations between the parties, would not have affected free choice in the election. Consequently, the Board affirmed the Executive Secretary's partial dismissal of the Teamsters' election objections.

* * *

CASE SUMMARY

OCEANVIEW PRODUCE COMPANY (UFW)

20 ALRB No. 16
Case No. 94-RC-1-EC(OX)

Background

The United Farm Workers of America, AFL-CIO (UFW or Union) filed a petition with the El Centro Regional Office of the Agricultural Labor Relations Board (ALRB or Board) seeking to be certified as the exclusive collective bargaining representative of the Ventura County agricultural employees of Oceanview Produce Company (Employer). Following an election which was held on May 18, 1994, and the subsequent resolution of challenged ballots, it became apparent that the UFW had received a majority of the valid votes cast. Thereafter, the Executive Secretary of the Board examined the Employer's six objections to the election and concluded that a portion of one objection, which alleged that the Union and/or its agents and supporters had threatened employees in a manner that would tend to interfere with their free choice, should be resolved in a full evidentiary hearing. He dismissed the remaining objections. The Employer then filed with the Board a Request for Review of those objections which the Executive Secretary had dismissed.

Board Review

The Board engaged in an independent investigation of the allegations set forth in the Employer's objections which the Executive Secretary had dismissed and decided to affirm the Executive Secretary's dismissal. The Board observed that none of the conduct alleged in those objections, even if ultimately proven to be true, and judged by the requisite objective standard, was such that it would tend to interfere with employee free choice and warrant the setting aside of the election. The Board let stand those allegations which the Executive Secretary had previously ruled should be set for hearing.

* * *

CASE SUMMARY

Nichols Farms, a California Corporation (Jose Vidales)
20 ALRB No. 17
Case No. 92-CE-34-VI

ALJ Decision

The Administrative Law Judge (ALJ) found that five employees, who joined in protesting the amount of salary raises and left work after their primary spokesman said he would quit and take another job, had quit rather than having engaged in a protected work stoppage. The employees did not return to work the next work day. Their first step was for two of them to file for unemployment insurance benefits. Both responded on the claim forms that they had quit, rather than checking a box stating that they had gone "on strike" or been "locked out." The two who had applied were advised that their claims were denied, and they advised the other employees. The five then contacted the Labor Commissioner and ALRB Regional Office, and thereafter made an offer to return to work that day, though they continued to protest the level of raises. The Employer declined to reinstate them, stating that they had quit. None of the five employees, according to the credited testimony, disagreed with this assertion that they had quit. Based on the foregoing, and the employees leaving without indicating that they would be back or stating that they were on strike, the ALJ found that General Counsel had failed to establish by a preponderance of evidence that the five were engaged in a protected work stoppage.

Board Decision

The Board declined to disturb the ALJ's credibility resolutions. Based on these, the Board found that the evidence failed to show that the employees were engaged in a protected work stoppage from the time they left Respondent's premises. The Board disagreed with the ALJ to the extent that his findings implied that their failure to state that they were striking or were leaving indefinitely was independent evidence of a resignation. The Board did find that the reference to quitting during the conversation preceding their leaving raised the possibility that they were quitting. The responses on the unemployment insurance forms and the employees' failure to disagree with the Employer's statement that he would not reinstate them because they had quit were sufficient evidence to support the ALJ's conclusion that General Counsel had failed to carry the burden of proof that the leaving was a strike rather than a resignation.

* * *

CASE SUMMARY

P-H RANCH, INC, et al.
(Teamsters Local 517)

20 ALRB No. 18
Case No. 93-RC-2-VI

Background

On May 25, 1993, the International Brotherhood of Teamsters, Local 517, Creamery Employees & Drivers (Local 517) was certified by the Agricultural Labor Relations Board (ALRB or Board) as the exclusive representative of all the agricultural employees of P-H Ranch, Inc., R-V Dairy and Veldhuis Dairy (P-H or Employer) in the State of California. On July 28, 1994, a Petition for Extension of Certification was filed with the Board by International Brotherhood of Teamsters, Local 517, Local 386 and Joint Council of Teamsters No. 38 (Petitioner), pursuant to Labor Code section 1155.2(b). The Employer filed a motion opposing the petition, and Petitioner filed a response.

The petition, which was unsworn, alleged, inter alia, that the Employer had refused to bargain in good faith by refusing to provide information requested by Petitioner in December 1993 and February 1994. Petitioner asked the Board to grant a 12-month extension of the certification.

The Employer opposed the petition, arguing that it was outside the statutory time limits within which a union may file for an extension of certification. The Employer also alleged that the petition did not contain an adequate description of the progress of negotiations, as required by Labor Code section 1155.2(b).

Board Decision

The Board found that an important distinction must be made between an extension of certification pursuant to the Board's remedial authority under Labor Code section 1160.3, and the Board's authority to extend certification pursuant to a party's petition filed under section 1155.2(b). Section 1155.2(b) allows the filing of such a petition only within a narrow window period, no earlier than the 90th nor later than the 60th day before expiration of the initial 12-month certification. Since Local 517 had been certified on May 25, 1993, the Board found that the applicable window period would have been between February 24 and March 24, 1994. Because the petition herein was filed on July 25, 1994, the Board denied the petition as untimely filed. The Board denied the petition on the further ground that it failed to comply with the regulatory requirement that a petition for extension of certification shall be submitted under oath. (Cal. Code Regs., tit. 8, §20382.)

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CASE SUMMARY

OASIS RANCH MANAGEMENT, INC. (UTAF, etc.)

20 ALRB No. 19
Case Nos. 90-CE-20-EC
90-CE-21-EC
90-CE-34-EC
90-CE-34-1-EC
90-CE-55-EC
90-CE-58-EC
90-CE-59-EC
90-CE-61-EC
90-CE-70-EC
90-CE-72-EC
90-CE-74-EC
90-CE-75-EC
90-CE-91-EC
90-CE-98-EC
90-CE-115-EC

Background

On August 23, 1994, Administrative Law Judge (ALJ) Douglas Gallop issued a decision in which he found that Oasis Ranch Management, Inc. (Oasis) owed discriminatee Vidal Lopez $18,911.00 in backpay, less standard payroll deductions, plus interest calculated in accordance with Board precedent. This compliance matter is based on the findings of the Agricultural Labor Relations Board (Board) in *Oasis Ranch Management, Inc.* (1992) 18 ALRB No. 11. In that case, which was affirmed by the 4th District Court of Appeal in an unpublished decision, the Board found, inter alia, that Oasis had discriminated against Lopez by refusing to assign him to irrigation work after a two month period when he could not do irrigation due to lack of transportation. The Board found that the record included some evidence of irrigation assignments that should have gone to Lopez and left for compliance the issue of the exact amount of irrigation work unlawfully withheld. The figure arrived at by the ALJ was based on Lopez' 1989 earnings, which is a methodology different than both that reflected in the General Counsel's specification and that urged by Oasis. Oasis timely filed exceptions to the ALJ's decision, alleging that the amount of back pay ordered represents an undeserved windfall. The General Counsel filed a response supporting the methodology used by the ALJ and urging that the Board adopt the ALJ's recommended decision.

Board Decision

The Board first affirmed the ALJ's rejection of Oasis' claim that the General Counsel had the burden of proving that each denial of an irrigation assignment was discriminatorily motivated. Instead, the Board found that, given Oasis' obligation to assign irrigation work to Lopez in the same manner as it had prior to the adjudicated discrimination, Oasis had the burden to show

legitimate reasons why Lopez was not given available irrigation assignments. The Board found that the record unequivocally showed that Oasis had failed to reinstate Lopez as ordered in the Board's earlier decision. The Board affirmed the ALJ's rejection of Oasis' proferred rationale for failing to assign irrigation work to Lopez, though both the ALJ and the Board found that Oasis did not have to replace irrigators who had regular assignments prior to the discrimination, nor train Lopez to do drip irrigation.

While the Board found that the ALJ's use of Lopez' 1989 earnings as the basis for calculating backpay was not unreasonable on its face, it agreed that Oasis did not have an adequate opportunity to attempt to rebut the reasonableness of the ALJ's methodology. The Board also agreed with Oasis that it had no duty to provide additional general labor hours when irrigation assignments were not available. Therefore, the Board remanded the case to allow Oasis the opportunity to present evidence to rebut the reasonableness of the backpay formula adopted by the ALJ.

* * *

CASE SUMMARY

BRIGHTON FARMING CO., INC., and FELIZ VINEYARD, INC. (UFW)

20 ALRB No. 20
Case Nos. 89-CE-59-EC
90-CE-14-EC
90-CE-32-EC
90-CE-33-EC

Background

On November 7, 1994, Brighton Farming Co., Inc. (Brighton) filed exceptions to a decision issued October 17, 1994 by Administrative Law Judge (ALJ) Thomas Sobel with regard to the General Counsel's Motion To Make Allegations In Backpay Specification True And For Default Judgement. Brighton admitted that it had defaulted in this matter, but claimed that the ALJ improperly issued an order in the nature of a default judgment. The General Counsel's motion was filed after Brighton failed to file an answer to the backpay specification which issued on July 28, 1994. On September 29, 1994, the ALJ issued an order to show cause why the General Counsel's motion should not be granted. On October 5, 1994, Brighton filed a response in which it asserted that it was no longer in business, had no assets, and would not participate in any hearing on the specification. However, Brighton objected to the entry of a default judgment, arguing that its default should not preclude entitlement to the benefit of any reductions in the amounts owed that are adjudicated in the scheduled hearing involving Feliz Vineyard, Inc., alleged in the specification to be a successor to Brighton.

Board Decision

The Board found that the authority cited by Brighton stands for the proposition that it has the discretion whether or not to issue an order in the nature of a default judgment where one respondent has defaulted. In the circumstances present in this case, the Board concluded that it was more appropriate not to issue a final order in the nature of a default judgment. Moreover, the Board did not read the ALJ's ruling as the entry of a default judgment, or as precluding any adjustment in the amounts owed that might result from the hearing involving Feliz. In order to eliminate any doubt or possible ambiguity, the Board clarified that its order affirming the ALJ is not in the nature of a default judgment against Brighton and that Brighton may be entitled to the benefit of any adjudication that results in the reduction of the amount of backpay alleged in the specification. However, the Board noted that any reduction or elimination of liability that rests on a theory peculiar to Feliz will not relieve Brighton of any of the terms of the specification as issued.

* * *

CASE SUMMARY

OCEANVIEW PRODUCE CO., A DIVISION OF DOLE FRESH VEGETABLE CO., INC. (UFW)

21 ALRB No. 1
Case No. 94-RC-1-EC(OX)

Background

On January 4, 1995, Investigative Hearing Examiner (IHE) Douglas Gallop issued a decision in which he dismissed Oceanview Produce Company's (Oceanview) election objection. Specifically, the IHE found that Oceanview failed to offer sufficient evidence to prove its allegations that the election should be set aside because organizers, agents, or supporters of the United Farm Workers of America, AFL-CIO (UFW or Union) threatened employees with job loss for failure to sign authorization cards or vote for the Union. The IHE first determined that the specific allegations set for hearing were limited to claims of pre-election threats of job loss for failure to support the Union. Finding the evidence of threats insufficient to warrant setting aside the election, the IHE recommended dismissal of the objection and, consequently, certification of the UFW as the exclusive bargaining representative of Oceanview's agricultural employees in Ventura County. Oceanview filed several exceptions, claiming that the evidence demonstrated interference with employee free choice that warranted setting aside the election. The UFW filed a single exception, asserting that the IHE erred in concluding that Board precedent requires that union supporters be deemed special agents of the union while soliciting authorization cards.

Board Decision

The Board affirmed the IHE's dismissal of Oceanview's election objection. The Board expressly rejected Oceanview's claim that the IHE improperly narrowed the scope of the hearing. The Board explained that, in earlier orders, the Executive Secretary and the Board had in fact discussed and dismissed the allegations which Oceanview asserted to be a part of the objection set for hearing. The Board also noted that the IHE's dismissal of the objections was further supported by evidence in the record that, when those who were allegedly subjected to threats of job loss for not supporting the Union related the statements to co-workers, the co-workers told them the comments were not true. The Board found that such countervailing statements lessened, if not eliminated, any coercive effects of the alleged threats.

The Board observed that the UFW's exception demonstrated the need to clarify its prior holdings with regard to the import of the NLRB's decision in *Davlan Engineering, Inc.* (1987) 283 NLRB 803 [125 LRRM 1049]. Acknowledging that a footnote in *Furukawa Farms, Inc.* (1991) 17 ALRB No. 4 may reasonably be read as

inconsistent with the Board's holding in *Agri-Sun Nursery* (1987) 13 ALRB No. 19, the Board clarified that it did not intend to overrule *Agri-Sun* or broaden the rule announced in *Davlan*. Consequently, the Board will not find a special agency relationship arising in all circumstances involving the solicitation of authorization cards. Rather, as stated in *Davlan*, those soliciting authorization cards will be deemed special agents of the union for the limited purpose of assessing the impact of statements about union fee waivers or other purported union policies that can be counteracted simply by making the union's internal policies known. In the present case, the Board concluded that the statement in question, which the Board construed as being related to the Union's aversion to the use of labor contractors, did not involve the type of internal union policy contemplated by *Davlan*. For the reasons stated by the IHE, the Board also found the record insufficient to establish a regular agency relationship.

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CASE SUMMARY

MONTEREY MUSHROOMS, INC. (UFW)

21 ALRB No. 2
Case No. 95-RC-2-SAL

Background

This matter came before the Board on a request for review, filed by the Comite de Campesinos Unidos (CCU), of the Executive Secretary's (ES) partial dismissal of CCU's election objections. CCU filed three numbered election objections. The objections stem from a decertification election held on April 4, 1995, in which a majority of those voting selected the United Farm Workers of America, AFL-CIO (UFW) to replace the CCU as their exclusive collective bargaining representative. The ES set for hearing only the portion of Objection No. 3 in which it is alleged that observers for the UFW took custody of the unsealed ballot box for approximately 15 minutes out of the view of CCU observers and Board agents. The other allegations contained in the objections petition were dismissed by the ES for failure to provide a prima facie case of conduct which would warrant overturning the election. On June 12, 1995, a decision dismissing the allegation which was set for hearing was issued by an Investigative Hearing Examiner. As no exceptions to that decision were filed, it became final.

In its request for review, CCU argued that Objection No. 1, in which its is alleged that the UFW distributed prior to the election a "sample ballot" that had been marked in favor of the UFW and would give the impression that the ALRB had endorsed the UFW and/or had given the UFW access to the Board's files. With regard to Objections No. 2 and No. 3, CCU argued that the ES had mistakenly applied the more lenient third party standard in evaluating the alleged pre-election misconduct, based on his conclusion that the supporting declarations did not indicate the alleged perpetrators were agents of the UFW. While not directly quarreling with the analysis of the ES, CCU nonetheless asserts that the ES should have conducted an investigation, considered material filed in other cases involving the same parties, and/or asked for further information if he had any question concerning the issue of agency. CCU attached to its request for review various documents, not previously provided to the ES, which are offered in support of its agency claim.

Board Decision

The Board affirmed the partial dismissal of CCU's election objections. The Board found that the ES properly dismissed Objection No. 1 because the "sample ballot" marked in favor of the UFW and allegedly distributed by the UFW prior to the election was so dramatically different from an actual ballot that employees would not have been misled into thinking that it was an official ballot or an endorsement by the ALRB.

CASE SUMMARY

Gallo Vineyards, Inc. (UFW)

21 ALRB No. 3
Case No. 94-RC-5-SAL

Background

An election was conducted among the Employer's employees on July 27, 1994, in which the UFW received the majority of votes cast. The Employer filed an objection to the election, contending that the election petition was untimely under section 1153.6(a)(1) because its work force was less than half the number it would employ during its peak payroll period for 1994. The Board reversed the Executive Secretary's dismissal of the objection, setting it for hearing.

IHE Decision

The IHE found that the methodology applied by the Acting Regional Director to estimate peak employment was valid. The Acting Regional Director found that the requirement of section 1156.3(a)(1) was met by comparing the absolute number of employees on the payroll preceding the filing of the petition with the averaged number of employees working during the peak payroll period. The IHE rejected the Employer's contention that the Board could not apply this methodology because it had not been adopted in a rulemaking proceeding. The IHE finally concluded that the Acting Regional Director had properly found that the increases in acreage and yields anticipated by the Employer for the current year did not compel the inference that the Employer's labor requirements would be increased to an extent requiring dismissal of the petition for failure to meet the 50 percent of peak requirement. He therefore dismissed the objection.

Board Decision

The Board affirmed the IHE's decision. The Board rejected the Employer's contention that it could not compare the absolute number of employees on the pre-election payroll with the averaged number for the anticipated current year peak payroll period. The Board considered itself bound by *Adamek & Dessert* v. *ALRB* (1986) 178 Cal.App.3d 970 [224 Cal.Rptr. 366], which held that the Board's former methodology, which required averaging of the current payroll period before comparing it with the average for the peak payroll period, was contrary to section 1156.3(a)(1) of the ALRA. The Board rejected the Employer's argument that *Adamek & Dessert* was an invalid judicial rejection of the Board's own reasonable interpretation of the statute. The Board held that it had properly adopted in *Triple E Produce Corp.* (1990) 16 ALRB No. 14 the methodology followed by the Acting Regional Director in the present case.

The Board held that it was not required to create a uniform system of standards based on crop and acreage statistics to determine whether the requirements of section 1156.3(a)(1) were met. The definition of peak employment set out in section 1156.4 recognizes that the prior year's payroll is properly the dominant basis for determining peak, and no party had shown that any other standards were either existent or relevant. The Board discussed the problems presented by creating such standards, and found that it was not required by statute or case law to have them in place before it could certify an election.

The Board found that the Employer's information concerning increased acreage and yields provided by the Employer before the election did not require that the petition be dismissed. The Acting Regional Director properly found that the Employer's payroll for the prior peak showed that the harvest crews worked such limited hours the prior year that it was unreasonable to conclude that they could not handle an increase in acreage and yield much greater than the Employer projected. The Employer had not provided any explanation for why the crews, which had only worked approximately 30 hours per week the prior week, would not absorb the increased labor requirements with more than a minimal change in the number of hours they worked. Moreover, prior to the election the Employer offered no estimate of any increase in labor needs that might result from the increased acreage or yield.

CONCURRENCE

Chairman Stoker would undertake to carry out the promise the Board that issued *Bonita Packing Co., Inc.* (1978) 4 ALRB No. 96, made to issue uniform standards based on crop and acreage statistics, in the Board's next rulemaking proceeding.

* * *

CASE SUMMARY

BOYD BRANSON FLOWERS, INC. (Ramon Romero)

21 ALRB No. 4
Case No. 93-CE-28-EC(OX)

Background

On February 9, 1995, Administrative Law Judge (ALJ) Douglas Gallop issued a decision in which he found that Boyd Branson Flowers, Inc. (Employer) unlawfully discharged 12 employees for protesting their wages and hours. Specifically, the ALJ found that when the employees left the Employer's premises after making concerted demands for changes in wages and hours, they reasonably believed that they had been discharged, and did not quit voluntarily, as maintained by the Employer. This matter proceeded as a consolidated liability and compliance hearing, and the ALJ fixed amounts owing to the 12 discriminatees. The Employer timely filed exceptions to the ALJ's conclusion that the employees were discharged, but did not challenge any of his findings with regard to compliance issues. The General Counsel did not file a response to the exceptions.

Board Decision

The Board affirmed the ALJ's findings of fact, conclusions of law, and recommended remedy, adopting pro forma the unexcepted to findings with regard to the amounts of backpay owing. The Board noted that the ALJ's decision, to a significant degree, turned on credibility determinations, which the Board will not overrule unless a clear preponderance of the relevant evidence demonstrates that they are incorrect. The Board also noted that the protected status of concerted demands concerning wages or working conditions does not depend on the reasonableness of the demands. Lastly, the Board noted that, in light of credited testimony attributing statements to the Employer that the employees reasonably would have taken to indicate that they had been fired, the result in the case would not differ even if the Employer actually had not intended to discharge the employees. Having made statements that the employees reasonably could have taken as indicating a discharge, it was incumbent upon the Employer, if he did not intend to fire the employees, to clarify the situation.

* * *

CASE SUMMARY

D'Arrigo Brothers Company of California (UFW)

21 ALRB No. 5
Case Nos. 93-CE-60-SAL
94-CE-2-SAL

Decision of the Administrative Law Judge

The ALJ concluded that Respondent had not, as alleged, violated the Act by discharging an employee who had been active in union and other concerted activities. Although the ALJ found that General Counsel had established that the employee had engaged in such activities, with Respondent's knowledge, she also found that the termination was dictated by Respondent's policy governing discharges for a series of unexcused absences. Therefore, as the ALJ found, Respondent would have discharged the employee even in the absence of is having engaged in any activity protected by the Act.

Decision of the Agricultural Labor Relations Board

The Board affirmed the rulings, findings and conclusions of the ALJ and ordered that the complaint be dismissed in its entirety.

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CASE SUMMARY

RAY M. GERAWAN and STAR R. GERAWAN, dba GERAWAN RANCHES and GERAWAN ENTERPRISES; GERAWAN CO., INC.; GERAWAN FARMING, INC. (UFW)

21 ALRB No. 6
Case No. 92-CE-38-VI

Background

This matter was brought before the Board on a stipulated record, having been bifurcated for the purpose of having the Board determine whether it has jurisdiction to proceed. General Counsel's initial consolidated complaint in this matter alleged that Gerawan Farming, Inc., et al. (Gerawan) had engaged in various unfair labor practices during June and July 1992. In November 1992, Gerawan filed a representation petition with the NLRB asking the Regional Director to determine whether or not Gerawan's packing shed workers were subject to the NLRB's jurisdiction (Case No. 32-RM-700). On March 9, 1993, the NLRB Regional Director issued his decision, in which he determined that the Gerawan's packing shed workers were commercial rather than agricultural. This result was based on his findings that Gerawan packed produce other than its own and, thus, under *Camsco Produce Co., Inc.* (1990) 297 NLRB 905, the work in the packing shed did not fall within the definition of secondary agriculture. Nevertheless, he dismissed the petition for an election in the packing shed unit because the UFW disclaimed interest in representing employees under the NLRA. On August 6, 1993, the NLRB denied the UFW's Request for Review of the Regional Director's decision. On January 7, 1994, the ALRB General Counsel filed a motion to amend the complaint on the basis of the NLRB decision, which was granted by the ALJ then assigned to the case.

After the Employer filed an answer to the complaint and a prehearing conference was held, the Employer and General Counsel filed a joint motion to bifurcate the issues in this matter so that a hearing could first be held solely on the issue of jurisdiction. This motion was granted by ALJ Douglas Gallop on April 25, 1994. The parties further agreed to file a stipulated record on the jurisdictional issue. On June 7, 1994, the Employer filed a motion to transfer the jurisdictional issue directly to the Board as a novel legal question. The Executive Secretary granted the motion on June 9, 1994.

Board Decision

First, the Board made it clear that it has never rejected *Camsco* as applicable NLRB precedent. The Board explained that, while it continues to believe that *Camsco* has grave practical implications because it allows employers to easily weave in and out of ALRB jurisdiction, it represents a rule that must be followed, where

applicable, until changed by the NLRB or the reviewing courts. Since the NLRB decision included factual findings showing that Gerawan packed outside produce during the period up to and including the time of the alleged unfair labor practices, the Board concluded that, under existing precedent, it was preempted from proceeding to adjudicate the merits of the unfair labor practice allegations. On that basis, the Board dismissed the case.

Concurring Opinion by Member Frick

Member Frick concurred that the Board was preempted from adjudicating the merits of the case, but wrote separately to suggest several ways in which the NLRB could ameliorate the problems caused by growing confusion over the boundaries between NLRB and ALRB jurisdiction. Member Frick suggested that the NLRB could retreat from its recent trend of narrowing the definition of its agricultural exemption, toll its statute of limitations during the period that a charge is pending before the ALRB, inform parties of their right to instead file charges before the NLRB, adopt the ALRB's certifications where jurisdiction shifts to the NLRB, and defer intervention until state processes have been exhausted. Member Frick also noted that the Board has previously expressed its willingness to work with the NLRB to establish procedures to provide a viable transition between jurisdictions, in order to ensure that the purposes of both state and federal collective bargaining laws are fulfilled.

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CASE SUMMARY

Lewis Farms (Adolfo Palacios Rodgriguez and UFW)

21 ALRB No. 7
Case No. 95-RD-2-VI

Background

On August 17, 1995, the Regional Director dismissed the decertification petition herein, finding evidence of Employer assistance. The Employer filed a request for review of the Regional Director's dismissal.

Board Decision

The Board denied the Employer's request for review. Board Regulations section 20393(a) provides that only the party whose petition for certification or decertification or objections petition has been dismissed by the regional director (or executive secretary, in the case of objections petitions) may request that the Board review a dismissal. The application of Regulations section 20393(a) to decertification petitions is consistent with the Agricultural Labor Relations Act, which provides that only employees may initiate a change of collective bargaining representative.

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CASE SUMMARY

Oceanview Produce Company (UFW)

21 ALRB No. 8
Case No. 94-CE-13-1-EC(OX)

ALJ Decision

The ALJ found that the Employer violated the ALRA by discharging two employees who refused to sign and urged other employees not to sign a "safety training sheet" circulated by their foreman. The ALJ found that the employees were concerned that their signatures might constitute a waiver of the Employer's liability in the event of an on-the-job accident. He concluded that their protest was not so unreasonable as to lose its protected status under the ALRA.

Board Decision

The Board affirmed the ALJ's conclusion that the employees had engaged in protected concerted activity when they refused to sign and/or urged other employees not to sign the safety sheet. The Board noted that the document would have been confusing to the employees because it was partially in English and partially in Spanish; it contained nothing indicating it was an official State of California document, although their foreman told them it was from the State; it appeared to document the employees' attendance at a safety meeting, although no such meeting had taken place; the employees' refusal was a one-time occurrence; the form did not constitute simply an acknowledgment of facts; the employees' protest did not disrupt work and was carried out in a manner which minimized any undermining of the authority of the Employer's agents to direct work; the refusal to sign was conditional, not absolute; and it was clear from the record that the discharges were motivated not so much by the failure to sign the form as by the encouragement of others not to sign, i.e., the very characteristic that made the conduct concerted in nature.

The Board emphasized that its decision should not be read to prohibit employers from requiring, as a condition of employment, that employees sign acknowledgments that they have received safety training or any other kind of information. The Board noted that where the purpose of the document is legitimate, the purpose is made clear to the employees, and the requirement and resulting discipline is made clear to the employees, there would be no reason why such action would be contrary to the ALRA. However, the Board held that the employees' refusal to sign the form was reasonable under the circumstances in this case, and that the Employer's discharge of the two employees therefore violated section 1153(a) of the ALRA.

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CASE SUMMARY

VCNM FARMS
(UFW)

21 ALRB No. 9
Case No. 95-RC-4-SAL

Background

Pursuant to a Petition for Certification filed by the United Farm Workers of America, AFL-CIO (UFW or Union), the Regional Director of the Salinas Region of the Agricultural Labor Relations Board (ALRB or Board) conducted a representation election among all the agricultural employees of VCNM Farms (Employer) on August 17, 1995. The tally of ballots revealed the following results: UFW, 332; No Union, 50, and 8 challenged ballots which were left unresolved because they were not sufficient in number to have affected the outcome of the election.

Thereafter, the Employer timely filed objections to the election which the Executive Secretary of the Board dismissed in their entirety because they failed to establish conduct which established a prima facie showing that the election was not conducted properly or that there was misconduct which interfered with employee free choice.

Board Decision

Upon the filing by the Employer of a Request for Review of the Executive Secretary's dismissal of objections, the Board considered the Employer's submissions and concluded that they failed to state grounds which would warrant an overruling by the Board of the Executive Secretary's dismissal. Accordingly, the Board affirmed the results of the election and certified the UFW as the exclusive representative of all of the Employer's agricultural employees in the State of California.

CASE SUMMARY

Scheid Vineyards and Management Company, Inc. (UFW)

21 ALRB No. 10
Case Nos. 92-CE-51-SAL
92-CE-111-SAL
92-CE-113-SAL
93-CE-1-SAL
93-CE-11-SAL
93-CE-27-SAL
93-CE-67-SAL

Background

The complaint herein alleged that Respondent violated the ALRA by unilaterally changing its hiring and recall procedures without notification to or bargaining with the certified bargaining agent, United Farm Workers of America, AFL-CIO (UFW). The complaint also alleged that Respondent discriminatorily laid off, refused to recall, reduced hours, and changed the job duties of certain employees because of their protected concerted activities.

ALJ Decision

The ALJ found that Respondent had unlawfully changed its hiring practices by hiring new, local employees for the 1992 suckering/training season in Paicines instead of recalling employees by classification seniority, without notifying or offering to bargain the change with the UFW, in violation of section 1153(e) and (a) of the ALRA. He also found that Respondent had violated section 1153(e) and (a) by engaging a labor contractor in the September 1992 grape harvest instead of using regular employees, without notifying or bargaining with the UFW. The ALJ dismissed allegations that Respondent had changed its recall policy by not recalling three employees for the 1992 grape harvest, as he found that the three employees were not eligible for recall. The ALJ found that Respondent had unlawfully changed its recall policy for the 1992-1993 pruning and tying season without notifying or offering to bargain with the UFW, and that three named employees were entitled to backpay if employees with less classification seniority had been recalled or hired for pruning. The ALJ also found that Respondent had unlawfully failed to notify the UFW and offer to bargain about layoffs following the 1992 and 1993 harvest seasons and the 1993 suckering and training season. However, he dismissed allegations that Respondent had violated the ALRA by failing to give notice that a single employee's hours had been reduced and his tractor driving duties had been eliminated, since the change did not impact the bargaining unit generally.

The ALJ dismissed all but two of the allegations that Respondent's employment decisions were the result of unlawful discrimination in retaliation for union activities and other protected activities. Thus, the ALJ found that Respondent had

refused to rehire an employee for the 1992 harvest season because of her union activities, and had denied gondola tractor driving work to another employee because of his protected concerted activities. The ALJ declined to rule on some of the allegations of discrimination, instead dismissing them as cumulative or duplicative of the bargaining violations alleged.

Board Decision

The Board affirmed the ALJ's conclusions that the seasonal layoffs of certain employees were unlawful, finding that the seasonal layoffs involved considerable discretion by the Employer and required the Employer to notify the union and provide the opportunity to bargain over implementation of the layoff policy. However, the Board declined to order backpay for the seasonally laid off employees, finding that the determination of the amounts of backpay owed, as well as the particular persons to whom such backpay would be due, would be highly speculative. The Board affirmed the ALJ's ruling that one employee's reduction in work hours was not bargainable.

The Board upheld the ALJ's determination that Respondent had unlawfully changed its hiring practices by hiring local employees in Paicines in 1992 instead of recalling regular employees, and by engaging a labor contractor for the September 1992 grape harvest. The Board also affirmed the ALJ's dismissal of the allegations that Respondent unlawfully failed to recall three named employees for the 1992 grape harvest. The Board affirmed the ALJ's determination that Respondent had unlawfully changed its recall policy by failing to recall pruning and tying workers for the 1992-1993 season, but ruled that backpay could be claimed by any employees who could demonstrate during compliance proceedings that they would have been recalled if Respondent had not instituted its new requirements.

The Board upheld the ALJ's dismissal on the merits of certain allegations of discriminatory actions by Respondent, as well as his conclusions that Respondent had discriminatorily refused to rehire one employee for the 1992 harvest season and discriminatorily taken gondola tractor driving duties away from a single employee. However, the Board concluded that none of the allegations of discrimination which the ALJ dismissed as cumulative were meritorious, and it therefore dismissed them on the merits.

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CASE SUMMARY

OASIS RANCH MANAGEMENT, INC. (UTAF, etc.)

21 ALRB No. 11
Case Nos. 90-CE-20-EC
90-CE-21-EC
90-CE-34-EC
90-CE-34-1-EC
90-CE-55-EC
90-CE-58-EC
90-CE-59-EC
90-CE-61-EC
90-CE-70-EC
90-CE-72-EC
90-CE-74-EC
90-CE-75-EC
90-CE-91-EC
90-CE-98-EC
90-CE-115-EC

Background

On July 5, 1995, Administrative Law Judge (ALJ) Douglas Gallop issued his second supplemental decision, following a hearing on remand as ordered by the Agricultural Labor Relations Board (Board) in *Oasis Ranch Management, Inc.* (1994) 20 ALRB No. 19. In the Board's decision on liability, *Oasis Ranch Management, Inc.* (1992) 18 ALRB No. 11, which was upheld on appeal to the courts, the Board found that Lopez had been discriminatorily denied irrigation assignments, resulting in the assignment of fewer hours. In 20 ALRB No. 19, which followed the initial compliance hearing, the Board affirmed, for the most part, the findings of the ALJ related to the proper calculation of the amounts owing to Vidal Lopez. However, the Board determined that it was necessary to remand for further hearing to allow Oasis Ranch Management, Inc. (Employer or Respondent) the opportunity to rebut the reasonableness of the ALJ's use of Lopez' 1989 earnings as the basis for calculating backpay. The ALJ had adopted that approach after rejecting the methodologies offered by the General Counsel and Respondent. The Board also allowed the parties the opportunity to address whether Marciel Ibanez and Ramon de la Torre might be considered comparable employees. However, no evidence on comparable employees was offered at the reopened hearing.

Based on the evidence offered at the reopened hearing, the ALJ concluded that, for the period from July 3, 1990 to July 10, 1991, while Lopez' former irrigation assignment was lawfully assigned to another employee, Lopez' losses should be measured by a daily comparison of Lopez' hours with those of other employees given back up irrigation assignments that should have gone to Lopez (the Board had previously held that Respondent was under no obligation to displace those who had regular flood irrigation assignments at the time the discriminatory conduct commenced). Respondent had offered an exhibit purporting to apply this

methodology, which the ALJ utilized after disregarding the hours of one irrigator who was improperly included. For the period beginning July 10, 1991, the ALJ concluded, based on his view that the record did not provide any reliable alternative, that a backpay formula based on Lopez' 1989 earnings was the most reasonable.

Board Decision

The Board affirmed the general methodology used by the ALJ for the first period, but relied on its own calculations instead, after finding that the calculations reflected in the exhibit submitted by Respondent and relied on by the ALJ both incorrectly included the hours of some employees while incorrectly excluding the hours worked by irrigators with regular assignments while working at other than their regularly assigned locations.

The Board rejected Respondent's argument that the use of a prior earnings formula is always improper in a seasonal industry like agriculture, finding that such a formula could be appropriate where more accurate methods are not available. However, the Board did state that, due to annual fluctuations in labor needs, a comparable employee formula is inherently more accurate and should be utilized whenever possible. The Board pointed out that, in the present case, the ALJ used a prior earnings formula after concluding that the record provided no reasonable alternative, and attempted to make adjustments to account for a subsequent drop in available work. However, the Board concluded that the daily comparison method reflected in Respondent's Exhibit 19 (a comparison of Lopez' hours with those worked by others performing flood irrigation at the ranch to which Lopez was assigned prior to the discrimination) was inherently the most accurate, and after conducting its own review of the underlying payroll records, the Board concluded that Exhibit 19 provided a reasonably accurate calculation based on that methodology. Therefore, the Board concluded that Respondent had satisfied its burden to provide a more reasonable formula. The Board's order calculates back pay through June 9, 1994, the date of the initial compliance hearing, since it was found in the previous decision that Lopez, as of that date, had not been reinstated.

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CASE SUMMARY

Tanimura & Antle, Inc.
(CLRA, Farias, Teamster Local 890)

21 ALRB No. 12
Case Nos. 93-CE-41-SAL
94-CE-63-SAL

Background

Respondent grows and harvests celery in Oxnard and Salinas. Employees who work through the end of the Oxnard harvest are accorded first preference in hiring should they seek work at the beginning of the following Salinas season. The next preference in hiring goes to employees who work only in Salinas, provided they completed the previous Salinas season.

Shortly after commencement of the 1993 Salinas season, an entire harvest crew of approximately 60 employees stopped working one afternoon because of unseasonably hot weather. Their harvest supervisor directed them to resume working or leave the fields. Fourteen of them boarded the Company bus which returned them to the parking lot where employees are picked up and dropped off daily. When they returned to the same lot the next morning prepared to resume work, they were not permitted to do so. They complained to one of Respondent's principals who considered their refusal to work a voluntary relinquishment of employment as well as an act of insubordination for failing to resume working when so directed by their supervisor. At the urging of California Rural Legal Assistance (CRLA) whose help the employees solicited, they were reinstated approximately two weeks later and completed the season.

The subsequent Salinas season began on June 20, 1994 with the hiring of one crew. A second crew was added the next day. The 14 employees who had engaged in the 1993 work stoppage sought work on both days. None was hired.

Decision of the Administrative Law Judge

Following the filing by CRLA and one of the discharged employees of an unfair labor practice alleging that the employees were denied rehire because of their concerted work stoppage, General Counsel issued a complaint which was the subject of a full evidentiary hearing before an Administrative Law Judge (ALJ). The ALJ found that the employees had advised their foreman that they could not continue to work because of the heat, that they did so concertedly for mutual aid and protection in regard to a working condition, and therefore their conduct was statutorily protected. The ALJ considered, but rejected, Respondent's contention that they were not hired simply because there was no work for them when they applied for work, finding instead that Respondent altered its establishing hiring policies in order to avoid rehiring the discriminatees in retaliation for their conduct in the prior season. The ALJ found that the discriminatees were passed over for

employees with a lesser entitlement to rehire under the declared policy.

Decision of the Agricultural Labor Relations Board

The Board affirmed the findings and conclusions of the ALJ, and adopted his recommendation that Respondent be directed to reinstate the discriminatees with backpay.

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CASE SUMMARY

P.H. RANCH, INC., et al.
(Jt. Council of Teamsters No. 38, et al.)

21 ALRB No. 13
Case No. 94-CE-99-VI

Background

On July 11, 1995, Administrative Law Judge (ALJ) Barbara D. Moore issued a decision in which she found that P.H. Ranch, Inc., Ray Gene Veldhuis, individually and doing business as R-V Dairy, a sole proprietorship, and Veldhuis Dairy (Employer or Respondent) violated section 1153, subdivisions (e) and (a), of the Agricultural Labor Relations Act (ALRA) by refusing to provide requested information and by refusing to meet and negotiate since on or about June 3, 1994. Respondent filed exceptions to the ALJ's finding of the two violations and the General Counsel filed a brief in response.

Board Decision

The Board affirmed the ALJ's findings and conclusions with regard to the failure to provide information and the refusal to bargain after June 3, 1994. In affirming the refusal to bargain violation, the Board noted that, after numerous bargaining sessions, including two with the assistance of a mediator, it appeared that the bargaining process was on track and proceeding in good faith. However, Respondent's subsequent failure to respond to the Union's written proposals and to continue to meet and negotiate derailed the bargaining process, constituting a violation of the statutory duty to bargain. The Board emphasized that it in no way intends to discourage the use of mediators. On the contrary, the Board strongly supports the use of mediation as a tool to facilitate bargaining. However, the Board cautioned that, except where there is an unrepudiated agreement that all contact must be through the mediator, whether such agreement is express or reasonably may be inferred from the conduct of the parties, a party may not use the existence of a mediator as an excuse to ignore efforts by the other party to resume direct contacts or negotiations. Here, Respondent failed to persuasively establish that the parties had in fact agreed to such an arrangement or that the Employer justifiably relied on conduct by the Union in believing that all communications must be through the mediator. The Board found that, absent such a showing, the parties' mutual duty to meet at reasonable times and confer in good faith, as defined in Labor Code section 1155.2, subdivision (a), cannot be conditioned on the presence of the mediator.

The Board also upheld the ALJ's conclusion that the bargaining makewhole remedy was appropriate, finding that the Employer's conduct significantly disrupted the bargaining process so as to effectively prevent the possibility of reaching a contract. In addition, since the parties' differences were not shown to be

intractable, the Employer failed to demonstrate that no agreement would have been reached even in the absence of bad faith bargaining. (*Dal Porto & Sons, Inc.* v. *ALRB* (1987) 191 Cal.App.3d 1195.) However, the Board modified the beginning of the makewhole period, finding that, while it was appropriate not to award makewhole during a period of union-caused delay, it was not appropriate to also offset an earlier period of comparable length in which the Employer avoided negotiations.

Based on the bargaining violations found, the Board also ordered the Regional Director to dismiss the decertification petition in Case No. 94-RD-2-VI, wherein an election had been held but the ballots impounded pending the outcome of this related unfair labor practice case. In ordering the dismissal of the petition, the Board relied on NLRB precedent holding that bad faith bargaining during the period prior to the filing of the decertification election precludes the finding of a bona fide question concerning representation. (See, e.g., *Brannan Sand & Gravel* (1992) 308 NLRB 922; *Big Three Industries, Inc.* (1973) 201 NLRB 197.) The Board observed that in this case the Employer's unlawful conduct derailed promising negotiations for a period that included the three and half months preceding the decertification election and that such conduct would tend to interfere with employee free choice preclude the holding of a fair election.

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CASE SUMMARY

Sun Gold, Inc.
(UFW)

21 ALRB No. 14
Case Nos. 94-CE-12-EC
94-CE-114-EC

Background

Respondent is a date farming company owned by Hernan and Efren Castro. During its seasonal operations, Respondent employed "palmeros" (employees who generally worked on the tallest trees with ladders of 48-56 feet) and general laborers who worked on shorter trees. Certain palmeros and laborers worked using machines, either cranes with buckets or forklifts with platforms. Palmeros were paid piece rate and general laborers were paid hourly wages. In November/December 1993, Respondent decided to mechanize its operation as much as possible by using cranes instead of ladders for all work in the tall trees.

Prior to the 1993 harvest season, Respondent informed its palmeros of certain changes in their wages and benefits. On March 21, 1994, the palmeros went to the offices of the United Farm Workers of America, AFL-CIO (UFW). The next day, the palmeros (most of them wearing union buttons) voiced their complaints about wages and working conditions to Hernan Castro, using Vicente Espejel as their spokesperson. Castro became angry and upset with Espejel because he felt he had done Espejel a number of favors, such as lending him money and hiring his two brothers when they were not very experienced. That same evening, Castro discharged the three Espejels.

All of the palmeros (except the Espejels) continued to work during the three seasons following the March 22 meeting. However, when the palmeros asked Castro if he would recall them for the 1994 harvest season, he refused, saying the harvest would all be done with cranes and general laborers, as well as four palmeros who had experience on the cranes.

ALJ Decision

The ALJ found that Castro discriminatorily fired the three Espejels because of Vicente Espejel's role in presenting the palmeros' grievances, as well as his being part of the group who had gone to the UFW. She concluded that the discharges violated section 1153(a) and (c) of the ALRA.

The ALJ concluded that Respondent's failure to recall the palmeros for the 1994 harvest also violated section 1153(a) and (c) of the Act. She found that Respondent had falsely used the justification of mechanization to conceal its true unlawful motivation for not recalling the employees. The ALJ did not find a violation for the continued refusal to rehire the palmeros in 1995, when Sun Gold no longer had the very tall trees which palmeros had worked on.

Board Decision

The Board upheld the ALJ's ruling that Respondent's discharge of the three Espejel brothers violated section 1153(a) of the ALRA. However, noting that the remedy for discrimination in violation of section 1153(a) is the same as for discrimination in violation of section 1153(c), the Board declined to reach the question as to whether the employees' union activity was an additional motivating factor for their discharge. The Board overruled the ALJ's finding of a violation for the failure to recall the palmeros for the 1994 harvest, finding that General Counsel had failed to establish that the decision was based on an unlawful motive rather than the desire to mechanize Respondent's operations.

The Board held that the Espejels were entitled to offers of reinstatement to their former jobs, or if their positions no longer existed, to substantially equivalent positions. The Board held that the question of what positions Respondent may currently have for which the Espejels would qualify is a matter for compliance.

The Board also denied Respondent's claim that the ALJ should have disqualified herself from the case for bias. The Board found that Respondent had not demonstrated any bias on the part of the ALJ under relevant case law.

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CASE SUMMARY

P.H. RANCH, INC.
(Teamsters Union, Local 517)

22 ALRB No. 1
Case No. 93-CE-24-VI

ALJ Decision

The ALJ found that the Employer had violated section 1153(c) and (a) of the ALRA by discharging one employee because he had assisted and supported the Union. The ALJ also found that the Employer had violated section 1153(a) of the ALRA by threatening employees with loss of benefits for exercising their section 1152 rights, as well as by promising employees benefits for refraining from exercising their section 1152 rights.

Board Decision

The Board affirmed the ALJ's findings of fact and conclusions of law, and adopted her recommended remedy. The Board noted that regardless of whether the discharged employee had failed to milk the cow he was accused of not milking, there was abundant evidence indicating that he would not have been discharged in the absence of his union activities. (Citing *Wright Line, A division of Wright Line, Inc.* (1980) 251 NLRB 1083 [105 LRRM 1169], enf'd (1st Cir. 1981) 662 F.2d 899 [108 LRRM 2513], cert. den. (1982) 455 U.S. 989 [109 LRRM 2779].)

* * *

The Board rejected the Employer's claim that it was not put on notice prior to the hearing that the status of the replacement workers was at issue. The Board noted that the Employer was on notice that General Counsel's central claim was that the separation agreements were not a valid impediment to reinstatement, and that permanent replacement of strikers is an affirmative defense to reinstatement which an employer has the burden to raise and establish.

While summarily affirming the various bases on which the ALJ found the separation agreements to be unenforceable, the Board discussed and rejected the Employer's argument that the well-established policy that a waiver of statutory rights be clear and unmistakable should not apply where the purported waiver occurs prior to a charge being filed. The Board noted that, under NLRB case law, where, as here, employees express a need for benefits and resign when told that was a necessary precondition, the right to reinstatement and backpay is not waived.

While rejecting the Employer's assertion that the ALJ improperly shifted the burden to the Employer when he found that Fernando Fernandez should be included in the Order because the record contained only hearsay evidence that Fernandez had engaged in strike misconduct, the Board held that the Employer may raise the issue in compliance because the Employer, in these circumstances, did not have the burden to prove unsuitability for reinstatement in the liability phase. The Board reversed the ALJ's finding that Tomas Torres and Antonio Vargas should be excused from making an unconditional offer to return to work because, having signed separation agreements, such an offer would be futile. The Board found that such excuse is available only in cases, unlike the present one, where the employment relationship has been severed by actions of the employer.

While acknowledging that the record reflects that the IUAW was as equally involved as the Employer in creating the settlement agreements and procuring the signatures of strikers, the Board noted that it was within the General Counsel's exclusive prosecutorial discretion to determine whether to issue a complaint against the Union. The Board found no merit in the Employer's additional claims that it was denied the right to take a deposition of a witness not shown to be unavailable, and that the ALJ improperly denied a continuance at the end of the hearing to allow the Employer to call a witness it claimed it had just located. The Board also found that the record revealed nothing to support the Employer's claim that the ALJ exhibited bias.

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CASE SUMMARY

SUNRISE MUSHROOMS, INC.
(IUAW, Joel Tapia Chavez,
Manuel Hernan Perez)

22 ALRB No. 2
Case Nos. 93-CE-43-SAL
93-CE-64-SAL
94-CE-1-SAL
94-CE-4-SAL

ALJ Decision

The ALJ found that the Employer, Sunrise Mushrooms, Inc. violated section 1153, subdivisions (c) and (a) of the ALRA by discharging three employees engaged in lawful strike activities and by failing to reinstate economic strikers upon their unconditional offers to return to work. The ALJ found that the former strikers were entitled to immediate reinstatement because they were not permanently replaced and because a separation agreement many of the strikers signed was unenforceable. The ALJ dismissed the portion of the complaint alleging an unlawful unilateral increase in hourly wage rates and held that certain employees were lawfully discharged for engaging in strike misconduct. All parties filed exceptions.

Board Decision

The Board rejected the IUAW's argument that the denials of the six employees found to have engaged in strike misconduct should have been credited over the contrary testimony of other witnesses. The Board found no basis in the record for disturbing the ALJ's credibility resolutions, which were not only are based in part on demeanor, but also supported by other evidence.

The Board declined to impose sanctions on the Employer for its tardy compliance with the Board's rules on discovery, since no prejudice to the General Counsel had been shown. The Board found that the ALJ reasonably refused to credit former striker Jose Antonio Ferreyra's claim that he was placed on a recall list, and affirmed the ALJ's finding that Ferreyra was not entitled to reinstatement on the basis that Ferreyra's failure to offer to return to work precluded the finding of a violation.

Finding no basis for disturbing the ALJ's credibility determinations, the Board found no merit in the Employer's exception that it had successfully shown that Jorge Leyva threw rocks at a vehicle occupied by replacement workers. The Board, while acknowledging that the ALJ may have been mistaken as to which incident Ricardo Aguilera and Manuel Bautista were alleged to have been involved in, concluded that the lack of any corroboration or even the identification of a witness to the actual alleged incident involving Aguilera and Bautista compels the same conclusion, i.e., that the Employer failed to demonstrate that it had a good faith belief that they were engaged in serious strike misconduct.

CASE SUMMARY

LEMINOR, INC., et al.
(William Paul Mellinger;
FFVW, Local 78-B (UFCW))

22 ALRB No. 3
Case No. 95-RD-3-VI

Background

A decertification election was held on January 8, 1996, with the tally of ballots showing 16 votes for the FFVW, 39 votes for No Union, and 2 unresolved challenged ballots. On March 4, 1996, the Investigative Hearing Examiner issued a decision in which he sustained the election objection filed by the FFVW and recommended that the decertification election be set aside due to the provision of an incorrect and/or incomplete list of the names and addresses of current employees, which agricultural employers are required by statute to maintain. The list provided by the Employer contained 19 inadequate or incomplete addresses and a shift of 13 votes would have changed the outcome of the election. The Employer filed timely exceptions to the IHE's decision.

Board Decision

The Board first noted that Labor Code section 1156.3(c) has been interpreted to create a presumption in favor of certification of an election, with the burden of proof on the objecting party to demonstrate that an election should be set aside. Moreover, an outcome determinative standard has been applied in cases involving employee address lists, and a significant aspect of the complaining union's burden in such cases is showing that the inadequacies in the list actually impaired the union's ability to communicate with employees. Upon reviewing its prior cases, as well as NLRB cases, the Board concluded that a strict numerical comparison of inadequate addresses and margin of victory has not been applied. Rather, where the number of inadequacies merely exceeds the number of votes necessary to change the outcome by an insubstantial margin, such as in this case, that alone will not result in the election being set aside. The Board found that the record failed to reflect any additional circumstances beyond the list's facial deficiencies that would support the conclusion that the outcome of the election would have been affected by the defective list. The Board noted that the record did not fully establish the extent to which the Union's ability to communicate with the unit employees was dependent on the use of the list, the Employer's submission of an imperfect list was not due to bad faith or any other conduct designed to hamper the Union's communication with the employees, and the Employer was not alerted to the deficiencies in the list and given the opportunity to correct them. Therefore, the Board upheld the results of the election.

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CASE SUMMARY

DOLE FRESH FRUIT COMPANY &
DOLE FARMING COMPANY, Inc.,
(UFW)

Case No. 94-CE-48-EC
22 ALRB No. 4

Background

On January 1, 1988, Respondent acquired all of the Coachella Valley assets of the former Tenneco West, Inc., a diversified farming enterprise whose employees were represented by the ALRB certified United Farm Workers of America, AFL-CIO (UFW or Union). Thereafter, Respondent and the UFW entered into various negotiations and agreements concerning the former Tenneco date workers. Respondent admitted, however, that since May 25, 1994, it rejected repeated requests by the UFW to bargain with respect to employees in the table grape operations which it also acquired from Tenneco, contending that any duty to bargain which it otherwise might have had been extinguished because (1 the unit as initially certified no longer existed (due to changes in the size of operations and employee turnover) and (2) the Union had abandoned the grape workers and therefore no longer represented them.

Decision of the Administrative Law Judge

The ALJ found that Respondent was a successor to Tenneco's Coachella Valley operations and therefore succeeded to the whole of Tenneco's bargaining obligation which included the table grape employees. Relying on cases in which the ALRB had previously addressed abandonment when asserted as a defense to a failure or refusal to bargain, and acknowledging that the ALRB has indeed recognized the defense of abandonment, he concluded that, in light of those precedents, Respondent had failed to show in this instance that the certified representative was either unwilling or unable to represent the grape employees. He cited to the Board's decision in Ventura County Fruit Growers (1984) 10 ALRB No. 45, in which the Board, on similar facts, held that "[a]t the critical time that Respondent [refused to bargain when so requested by the union], its abandonment theory was a factual impossibility." In accordance with Ventura, he recommended that Respondent be required to make its employees whole and that the makewhole period commence to run from May 25, 1994, the date on which Respondent admittedly refused to bargain.

Decision of the Agricultural Labor Relations Board

The Board affirmed the ALJ's findings on successorship and abandonment. The Board noted that Respondent's proposal to effectively sever out the table grape portion of its overall Coachella Valley bargaining unit would be contrary to express statutory policy which requires, as a general rule, that all of

the agricultural employees of an employer be included in a single bargaining unit and thus prohibits the Board from carving out units on the basis of such factors as crop divisions or job classifications. With regard to the Union's abandonment as a defense to the failure or refusal to bargain over the grape employees, the Board found that given the Union's repeated requests to include the grape employees in the parties' negotiations and the Union's urging of all Coachella Valley grape employees to press for an increase in wages, Respondent failed to show that the Union had in fact disclaimed interest in representing those same employees and therefore failed to sustain its legal burden of establishing that its duty to bargain had been extinguished.

With regard to a remedy for Respondent's failure to bargain, the Board limited the makewhole period to 30 days from the date upon which the Union requests bargaining following issuance of this decision. The Board reasoned that after weighing all of the facts and equities in the case, Respondent may have had cause to doubt the prior status of the defense of abandonment as a result of the Board's 1994 regulatory process in which it initially expressed interest in considering so-called "dormant" certifications occasioned when it appeared to employers that unions had become defunct or otherwise had relinquished their right of representation. The Board observed that certain actions of the Union could also have created confusion, from Respondent's perspective, as to whether the Union itself believed that it continued to represent the disputed employees (actions which included, but are not limited to, filing Notices of Intent to Take Access which normally are utilized only for initial organizing purposes) as well as the Union's decision to rest on its bargaining rights over the grape employees for several years. In light of these factors, the Board believed Respondent acted in good faith in pursuing this action and therefore did not deem the makewhole remedy appropriate prior to the issuance of this clarification of the doctrine of abandonment.

Concurrence & Dissent

Member Frick concurred with part I-IV of the decision, but dissented on part V, finding that the facts of this case, in light of well settled law, compel the conclusion that the bargaining makewhole remedy should be awarded as recommended by the ALJ, i.e., the remedy should begin on May 25, 1994, the date of the Employer's refusal to bargain which is the subject of the unfair labor practice complaint. Member Frick observed that the Employer's proffered defenses to its duty to bargain are not only in direct contradiction to settled law under the ALRA, they cannot even be squared with case law under the NLRA, which affords much

broader means for excusing an employer's duty to bargain. Though Member Frick would not award the makewhole remedy where the controlling law is unclear or where a party seeks a logical extension of controlling law, she found neither circumstance to be present in this case. Since the Board has awarded the makewhole remedy in similar cases where the same or similar challenges were made to established legal principles, Member Frick fears that not to award the remedy in this case will engender uncertainty and confusion in the law and encourage employers in the future to pursue challenges to other well-settled legal principles on the false hope that they too will not be subject to the makewhole remedy, thus setting a trap for the unwary.

In examining all surrounding circumstances reflected in the record, Member Frick found no legitimate equitable considerations that would warrant any further restriction of the remedy. In particular, there was nothing in the Board's previous regulatory efforts that would have engendered confusion as to the present state of the law, nor could a party expect that a subsequent change in law through the regulatory process, even if such a change were likely, would operate retroactively to shelter conduct occurring prior to the passage of the regulations. In addition, while the Union's filing of Notices of Intent to Take Access was unusual, whatever confusion was generated by such conduct would have been resolved soon after by the Union's nearly contemporaneous requests to bargain over the grape employees.

* * *

CASE SUMMARY

Dutra Farms
(United Farm Workers of America, AFL-CIO)

Case No. 96-PM-1-SAL
22 ALRB No. 5

Background

The Employer filed a motion to bar UFW organizer Efren Barajas from its property for one year with the Executive Secretary. The Employer requested that the Board set a hearing on the motion, which alleged that the UFW had violated the Board's access regulations by driving a car into the Employer's fields which raised dust and damaged the Employer's fruit, and by blocking the Employer's road, thereby preventing the Employer's trucks from picking up the harvested fruit. The Employer's motion was in the form of a letter from the Employer's attorney, and was unsupported by any declaration asserting facts under penalty of perjury. The Union filed a response, including a sworn declaration by Efren Barajas stating that a number of vehicles, including trucks and motorcycles, were in an area half a mile from the edge of the field, the area where the employees took lunch and where he drove his car. Barajas stated that he carefully drove his car on the road inside the field at about five miles an hour, and parked it so as to avoid blocking any road or crushing any plants in the Employer's field.

Board Decision

The Board held that the allegations made in the Employer's letter, unsupported by any sworn declarations, failed to make a prima facie showing sufficient to warrant setting the matter for hearing. The Board therefore denied the Employer's motion for a hearing. The Board noted that its regulations do not specify a procedure for the filing of motions to deny access, and, in particular, have not put employers on notice that they should file declarations with their motions that reflect a prima facie basis for a hearing. Therefore, the Board dismissed the motion without prejudice to the Employer's right to refile the motion with supporting declarations. The Board also set forth a procedure requiring that henceforth all motions to deny access shall be accompanied by a detailed statement of the facts and law relied upon, and declarations within the personal knowledge of the declarants which, if uncontroverted or unexplained, would support the granting of the motion. The procedure requires the moving party to file and serve the motion and accompanying documents in accordance with Board regulation sections 20160(a)(2), 20166 and 20168.

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CASE SUMMARY

DUTRA FARMS
(UFW)

22 ALRB No. 6
Case No. 96-NO-10-SAL

Background

The Board's regulations provide that any labor organization which seeks to take organizational access to an employer's premises prior to an election under the Board's access rule must first serve on the employer and file with the Board a Notice of Intent to Take Access (NA). Thereafter, at anytime during the 30 day pendency of the NA, the same labor organization may qualify to receive employees' names and home addresses by filing a Notice of Intent to Organize (NO) supported by at least 10 percent of the employees in the bargaining unit. This matter came before the Board for a determination as to whether failure to submit the requisite 10 percent showing of employee interest at the time the NO is filed should result in the immediate dismissal of the NO.

Board Decision

The Board concluded that since an NO remains open for 30 days from the date on which the NA was filed, it is reasonable to permit a deficient initial showing of interest to be cured at any time during the pendency of the NA. Where, however, the showing is not perfected prior to expiration of the NA, no extensions may be granted and the NO file will be closed.

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ATTACHMENT C

ADMINISTRATIVE ORDERS
ISSUED DURING FISCAL YEARS
1994-1995 AND 1995-1996

ADMIN. ORDER NUMBER	CASE NAME	CASE NUMBER	ISSUE DATE	DESCRIPTION
94-12	Ace Tomato Co., Inc.	93-CE-37-VI	7/06/94	ORDER DENYING RESPONDENT'S MOTION FOR RECONSIDERATION
94-13	George Arakelian Farms, Inc.	78-CE-12-E	7/08/94	ORDER DENYING APPROVAL OF FORMAL SETTLEMENT AGREEMENT AND NOTICE RESETTING PREHEARING CONFERENCE AND HEARING
94-14	George Arakelian Farms, Inc.	78-CE-11-E	7/11/94	ORDER GRANTING MOTION FOR CONTINUANCE; ORDER SETTING NEW PREHEARING/ SETTLEMENT CONFERENCE AND HEARING DATES
94-15	Coke Farms, Inc.	94-RD-1-SAL	7/19/94	ORDER GRANTING REQUEST FOR STAY; AND ORDER TAKING UNDER SUBMISSION APPEAL OF REGIONAL DIRECTOR'S DECISION TO COUNT IMPOUNDED BALLOTS
94-16	Coke Farms, Inc.	94-RD-1-SAL	7/27/94	ORDER GRANTING REQUEST FOR REVIEW OF REGIONAL DIRECTOR'S DECISION TO OPEN AND COUNT IMPOUNDED BALLOTS AND ORDER DENYING CERTIFIED BARGAINING REPRESENTATIVE'S REQUEST TO OVERRULE REGIONAL DIRECTOR
94-17	Scheid Vineyards and Management Company, Inc.	92-CE-51-SAL	9/13/94	ORDER GRANTING SPECIAL PERMISSION TO APPEAL ADMINISTRATIVE LAW JUDGE'S RULING AND GRANTING MOTION TO SEVER

ADMIN. ORDER NUMBER	CASE NAME	CASE NUMBER	ISSUE DATE	DESCRIPTION
94-18	D'Arrigo Brothers Company of California	92-CE-32-VI	9/19/94	ORDER APPROVING RECOMMENDATION TO SEEK COURT ENFORCEMENT OF SUBPOENA DUCES TECUM
94-19	Gallo Vineyards, Inc.	94-RC-5-SAL	10/07/94	ORDER GRANTING REQUEST FOR REVIEW; ORDER SETTING OBJECTION FOR HEARING AND NOTICE OF HEARING
94-20	Gallo Vineyards, Inc.	94-RC-5-SAL	10/07/94	ORDER DENYING MOTION TO SUBMIT SUPPLEMENTAL INFORMATION
94-21	Triple E Produce Corp.	93-CE-39-VI	10/07/94	ORDER DENYING REQUEST FOR REVIEW
94-22	Oceanview Produce Company	94-RC-1-EC(OX)	10/14/94	ORDER DENYING EMPLOYER'S REQUEST FOR RECONSIDERATION OF BOARD'S DECISION AFFIRMING EXECUTIVE SECRETARY'S PARTIAL DISMISSAL OF ELECTION OBJECTIONS
94-23	Produce Magic, Inc.	92-CE-119-SAL	11/23/94	DENIAL OF RESPONDENT'S REQUEST FOR REVIEW OF ADMINISTRATIVE LAW JUDGE'S DENIAL OF MOTION TO DISMISS
94-24	George Arakelian Farms, Inc.	78-CE-11-EC	1/04/95 (orig.12/20/94)	**CORRECTED** ORDER DENYING APPROVAL OF FORMAL SETTLEMENT AGREEMENT
95-1	California Redi-Date, Inc.	93-CE-58-EC	6/30/95	ORDER APPROVING FORMAL BILATERAL SETTLEMENT AGREEMENT
95-2	Brighton Farming Co., Inc.	89-CE-59-EC	7/11/95	FINAL ORDER ON ENTRY OF DEFAULT

ADMIN. ORDER NUMBER	CASE NAME	CASE NUMBER	ISSUE DATE	DESCRIPTION
95-3	Sun Gold, Inc.	94-CE-12-EC	7/14/95	ORDER DENYING APPLICATIONS FOR SPECIAL PERMISSION TO APPEAL RULINGS OF THE ADMINISTRATIVE LAW JUDGE
95-4	Oceanview Produce Company	94-CE-13-EC(OX)	7/19/95	ORDER APPROVING WITHDRAWAL OF UNFAIR LABOR PRACTICE CHARGES, VACATING PORTIONS OF ALJ DECISIONS, AND APPROVING WITHDRAWAL OF COMPLAINT ALLEGATIONS AND EXCEPTIONS RELATING THERETO
95-5	Lewis Farms	95-RD-1-VI	8/18/95	ORDER DENYING EMPLOYER'S APPEAL OF REGIONAL DIRECTOR'S DISMISSAL OF DECERTIFICATION PETITION
95-6	Michael Hat Farming Company	89-CE-10-SAL	8/29/95	ORDER APPROVING FORMAL BILATERAL SETTLEMENT AGREEMENT
95-7	Robert Meyer dba Meyer Tomatoes	88-CE-3-VI	10/24/95	ORDER APPROVING FORMAL BILATERAL SETTLEMENT AGREEMENT
95-8	Imperial Asparagus Farms	93-CE-7-EC	11/17/95	ORDER APPROVING FORMAL BILATERAL SETTLEMENT AGREEMENT
95-9	Scheid Vineyards Management Company, Inc.	92-CE-51-SAL	11/20/95	ORDER DENYING UNION'S MOTION FOR RECONSIDERATION
95-10	Oceanview/ Bud Antle	95-UC-1-EC(OX)	12/15/95	ORDER GRANTING SPECIAL REQUEST FOR INTERIM APPEAL OF ORDER DENYING MOTION FOR SUMMARY ADJUDICATION AND ORDER TAKING CASE OFF CALENDER
96-1	Giannini Packing Corporation	91-CE-62-VI	1/24/96	ORDER APPROVING UNILATERAL FORMAL SETTLEMENT AGREEMENT

ADMIN. ORDER NUMBER	CASE NAME	CASE NUMBER	ISSUE DATE	DESCRIPTION
96-2	Oceanview Produce Company	95-UC-1-EC(OX) 95-UC-2-EC	2/05/96	ORDER DENYING UFW'S INTERIM APPEAL OF INVESTIGATIVE HEARING EXAMINER'S DENIAL OF MOTION FOR SUMMARY ADJUDICATION AND ORDER SETTING MATTERS FOR HEARING
96-3	Harlan Ranch Company	90-CE-31-VI	2/15/96	ORDER APPROVING FORMAL UNILATERAL SETTLEMENT AGREEMENT
96-4	Bruce Church, Inc.	87-CE-8-SAL	3/26/96	ORDER GRANTING APPLICATION FOR PERMISSION TO FILE INTERIM APPEAL AND ORDER DENYING INTERIM APPEAL
96-5	Bruce Church, Inc.	87-CE-8-SAL, et al.	5/15/96	ORDER APPROVING FORMAL BILATERAL SETTLEMENT AGREEMENT
96-6	Tanimura and Antle, Inc.	94-CE-41-SAL	6/12/96	ORDER APPROVING FORMAL BILATERAL SETTLEMENT AGREEMENT

ATTACHMENT D

COURT AND SPECIAL LITIGATION

BUD ANTLE, INC. v. *AGRICULTURAL LABOR RELATIONS BD.*
Ninth Circuit and U.S. Supreme Court, and
U.S. District Court, Northern District of California

As of June 30, 1996, pending before the Ninth Circuit was Antle's appeal of the District Court's dismissal of the remaining portion of the suit, which sought damages and attorneys fees against the Board for issuing decision on jurisdiction that later was found by Ninth Circuit to be incorrect.

In the earlier portion of the case, the Ninth Circuit found that Antle had become a non-agricultural employer as to the cooling shed employees, and the ALRB therefore was preempted from continuing to assert jurisdiction from date of that change of status. ALRB jurisdiction over Antle had been unchallenged from the 1974 inception of the ALRA until 1991. The U.S. District Court had initially dismissed Antle's suit.

HEUBLEIN, INC.* v. *AGRICULTURAL LABOR RELATIONS BD.
Superior Court and California Court of Appeal, Sixth District

Court of Appeal upheld Board's authority to determine, in a derivative liability proceeding, whether an alleged joint employer not named in the original complaint should be jointly liable for amounts owed to employees. Heublein had initiated writ of prohibition proceedings in superior court to stop the Board from holding such a hearing. Board appealed to Court of Appeal which, in a published decision, issued on October 25, 1994, upheld Board's authority to proceed. Heublein's petition for rehearing was denied on November 15, 1994.

UNITED FARM WORKERS OF AMERICA, AFL-CIO (CALIFORNIA TABLE GRAPE COMMISSION) v. AGRICULTURAL LABOR RELATIONS BD.
California Court of Appeal, Second District

On December 21, 1995, the court of appeal, in a published decision, held that the Ketchum Act prohibited the California Table Grape Commission from filing an unfair labor practice charge against secondary picketing of supermarkets selling grapes grown by California growers with which the Union had a dispute, and that the Board could not require Union to pay losses caused by secondary picketing. The Board and the Table Grape Commission filed petitions for review, which were denied by the California Supreme Court on April 11, 1996.

The Court of Appeal did not rule on the California Table Grape Commission's appeal of the Board's holding that the picketing of

markets selling California table grapes did not constitute an unlawful demand for recognition of the Union without Board election, nor did it rule on the Board's distinction between picketing, which may be subject to regulation, and protected speech.

CURTI* v. *AGRICULTURAL LABOR RELATIONS BD.
California Court of Appeal, Fifth District

On September, 26, 1994, the Court of Appeal summarily dismissed the Employer's petition for review of a Board order finding that the Employer discriminatorily discharged an employee for initiating a union election drive among its employees. On November 16, 1994, the California Supreme Court denied the Employer's petition for review.

OLSON FARMS, INC.* v. *AGRICULTURAL LABOR RELATIONS BD.
California Court of Appeal, Sixth District, Case No. HO 12328
California Supreme Court

Employer petitioned for review of Board backpay order, asserting that the Board was preempted by the National Labor Relations Board. On March 15, 1995, the Court of Appeal affirmed the Board's decision in unpublished opinion. The Employer's petition for review in the California Supreme Court was denied on June 28, 1995.

OLSON FARMS, INC.* v. *AGRICULTURAL LABOR RELATIONS BD.
California Court of Appeal, Sixth District, Case No. HO 12130

Employer petitioned for review of Board order, based on the same preemption argument rejected in Case No. HO12328. Pending action by the Court.

OLSON FARMS, INC.* v. *AGRICULTURAL LABOR RELATIONS BD.
United States District Court, Southern District of California

Olson filed a federal court action seeking to enjoin enforcement of the earlier Board decisions noted above, based on federal preemption. Board's motion to dismiss was granted by the District Court on May 20, 1996. Olson's appeal pending in Ninth Circuit.

IMPERIAL ASPARAGUS v. *AGRICULTURAL LABOR RELATIONS BD.*
California Court of Appeal, Fourth District

On January 17, 1995, the Court of Appeal dismissed the Employer's petition for review of a Board order finding the Employer unlawfully laid off a crew of asparagus workers due to their demands for better wages and conditions.

PRODUCE MAGIC, INC., 311 NLRB 1277
National Labor Relations Board

On September 14, 1995, the NLRB denied the ALRB's petition for reconsideration, as well as the intervening Union's petition for a cession agreement. The NLRB's decision in *Produce Magic* had narrowed the definition of "agriculture," thus creating confusion and uncertainty with regard to the parameters of the two boards' jurisdiction.

CLAASSEN MUSHROOMS, INC. v. *AGRICULTURAL LABOR RELATIONS BD.*
California Court of Appeal, Fifth District

On February 16, 1995, the Court of Appeal summarily denied Claassen's petition for review of the Board's decision holding California Mushroom Farm and David E. Claassen jointly and severally liable to remedy the unfair labor practices earlier found by the Board.

CLAASSEN MUSHROOMS, INC.
U.S. Bankruptcy Court

Board successfully opposed bankrupt Employer corporation's attempt to reject Board's backpay claims on behalf of four unlawfully discharged employees. Partial payment ordered by bankruptcy court.

SAN JOAQUIN TOMATO GROWERS v. *AGRICULTURAL LABOR RELATIONS BD.*
California Court of Appeal, Fifth District

On June 8, 1995, the Court of Appeal summarily denied the Employer's petition for review of a Board order finding bargaining makewhole due employees during the period of Employer's appeal of Board's certification of Union as collective bargaining representative, where appeal was shown not to have a reasonable basis. No petition for review was filed with the California Supreme Court.

BERTELSEN v. *U.S. DEPARTMENT OF LABOR, ET AL., INCLUDING AGRICULTURAL LABOR RELATIONS BD.*
U.S. District Court, Eastern District of California

On November 6, 1995, the U.S. District Court dismissed, on plaintiff's own motion, suit against Board and other entities, including federal agencies, for upholding backpay award to crew of unlawfully discharged employees. Plaintiff volunteered to dismiss action after Board and real party in interest UFW alerted plaintiff to case law barring such a suit in the lower federal courts.

UNITED FARM WORKERS v. *AGRICULTURAL LABOR RELATIONS BD.*
Court of Appeal, Fourth District

On June 27, 1996, the UFW filed a petition for review of a Board decision in which it found that Dole Fresh Fruit Company refused to bargain in bad faith, but decided not to award the bargaining makewhole remedy.

GALLO VINEYARDS, INC. v. ALRB
Stanislaus County Superior Court; Court of Appeal, Fifth District

After the superior court granted Gallo's writ of mandate seeking to invalidate a decision of the Board certifying an election, the Board sought a writ in the Court of Appeal on the grounds that Gallo had failed to state a claim under the narrow exception to the prohibition on direct appeal of election decisions. On April 5, 1996, the Court of Appeal issued an order to show cause why the Board's petition should not be granted. As of June 30, 1996, the Court of Appeal had not yet issued a final ruling.

BRUCE CHURCH, INC. v. UNITED FARM WORKERS OF AMERICA, AFL-CIO
Court of Appeal, Arizona (claim for damages due to unlawful secondary boycott activity)

Upon request of UFW and the court, on July 26, 1994 the Board filed an amicus brief in order to aid the Arizona court's understanding of the parameters of lawful secondary activity under the California Agricultural Labor Relations Act. On February 13, 1996, the Arizona Court of Appeal reversed the lower court's decision and remanded for a new trial. Thereafter, the parties reached a settlement agreement and stipulated to a dismissal of the action, which was approved by the Court of Appeal on June 3, 1996.

HOLLY FARMS v. NATIONAL LABOR RELATIONS BOARD
United States Supreme Court

On December 19, 1995, the Board filed an amicus curiae brief in the above-entitled case before the U.S. Supreme Court, since that case raised many of the same issues as the *Produce Magic* case (see summary above). On April 23, 1996, in a 5-4 decision, the Court upheld the NLRB's decision, which suffered from the same analytical problems as *Produce Magic*.

OCEANVIEW PRODUCE COMPANY v. ALRB
Court of Appeal, Second District

On June 19, 1996, the Court of Appeal summarily denied Oceanview's petition for review of the Board's decision finding that the activity for which two employees were discharged was protected under the Agricultural Labor Relations Act.

TANIMURA & ANTLE v. ALRB
Court of Appeal, Sixth District

On June 24, 1996, the Court dismissed the petition for review, after the petitioner requested dismissal due to settlement of the case.

SUN GOLD, INC. v. ALRB
Court of Appeal, Fourth District

On January 26, 1996, Sun Gold filed a petition for review, but later agreed to comply with the Board's order. Pending complete compliance and request to court for voluntary dismissal.

SCHEID VINEYARDS AND MANAGEMENT CO. v. ALRB
Court of Appeal, Sixth District

Both the Employer and the Union filed petitions for review of the Board's decision. The Board found that the Employer had made several unlawful unilateral changes in terms and conditions of employment and had discriminated against two employees due to their protected activities. The Board also dismissed several other allegations. On January 29, 1996, the Court granted the Union's request to dismiss its petition for review. The Employer's petition for review is still pending before the Court.

LEWIS FARMS v. ALRB
Superior Court, Fresno County

On September 14, 1995, Lewis Farms filed a petition for writ of mandate in the Superior Court, challenging a decision by the Board holding that an employer does not have standing under the Board's regulations to appeal a regional director's dismissal of a decertification petition. On October 3, 1995, the court denied the petition.

ACE TOMATO CO. v. ALRB
Court of Appeal, Third District

On February 9, 1995, the Court summarily denied the Employer's petition for review of the Board decision, in which the Board upheld its earlier decision to certify the election of the UFW and found the bargaining makewhole remedy to be appropriate.

ATTACHMENT E

INFORMATIVE DIGEST/SUMMARY OF ADOPTED CHANGES

Amend section 20164. Service of Papers by the Board. The amendment repeals a portion of the existing regulation insofar as it heretofore has permitted the Board to mail official papers by means of a U.S. Postal Service procedure entitled "certificate of mailing." In conformity with a recent judicial ruling which strictly construed the provisions of Labor Code section 1151.4, the regulation is changed insofar as it now requires that such service be by "registered mail" [or personal service]. The amendment requires parties as well as the Board to retain the original or a duplicate original proof of service.

Amend section 20190. Continuance of Hearing Dates. The amendments provide that following the filing of a motion for a new date to commence or resume a prehearing or hearing, the executive secretary will solicit the positions of all parties by telephone. Thereafter, no written positions for or against continuance may be submitted absent express request of the executive secretary.

Amend section 20240. Motions Before Prehearing and After Hearing. The amendment to existing section 20240 expedites the hearing process by limiting the filing of pleadings in favor of or in opposition to motions unless requested by the executive secretary or the administrative law judge.

Amend section 20241. Motions During or After Prehearing Conference and Before Close of Hearing. The amendment provides that, following the filing of response to a motion, further pleadings in support of or in opposition to the motion may not be filed except as requested by the administrative law judge.

Amend section 20242. Motions, Responses, Rulings; Appeals of Rulings. The amendment provides that pleadings, in addition to those permitted by the existing regulation, may be filed only upon special request to and permission of the Board through the executive secretary.

Amend section 20286. Board Action on Unfair Labor Practice Cases. Section 20286(c) has been amended to specify the manner in which motions for reconsideration or to reopen the record should be filed and served with respect to final unfair labor practice decisions and orders of the Board, and to clarify that alternative motions for reconsideration or reopening are permitted. Section 20286(d) has been amended to specify the filing and service requirements with respect to non-final Board actions in unfair labor practice cases, to clarify that only motions for reconsideration may be filed with respect to such

non-final actions, and to require that such motions be supported by a showing of extraordinary circumstances, as is already required for motions filed under section 20286(c).

Amend section 20370(a). Investigative Hearings-Types of Hearings and Disqualification of IHE's. The amended add alleged violations of access rights and revocations of certifications to the types of matters which the executive secretary may assign to an investigative hearing officer for hearing, and corrects a typographical error.

Adopt a new section 20370(s). Investigative Hearings-Types of Hearings and Disqualification of IHE's. The amendment acknowledges that motions may be filed in representation matters and, accordingly, establishes a procedure by which such motions may be filed and processed.

Amend section 20393(a). Requests for Review; Requests for Reconsideration of Board Action; Requests to Reopen the Record. The title to section 20393 has been amended by adding requests to reopen the record, because the text of the section is amended to provide for such requests. Section 20393(a) is amended to apply the filing and service requirements contained in Chapter 1.5 when parties request review from dismissals of petitions or objections in representation matters.

Amend section 20393(c). Requests for Review; Requests for Reconsideration of Board Action; Requests to Reopen the Record. The amendment permits the filing of requests to reopen the record instead of, or as an alternative to, requests for reconsideration of Board decisions or orders in representation cases. The amendment requires a showing of extraordinary circumstances to support granting either type of request. In addition, the amendment provides that the filing of such requests does not stay the operation of the pending decision or order. Finally, the filing and service requirements contained in Chapter 1.5 are applied to motions filed under this section.

TEXT OF AMENDMENTS TO REGULATIONS

Section 20164. Service of Papers by the Board~~.~~ or on the Board.

All papers filed by the Board or any of its agents, except subpoenas, shall be served, together with a copy of a proof of service, on the attorney or representative of each party and on each unrepresented party either (i) personally, by leaving a copy at the principal office, place of business, or, if none, at the residence of the person(s) required to be served, or (ii) by registered or certified mail, with return receipt requested, ~~including use of a certificate of mailing,~~ addressed to the principal office, place of business or, if none, to the residence of the person(s) required to be served, together with an appropriate proof of service. All papers filed by a party with the Board, the executive secretary, an administrative law judge, an investigative hearing examiner, any regional office of the Board, or the general counsel, may be served in accordance with any of the methods prescribed above or with a certificate of mailing.

Service need only be made at one address of a party, or attorney or representative of a party and only to one attorney or representative of a party. Service shall be established by a written declaration under penalty of perjury, setting forth the name and address of each party, attorney or representative served and the manner of their service. The Board or the party shall retain the original proof of service.

Authority: Labor Code Section 1144

Reference: Labor Code Sections 1151.3, 1151.4(a), 1156.3(a), (c), 1156.7(c), 1156.7(d), 1160.2, 1160.3 and 1160.5

Section 20190. Continuance of Hearing Dates.

(a) - ()b(1)) (No change)

(b)(2) If the parties are unable to agree on a new date for the hearing and/or prehearing, the objecting party may submit a written request to the executive secretary within the ten day period, with copies to the other parties indicating the reasons the initial date(s) are objected to and requesting date(s) which are more convenient. The request will be treated as a motion to continue, and all parties will be contacted by telephone and given an opportunity to respond. No further pleading in support of or in opposition to the continuance shall be filed unless requested by the executive secretary. In ruling on the request, the executive secretary may grant the continuance to the date(s) requested, select other date(s), or retain the initial date(s).

The executive secretary's ruling will be finalized by issuance of a confirming notice of hearing.

(b)(3) - (g)(6) (No change)

Authority: Labor Code section 1144

Reference: Labor Code sections 1142(b), 1156.3(c), 1160.2 and 1160.5

Section 20240. Motions Before Prehearing and After Hearing.

(a) With the exception of applications for discovery, continuances, extensions of time, requests to shorten time, and motions to correct the transcript, all motions made before the prehearing conference or after the close of hearing shall be filed with the executive secretary in accordance with sections 20160 and 20166. Responses shall be filed within seven (7) days after the filing of the motion, or within such time as the executive secretary may direct, as provided in section 20160 and 20168. No further pleadings shall be filed in support of or in opposition to the motion unless requested by the executive secretary or assigned administrative law judge.

(b) (No change)

Authority: Labor Code section 1144

Reference: Labor Code sections 1160.2, 1160.3

Section 20241. Motions During or After Prehearing Conference and Before Close of Hearing.

(a) (No change)

(b) Any party may respond to a written motion orally, at the prehearing conference or hearing, or in writing so long as a response is made within five (5) days after the filing of the motion, or such time as the administrative law judge may direct. Written responses shall be served on each party or its representative. No further pleadings shall be filed in support of or in opposition to the motion unless requested by the administrative law judge.

(c) - (d) (No change)

Authority: Labor Code section 1144

Reference: Labor Code sections 1160.2, 1160.3

Section 20242. Motions, Responses, Rulings; Appeals of Rulings.

(a) (No change)

(b) No ruling or order shall be appealable, except upon special permission from the Board; except that a ruling which dismisses a complaint in its entirety shall be reviewable as a matter of right. A party applying for special permission for an interim appeal from any ruling by the executive secretary or an administrative law judge shall, within five (5) days from the ruling, file with the executive secretary, to be forwarded to the Board for review, its application for permission to appeal, setting forth its position on the necessity for interim relief and on the merits of the appeal. The application shall be supported by declarations if the facts are in dispute and by such authorities as the party deems appropriate. Applications and supporting papers shall be filed and served in accordance with sections 20160 and 20166. Any party may file a statement of opposition to such application, with proof of service on the other parties as provided in sections 20160 and 20166, within such time as the executive secretary may direct. No further pleadings shall be filed in support of or in opposition to the appeal unless requested by the Board through the executive secretary.

(c)-(e) (No change)

Authority: Labor Code section 1144

Reference: Labor Code sections 1160.2, 1160.3

Section 20286. Board Action on Unfair Labor Practice Cases.

(a) - (b) (No change)

(c) A party to an unfair labor practice proceeding before the Board may, because of extraordinary circumstances, move for reconsideration or reopening of the record after issuance of the Board's final decision and order in the case. Such motion shall be in writing and state with particularity the grounds for reconsideration or reopening. Any motion pursuant to this section shall be filed within 10 days after service of the Board's final decision and order, in accordance with the provisions set forth in section 20160(a)(1), and served on the parties, in accordance with the provisions set forth in sections 20166 and 20168. The motion may alternatively request reconsideration and reopening. A motion filed under this section shall not operate to stay the decision and order of the Board.

(d) ~~Motions for reconsideration of any Board action in an unfair labor practice case other than final decisions and orders shall be filed pursuant to section 20390(c).~~ A party to an unfair labor practice proceeding may, because of extraordinary circumstances, move for reconsideration of the record after issuance of any Board action other than a final decision and order, in accordance with the provisions set forth in section 20286(c), except that the motion and supporting documents must be filed within five days after service of the non-final Board action.

Authority: Labor Code section 1144

Reference: Labor Code sections 1160.2, 1160.3

Section 20370. Investigative Hearings-Types of Hearings and Disqualification of IHE's.

(a) The executive secretary shall appoint an investigative hearing examiner to conduct an investigative hearing on objections filed pursuant to section 20365, on challenges pursuant to section 20363, ~~or~~ on extensions of certifications pursuant to section 20382, on petitions seeking clarification of a bargaining unit or amendment of a certification pursuant to section 20385, on petitions to revoke certifications, on alleged violations of access rights pursuant to section 20900, or on any other representation matter. No person who is an official or an employee of a regional office shall be appointed to act as an investigative hearing examiner. An investigative hearing examiner is subject to disqualification on the same basis and in the same manner as provided in section 20263 for administrative law judges in unfair labor practice proceedings. If the investigative hearing examiner assigned to a hearing becomes unavailable for any reason at any time between the beginning of the hearing and the issuance of the decision, the executive secretary may designate another investigative hearing examiner for such purpose.

Investigative Hearings--Powers of IHE's

(b) through (r) (No change)

(s) The provisions of sections 20240 and 20241 with respect to motions, rulings and orders, and section 20242 with respect to appeals therefrom shall apply to all motions filed with the executive secretary prior to or after the close of hearing, and the procedure set forth in section 20241 shall apply to all motions filed with the investigative hearing examiner from the opening to the close of the hearing.

Authority: Labor Code section 1144

Reference: Labor Code sections 1142.(b), 1145, 1151, 1151.3, 1156.3(a),(c), and 1156.7(c),(d)

Section 20393. Requests for Review; Requests for Reconsideration of Board Action; Requests to Reopen the Record.

(a) Dismissal of a representation petition, cross-petition, or intervention petition by a regional director pursuant to section 20300(i), or dismissal by the executive secretary pursuant to section 20365(f)(6) of an objections petition filed pursuant to Labor Code section 1156.3(c), in whole or in part, may be reviewed by the Board pursuant to Labor Code section 1142(b), upon a written request for review filed by the party whose petition is dismissed. The request for review shall be filed with the Board within five days of service of the dismissal upon the party making the request. Requests for review of other delegated action reviewable under Labor Code section 1142(b), except those specifically provided for in subsection (b), *infra*, shall also be filed with the board within five days of service of notice of the action for which review is requested. Such requests ~~may be timely filed by deposit of the request and supporting documents in registered mail properly addressed to the Board and postmarked within the five day filing period~~ shall be filed in accordance with the provisions set forth in section 20160(a)(2), and served in accordance with the provisions set forth in sections 20166 and 20168. The request shall set forth with particularity the basis for the request and shall be accompanied by ~~two~~ six copies of the following:

(a)(1) -(a)(4) (No change)

(a)(5) evidence that the aforementioned material has been served upon all parties pursuant to sections 20166 and 20168.

(b) (No change)

(c) A party to a representation proceeding may, because of extraordinary circumstances, move for reconsideration or reopening of the record, after the Board issues a decision or order in the case. A motion ~~for reconsideration of any decision or order of the Board~~ under this section must be filed with the Board within five days of ~~the~~ service of the decision or order upon the party making the request ~~by deposit of two copies of the request and of all supporting documents in registered mail properly addressed to the Board within the five-day period.~~, in accordance with the provisions set forth in section 20160(a)(2), and served on the parties, in accordance with the provisions set forth in sections 20166 and 20168. A motion for reconsideration or reopening of the record shall set forth with particularity the basis for the motion and legal argument in support thereof and

shall be accompanied by proof of service of the motion and accompanying documents upon all parties as provided in sections 20166 and 20168. Only one request for reconsideration of or to reopen the record for any decision or order will be entertained. A motion filed after the issuance of a decision of the Board may alternatively request reconsideration and reopening. A motion filed under this section shall not operate to stay the decision and order of the Board.

(d) -(f) No change

Authority: Labor Code section 1144

Reference: Labor Code sections 1142(b), 1156.3(a),(c), 1156.7(c).(d)