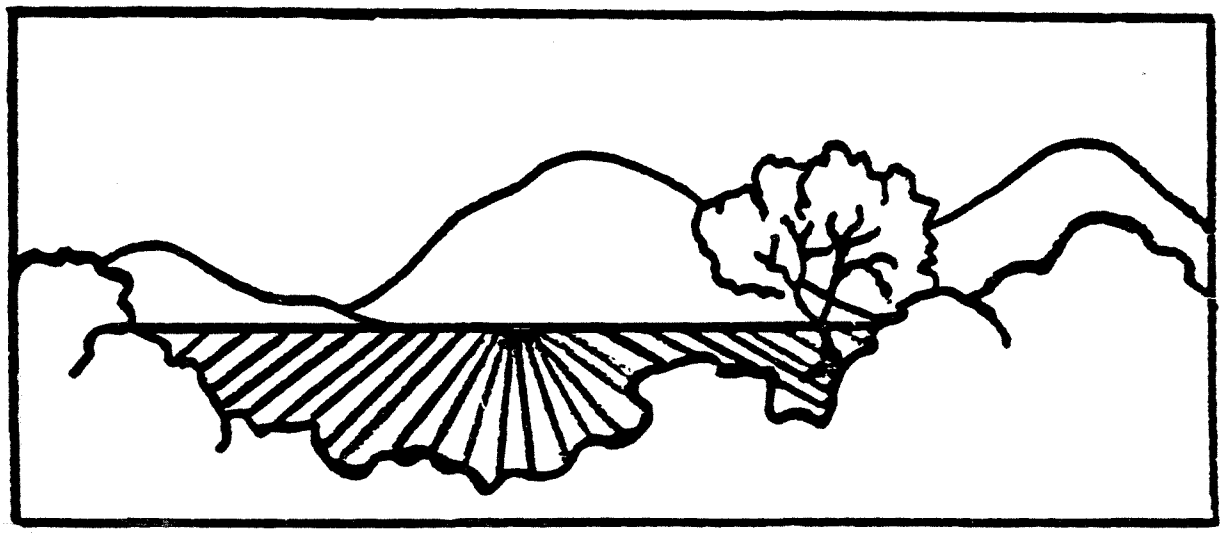
1990

Annual Report to the Legislature 1989-1990

Agricultural Labor Relations Board

AGRICULTURAL LABOR RELATIONS BOARD

ANNUAL REPORT TO THE LEGISLATURE



1989 — 1990

FOURTEENTH ANNUAL REPORT

OF THE

AGRICULTURAL LABOR RELATIONS BOARD

FOR THE FISCAL YEAR ENDED

JUNE 30, 1990

Members of the Board

BENJAMIN G. DAVIDIAN, Chairman[1]
BRUCE J. JANIGIAN, Chairman[2]
GREGORY L. GONOT[3]
IVONNE RAMOS RICHARDSON
JAMES L. ELLIS
JOSEPH C. SHELL[4]

Bernard L. Allamano, Executive Secretary

Clark Bennett, Chief of Administration

DAVE STIRLING, General Counsel[5]
DONALD S. PRESSLEY, General Counsel[6]

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[1]Resigned as Chairman August 10, 1989.
[2]Appointed to ALRB January 5, 1990. Designated Chairman February 14, 1990.
[3]Served as Acting Chairman August 11, 1989 to February 13, 1990.
[4]Appointed to ALRB October 1, 1989.
[5]Resigned as General Counsel November 17, 1989.
[6]Appointed General Counsel to ALRB March 9, 1990.

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INTRODUCTION

Labor Code section 1143 provides that "the board shall, at the close of each fiscal year, make a 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 it has disbursed."

The Annual Report provides the information required by statute and, in addition, a report on litigation involving the Agricultural Labor Relations Board (ALRB or Board).

A report of the names, salaries, and duties of ALRB employees has been provided to the Governor, the Speaker of the Assembly, and the President pro Tempore of the Senate. 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. Administration of the ALRA

The Agricultural Labor Relations Act (Act or ALRA) was enacted in 1975 "to ensure peace in the fields by guaranteeing justice for all agricultural employees and stability in agricultural labor relations." Preamble, Section 1.5 SB 1, 1975-76 Third Extraordinary Session. The Act seeks to achieve these ends by recognizing that agricultural employees have the right 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; by providing for the holding of secret ballot elections through which employees may freely choose whether they wish to be represented by a labor organization; by imposing an obligation on the part of employers to bargain with any labor organization so chosen; and by declaring 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. The General Counsel is responsible for the prevention

of those practices which the Act declares to be impediments to the free exercise of employee rights. The General Counsel acts only after someone has filed charges claiming a violation of the Act. 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 that sets forth the charges and that also provides for a hearing before the Board to determine whether a respondent has committed the unfair labor practices 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 (ALJs) 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 ALJs 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.

In addition to its 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 in the absence of a strike, 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 make out 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 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, and requests by the parties to take a case off calendar because of a proposed settlement agreement.

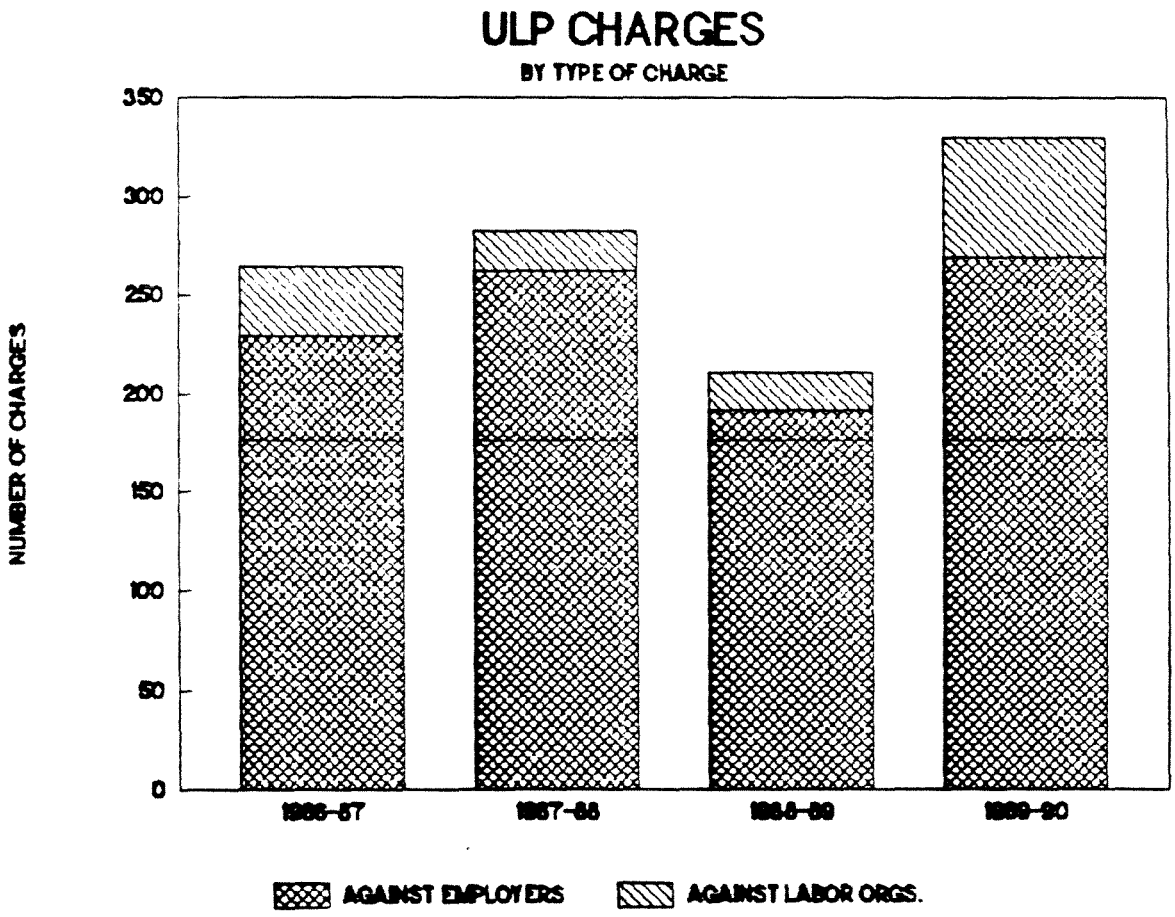
The agency also receives frequent requests for information regarding the ALRA itself, the enforcement procedures used by the agency to seek compliance with the law, and case processing statistics. Such requests are routinely received from the media, trade associations, growers, unions, parties to particular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

B. Operational Summary for Fiscal Year 1989-90

1. Unfair Labor Practices

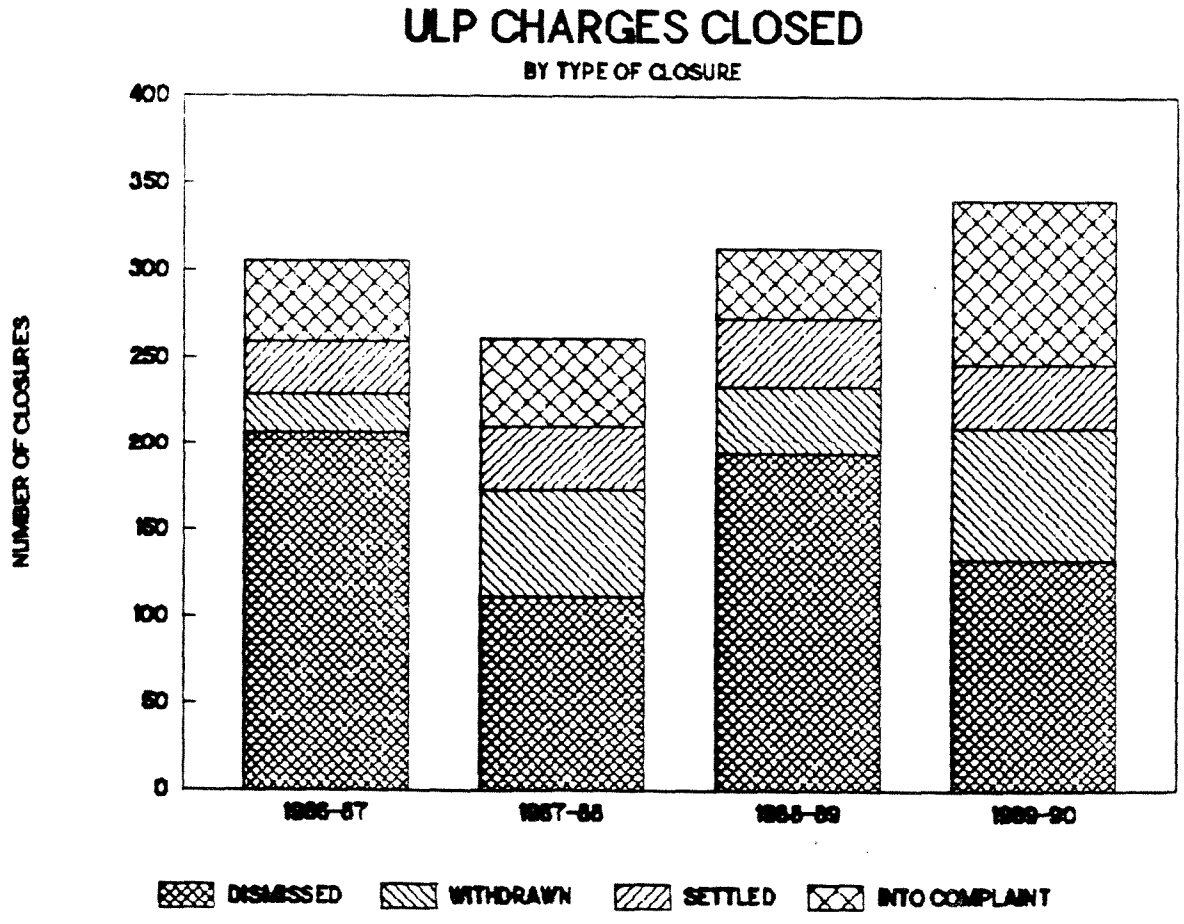
Unfair labor practice charges increased in fiscal year 1989-90. (Chart I) During the year, 330 unfair labor practice (ULP) charges were filed with the ALRB, an increase from 211 ULPs filed during 1988-89. Of the 330 charges, 269 were filed against employers and 61 were filed against labor organizations.

CHART I



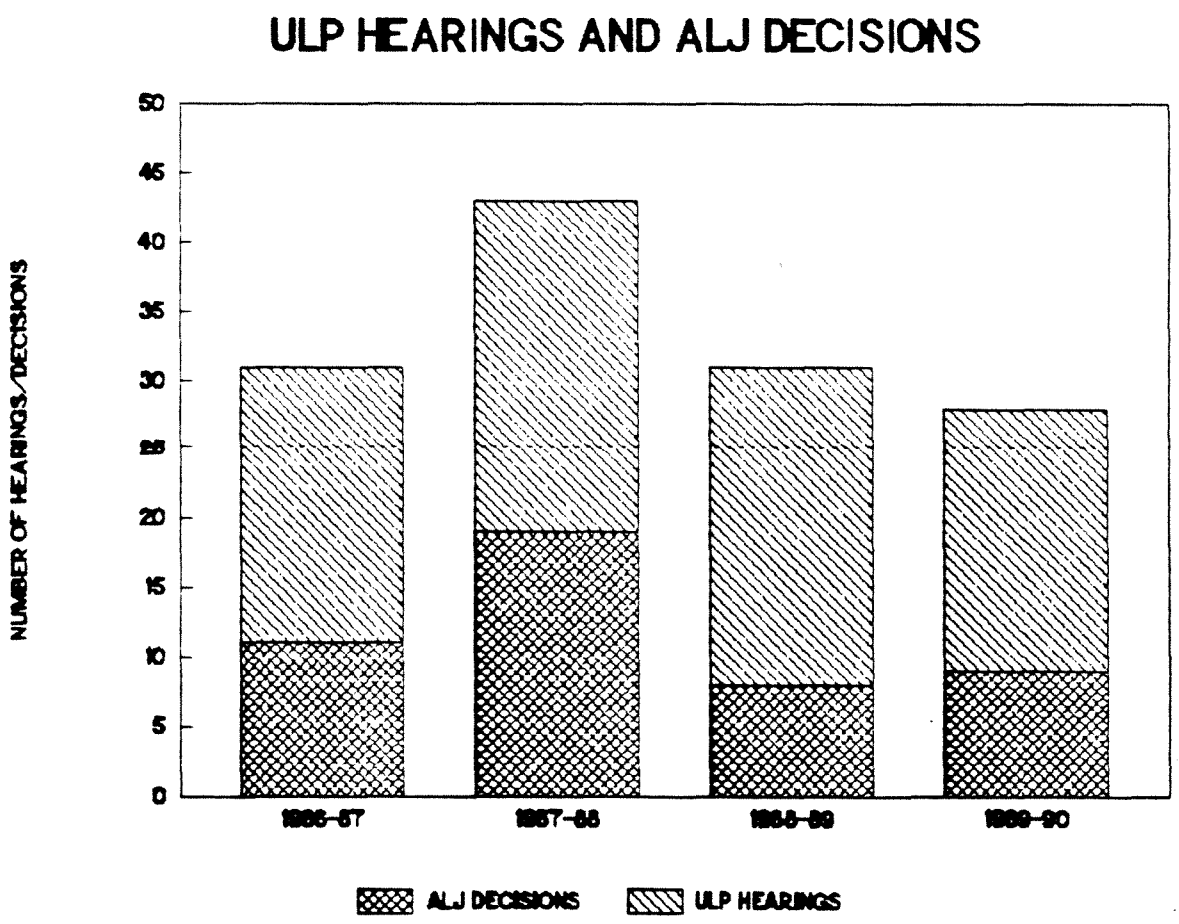
Of the 330 ULP's filed, (Chart II) the General Counsel sent 94 charges to complaint and closed 27 complaints, as compared to the prior year when 41 charges went to complaint and 37 complaints were closed. In addition to the 94 charges to complaint closed in 1989-90, the General Counsel dismissed 132 charges, settled 37, and permitted the withdrawal of 77 others; last year 194 charges were dismissed, 38 were settled and 39 were withdrawn. This year, no complaints were withdrawn before hearing, 8 complaints were settled before hearing, and 6 complaints were settled at hearing; last year, 1 complaint was withdrawn, 12 were settled before hearing, and 10 were settled at hearing.

CHART II



Administrative Law Judges conducted 19 ULP hearings this year, as compared to 23 last year. (Chart III) They issued 9 decisions in ULP cases, including 4 in compliance cases; last year there were 8 ULP decisions, 3 of which involved compliance.

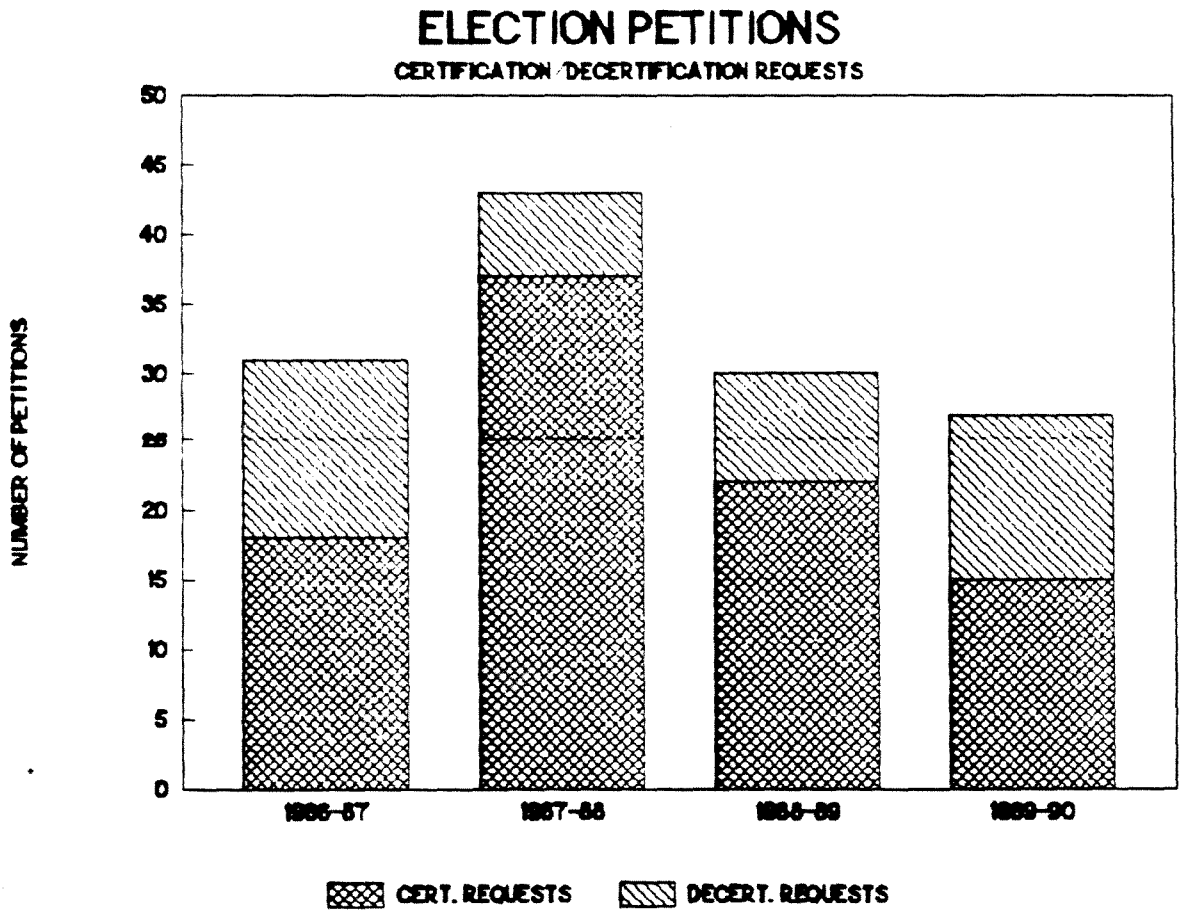
CHART III



2. Elections

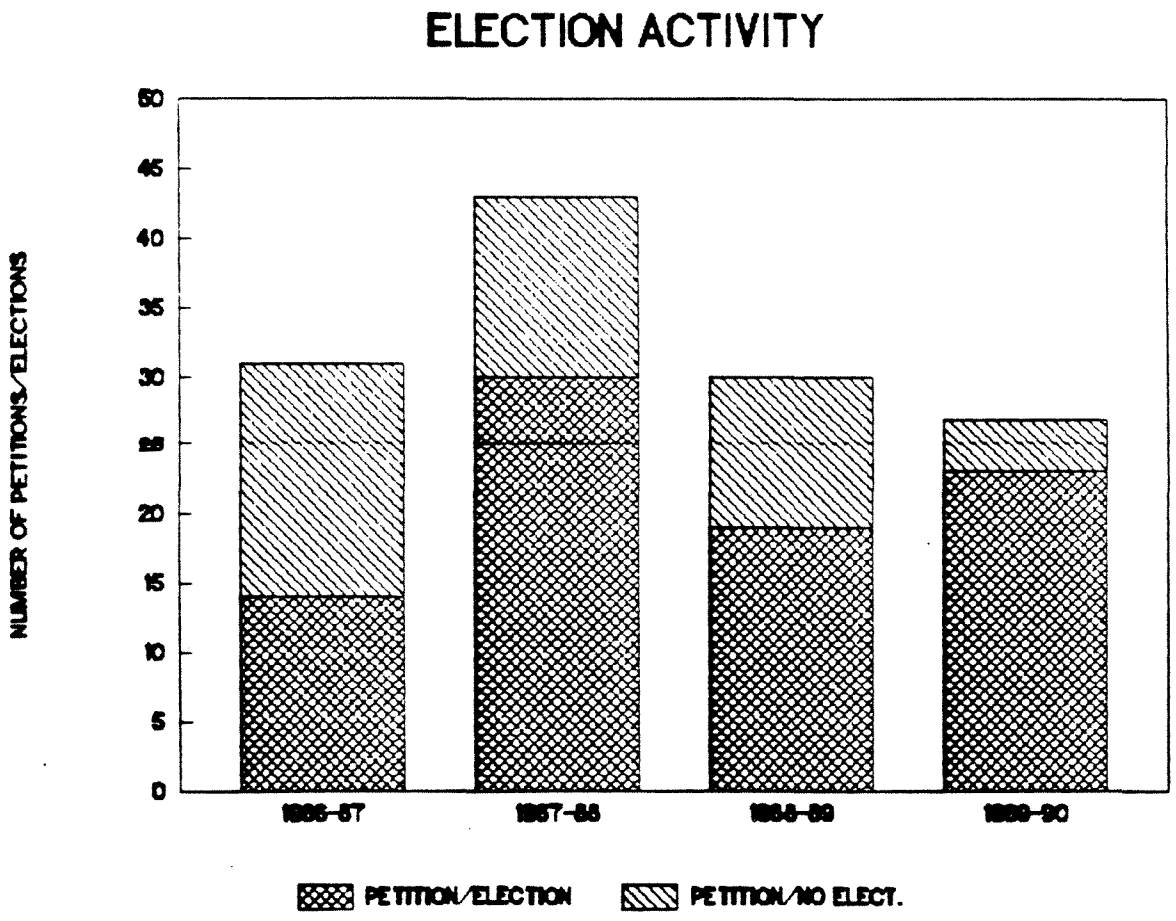
Twenty-seven election petitions were filed, 12 of them to decertify an incumbent union, as compared to 30 petitions last year, of which 7 were to decertify. (Chart IV) The petitions

CHART IV



filed in 1989-90 resulted in 23 elections being held, as compared with 19 last year. (Chart V) The Board certified that a majority had voted for the union in 10 elections and no union was certified in 15 elections; last year, a union was certified in 9 elections and no union was certified in 9 elections. One election was set aside this year and in one election the ballots were impounded; last year, no elections were set aside and no ballots were impounded.

CHART V

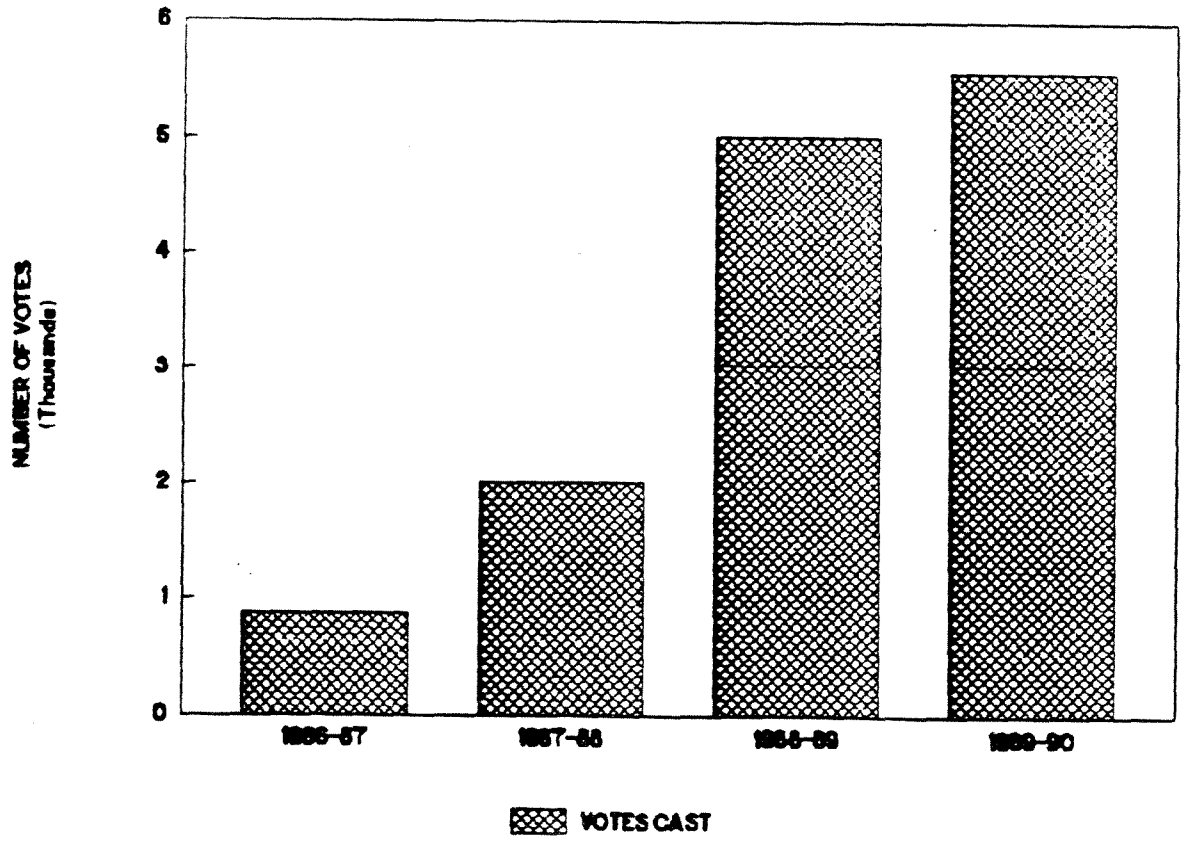


Investigative Hearing Examiners (IHEs) heard 4 cases involving election-related matters in fiscal year 1989-90 and issued 2 decisions. Last year there were 4 hearings and 7 decisions (3 cases were from the previous year). At the close of fiscal year 1989-90, two election matters were awaiting decision by IHEs.

The total of votes cast was up sharply from previous years (Chart VI) which strained the personnel resources of the Board. One election certified in 1989-90, in which 3,341 employees were eligible to vote, resulted in 2,695 votes cast. Forty-five ALRB employees were utilized over a period of two days. Eighteen sites were used the first day and 40 sites the second day. The sites ranged from the Arizona/Mexico border to Watsonville.

CHART VI

ELECTION VOTES CAST



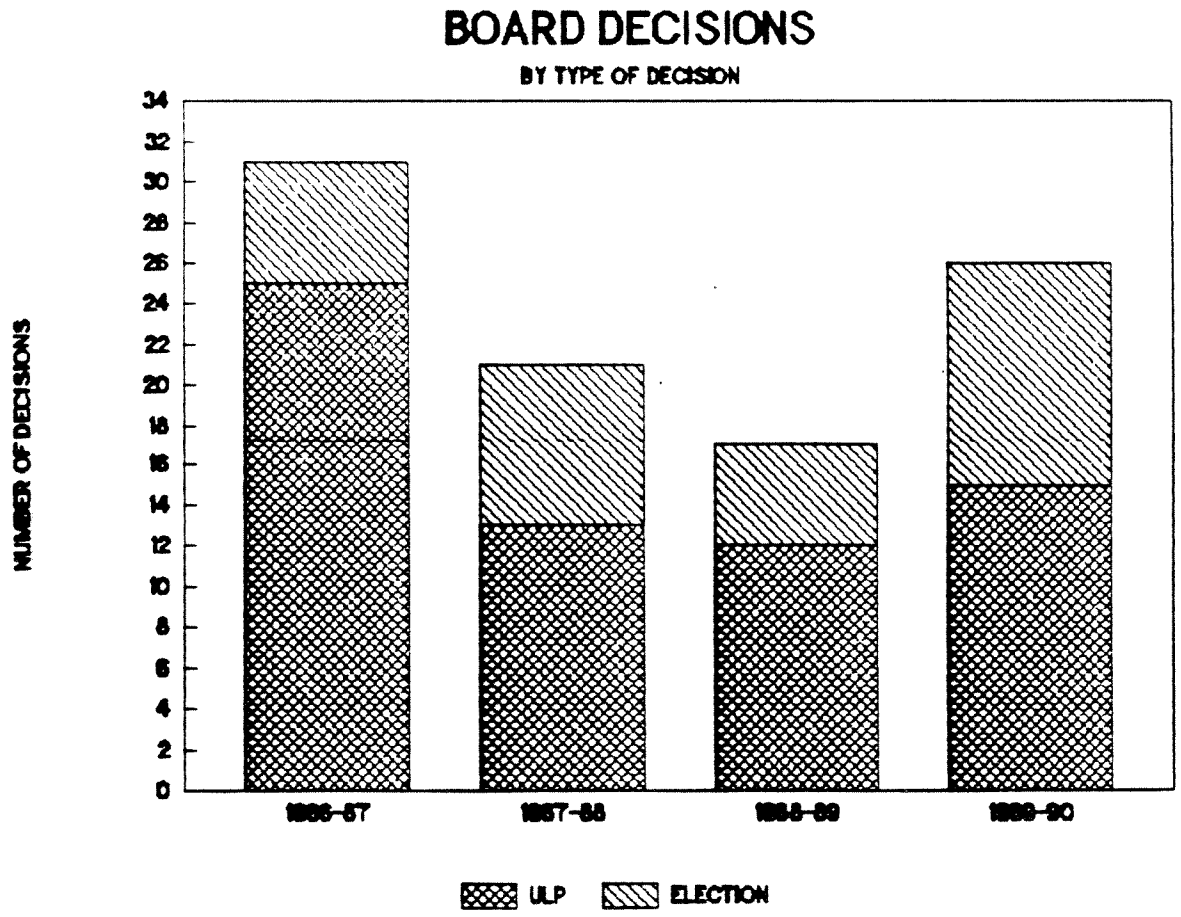
3. Board Decisions Issued

The Board issued a total of 26 decisions involving allegations of ULPs and issues relating to employee representation during fiscal year 1989-90. (Chart VII) Of the 26 decisions, 15 involved ULPs, and 11 were related to elections. Last year there were 17 decisions, 12 involving ULPs, and 5 concerned election issues. A summary of each decision is contained in Chapter II.

4. Board Orders

The Board issued 29 numbered orders in fiscal year 1989-90. A description of each order is contained in Chapter III.

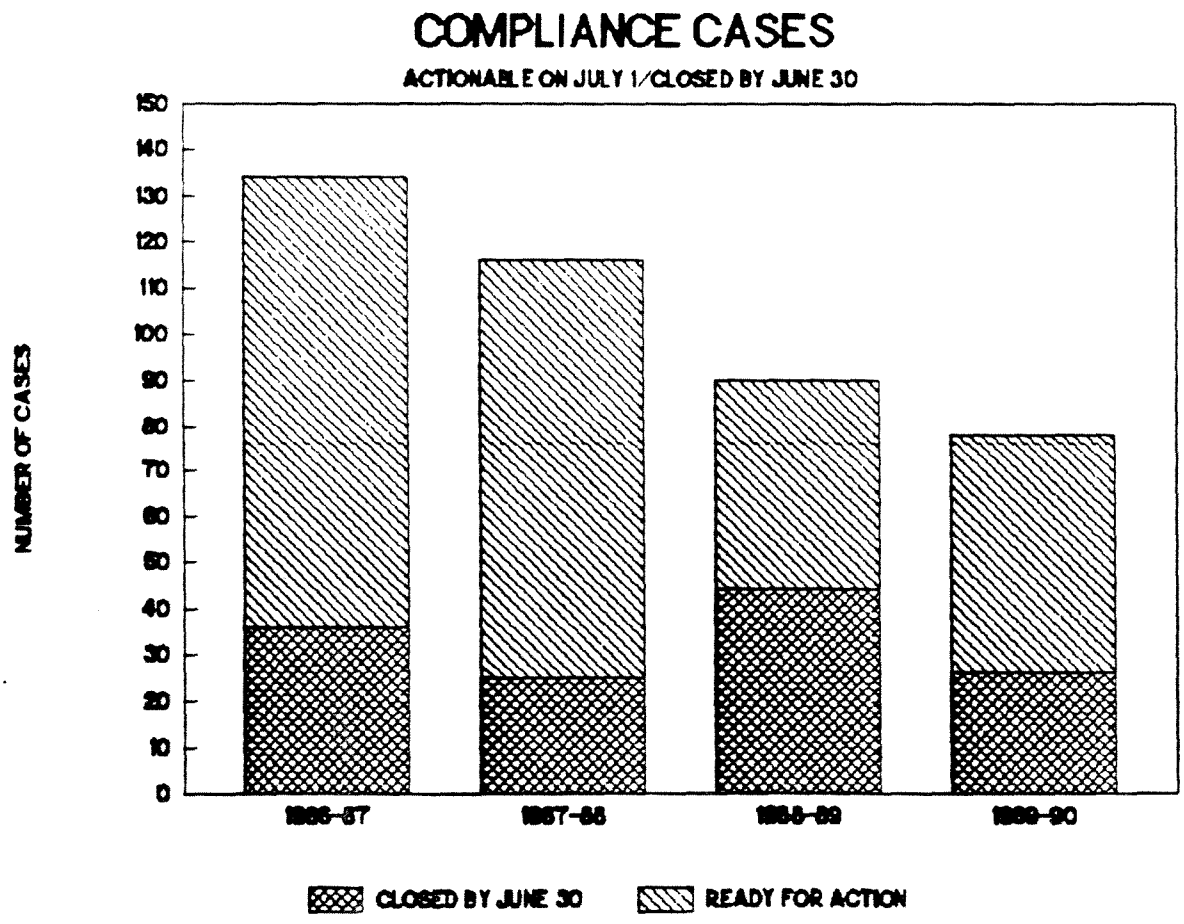
CHART VII



5. Compliance Activity

At the beginning of 1989-90, 78 cases were ready for compliance action. This includes Board orders and ALJ decisions which had become final. Of these 78 cases, 26 were closed during the fiscal year following either settlement, voluntary compliance, or an administrative compliance hearing to determine the monetary amount owing. (Chart VIII) In addition, prior to closure of these cases, compliance was achieved with regard to the non-monetary remedies ordered by the Board. During this fiscal year, a total of $618,181 was distributed to 3,846 agricultural employees. Also, at the close of the fiscal year, there were 8 decisions on appeal to the courts.

CHART VIII



C. Goals for Fiscal Year 1990-91

The Board and General Counsel will continue to improve the expeditious handling of all ULP and election matters through rigorous case management, assuring accuracy, fairness, impartiality and timeliness.

The Board will continue to improve the predictability and clarity of application of the law through its decisions, regulations and manuals. The Board will revise its Election Manual and Compliance Manual. The General Counsel will maintain its newly revised Unfair Labor Practice Manual. The Board will update its Regulations through a series of amendments, a task commenced this year with the solicitation of public comment.

The Board and General Counsel will increase public outreach to inform and educate agricultural employees, employers and unions regarding the Agricultural Labor Relations Act, recent Board decisions and recent court decisions. These efforts seek to improve public credibility and to assist the proactive avoidance of disputes wherever possible.

Our ongoing goal is to assure that the Act will be carried out as stated in the preamble - "to ensure peace in the fields by guaranteeing justice for all agricultural employees and stability in agricultural labor relations." The Board and General Counsel are committed to making California a showcase for the sound and equitable administration of agricultural labor relations.

II

DECISIONS ISSUED BY THE BOARD

Case Name	Opinion Number
Salinas Valley Nursery	15 ALRB No. 4
Sam Andrews' Sons	15 ALRB No. 5
Andrews' Distribution Company, Inc.	15 ALRB No. 6
Ace Tomato Company, Inc.	15 ALRB No. 7
Borrego Packing Company	15 ALRB No. 8
David Freedman & Company, Inc.	15 ALRB No. 9
The Careau Group dba Egg City	15 ALRB No. 10
Mann Packing Company, Inc.	15 ALRB No. 11
Kubota Nurseries, Inc.	15 ALRB No. 12
CAPCO Management Group, Inc.	15 ALRB No. 13
Harry Carian, et.al.	15 ALRB No. 14
Paul W. Bertuccio dba Bertuccio Farms	15 ALRB No. 15
Valley-Wide dba Mona, Inc.	15 ALRB No. 16
Sam Andrews' Sons	15 ALRB No. 17
Ventura County Fruit Growers, Inc.	15 ALRB No. 18
Perez Packing Company, Inc.	15 ALRB No. 19
Limoneira Company	15 ALRB No. 20
The Careau Group dba Egg City	15 ALRB No. 21
Mario Saikhon, Inc.	16 ALRB No. 1
Adam Farms	16 ALRB No. 2
Bruce Church, Inc.	16 ALRB No. 3
Namba Farms, Inc.	16 ALRB No. 4
Triple E Produce Corp.	16 ALRB No. 5
Sam Andrews' Sons	16 ALRB No. 6
Certified Egg City & Olson Farms, Inc.	16 ALRB No. 7
Gerawan Ranches	16 ALRB No. 8

The following case summaries are prepared for each decision issued by the Board. They are furnished for information only, and are not official statements of the Board. The official decisions of the Board are available through the ALRB. Each decisions is numbered according to the year and order in which it was issued. The volume number signifies the calendar year since the inception of the ALRB and is followed by the decision number for that calendar year. Thus 15 ALRB No. 21 designates the 21st decision published in the 15th year of the ALRB's existence.

CASE SUMMARY

Salinas Valley Nursery,
UFW

15 ALRB No. 4
Case No. 88-RC-1-SAL

Background

On January 11, 1988, pursuant to a Petition for Certification filed by the United Farm Workers of America, AFL-CIO (UFW or Union), the Agricultural Labor Relations Board (ALRB or Board) conducted a representation election among all agricultural employees of Salinas Valley Nursery (Employer) in the State of California. The initial Tally of Ballots revealed 7 votes for the UFW, 2 votes for No Union, and 14 Challenged Ballots. As the latter were sufficient in number to determine the outcome of the election, the Regional Director (RD) of the Board's Salinas Regional Office conducted an administrative investigation. While all parties agreed that one of the challenges should be sustained, the RD determined that the 13 remaining ballots concerned issues which should be the subject of an evidentiary hearing.

IHE's Decision

Following a hearing in which all parties participated, the IHE recommended that the Union's challenges to the ballots of two employees be sustained, finding one to be a managerial employee and the other a supervisor and thus not agricultural employees subject to inclusion in the bargaining unit. The IHE recommended that the challenges to seven additional employees be overruled. With regard to four minors who worked during school vacations, three of whom were children of full-time employees, the IHE recommended that the Employer's challenges to their ballots be overruled. The IHE found that since they met the statutory definition of eligibility (i.e., they were employed in agriculture during the applicable pre-petition payroll period), the Employer's objection, based on age, was not legally cognizable under the Act.

Board Decision

Absent any exceptions thereto, the Board adopted the IHE's recommendation that challenges to seven of the ballots be overruled. In response to the employer's exceptions, the Board examined the job duties and the responsibilities of the alleged supervisor and determined that they did not satisfy the indicia of supervisorial status within the meaning of the Act and overruled the challenge to his ballot. The Board reached a similar result with regard to the alleged managerial employee, concluding that his work assignment was not such that he could be said to formulate and/or carry out management's policies. Having thus directed the RD to open and count nine of the challenged ballots, the Board decided to hold in abeyance the remaining four ballots and to consider them only if they prove outcome determinative following the issuance of a Revised Tally of Ballots.

CASE SUMMARY

Sam Andrews' Sons
(UFW)

15 ALRB No. 5
Case No. 88-RD-1-VI

IHE DECISION

Two days prior to the holding of a decertification election, a Board agent appeared at an employees' meeting to discuss employees' questions about pending backpay and makewhole awards. The meeting was called by a union ranch committee member who gave a strongly pro-union speech immediately prior to the Board agent's introduction and subsequent remarks. The Board agent explained the methods of computing backpay and makewhole awards, and attempted to explain the impact of William Dal Porto & Sons v. ALRB (1987) 191 Cal.App.3d 1195 [237 Cal.Rptr. 206] on a makewhole award previously imposed against the employer. The Board agent noted that the employer's invocation of the Dal Porto process would delay the employees' receipt of a makewhole award. The following day the union distributed a one-page flyer implying that the agent had stated the employer's use of the Dal Porto process would mean the loss of any makewhole award whatsoever.

At hearing on the employer's objections, the Investigative Hearing Examiner (IHE) found that the agent had not made statements indicating employees' backpay awards would be reduced or eliminated in the event of a union victory, nor that misrepresentations had been made by the union speaker and adopted by the Board agent that would have a reasonable tendency to interfere with employee free choice. The IHE also found that the agent's presence and introduction at the partisan meeting were not sufficient to justify setting aside the election, since the agent withstood the union speaker's efforts to draw him into the campaign by refuting the possibility of a correlation between the outcome of the decertification election and the Board's computation of backpay awards. Finally, the IHE found that the Employer had failed to prove that union organizers told employees that a union loss would result in the loss of backpay awards.

BOARD DECISION

The Board rejected the IHE's treatment of the union's misrepresentation concerning the agent's Dal Porto remarks. Although the agent's mere appearance at the meeting was not enough to justify setting aside the election, the Board determined that the Union's subsequent dissemination of a misleading version of the agent's statement concerning the effect of the employer's Dal Porto motion made clear that the agent had allowed himself to be used in a manner that seriously affected the neutrality of the

Board's election procedures. The Board set aside the election on that basis.

* * *

This Case Summary is furnished for information only and is not an official statement of the case, or of the ALRB.

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CASE SUMMARY

Andrews Distribution Co. (FFVW)

15 ALRB No. 6
Case No. 88-CE-14-VI

Background

In a prior case involving the Employer herein, the Agricultural Labor Relations Board (ALRB or Board) held that employees in the Holtville, California, vacuum cooling facility of Andrews Distribution Company (ADC or Employer) were engaged in agriculture. Accordingly, the Board held that it had jurisdiction to conduct a representation election. In that election, the employees voted to be represented by the Fresh Fruit & Vegetable Workers Union, Local 78-B (Union). The Board certified the Union as the exclusive bargaining representative of all ADC employees in the Holtville plant. ADC had contended that since more than 10 percent of the produce handled by its employees was grown by an independent grower, that amount was sufficient under the National Labor Relations Act to render the company non-agricultural and not under the jurisdiction of the ALRB. The Board found that the alleged independent grower in that instance was merely an investor in what otherwise was a single employing enterprise and, therefore, ADC employees performed tasks which were in conjunction with and incidental to the primary growing operation. (Andrews Distribution Company (1988) 14 ALRB No. 19.) A similar issue is central to the instant case where the Union filed a petition for certification in which it sought to represent employees in ADC's Bakersfield cooling plant. The Union did not prevail in that election and filed an unfair labor practice charge in which it alleged that ADC's denial of access to Union organizers, on the grounds that the employees were not agricultural, constituted unlawful interference with employees' statutory rights to engage in mutual aid and protection and/or to decide to join a union or to refrain from joining a union. At the time of the alleged violation, the Board had not yet issued its decision in the earlier ADC matter.

ALJ Decision

The ALJ found that employees in ADC's Bakersfield facility, unlike those in Holtville, did process crops produced by independent growers but that the amount of such produce was not sufficient to render them commercial rather than agricultural. Having thus determined that the Board had jurisdiction, she proceeded to examine the alleged denial of access, concluding that Respondent did in fact deny access in contravention of the Board's access rule. As a remedy, she invoked the Board's standard cease and desist, mailing and notice provisions and, in addition, required that should the Union again attempt to organize ADC's Bakersfield employees, the Union will be permitted to meet with employees for up to one hour on paid work time.

Board Decision

The Board affirmed the ALJ's Decision in all respects, including her recommended remedial provisions.

Concurring and Dissenting Opinion

Member Ramos Richardson concurred in the majority opinion insofar as it determined that the denials of access violated the Act, but dissented from the majority's inclusion of a one-hour work time access period as part of its remedial order. She would find the grant of this expanded access remedy appropriate only in those cases where the Board has found extensive evidence of pervasive unfair labor practices, including violations of the Board's access rules. As these factors were not present in this case, she would find the expanded access remedy to have been inappropriately granted in this case.

* * *

This Case Summary is furnished for information only and is not an official statement of the case, or of the ALRB.

* * *

CASE SUMMARY

Ace Tomato Company, Inc./
George B. Lagorio Farms,
(UFW)

15 ALRB No. 7
87-CE-1-D (F)

Background

On August 16, 1983, Charging Party United Farm Workers of America, AFL-CIO (UFW or Union) filed a petition for certification as the exclusive collective bargaining agent of all the agricultural employees of Ace Tomato Company, Inc./George B. Lagorio Farms (Ace or Respondents). At an election conducted by the Agricultural Labor Relations Board (ALRB or Board) on August 23, 1983, the Union prevailed. Challenged ballots were not outcome determinative. After a hearing held on May 14 and 15, 1985, on Respondents' objections alleging violence by Union supporters that created an atmosphere of fear and coercion or reprisal sufficient to render employee free choice impossible, as well as Board agent bias and conduct by Union supporters at a polling site that reasonably tended to interfere with employee free choice, the Investigative Hearing Examiner (IHE) issued a decision that recommended the dismissal of all Respondents' objections. The Board upheld the IHE's decision and certified the Union as the collective bargaining agent of all Respondents' agricultural employees in Ace Tomato Company, Inc./George B. Lagorio Farms (1986) 12 ALRB No. 20, Member Carrillo dissenting. Thereafter, Respondents engaged in a technical refusal to bargain to test the propriety of the Board's certification decision, and the matter was presented directly to the Board on a stipulated record.

Board Decision

The Board reconsidered its prior certification decision as permitted under T. Ito & Sons Farms (1985) 11 ALRB No. 36 (Ito). In Ito the Board decided that it would reconsider matters previously litigated in representation proceedings in subsequent technical refusal to bargain cases when the record upon reconsideration demonstrated the presence of an atmosphere of fear and coercion or reprisal sufficient to render employee free choice impossible. The Board observed in Ito, that while widespread threats of beatings and reporting to the U.S. Immigration and Naturalization Service could create such an atmosphere, where actual violence was present, such an atmosphere was readily established. Here the Board found such an atmosphere was created by the violent attempts to intimidate Respondents' labor consultants three days before the election when they were trapped in their car while it was bombarded with hard dirt clods and unripe tomatoes and was rocked by pro-Union employees with the possibility of overturning it, by the violent coercion of employees on the same day who were struck by clods and tomatoes thrown by Union organizers and adherents as witnessed by 150 employees in an attempt to force them to cease work and attend a

Union meeting, and by the violent assault on a consultant's car at a polling site on the day of the election when it was surrounded by Union adherents who again bombarded the car with hard clods and unripe tomatoes, and rocked the car with the consultants inside while pounding on it with their fists. Since these incidents of actual violence were not isolated or insubstantial, they created the prohibited atmosphere of fear and coercion or reprisal that renders employee free choice impossible. Noting that its duty is to formulate norms that strongly discourage labor relations violence, the Board dismissed the unfair labor practice complaint, vacated its prior certification order and stated that it would not tolerate violence in connection with representation elections.

* * * *

This Case Summary is furnished for information only and is not the official statement of the case, or of the ALRB.

CASE SUMMARY

BORREGO PACKING COMPANY, UFW

15 ALRB No. 8
Case No. 88-RC-6-SAL

Background

On June 3, 1988, pursuant to a Petition for Certification filed by the United Farm Workers of America, AFL-CIO (UFW or Union), the Agricultural Labor Relations Board (ALRB or Board) conducted a representation election among all agricultural employees of Borrego Packing Company (Employer) in the State of California. The Amended Tally of Ballots issued on July 7, 1988, revealed 107 votes for the UFW, 93 for No Union, and 3 Unresolved Challenged Ballots. The Employer filed objections to the conduct of the election, and the following were set for hearing: (1) whether the Board agents' disqualification of the Employer's election; (2) whether the Union engaged in improper electioneering and campaigning on the day of the election which interfered with the conduct of the election; (3) whether incidents and conduct occurred during the course of the election that created the appearance of bias on the part of Board agents and, if so, whether that appearance interfered with the conduct of the election; and (4) whether the allegations set forth in the objections occurred and, if so, whether the cumulative effect of those events and conduct interfered with the employees' free choice in the election.

IHE's Decision

Following a hearing in which all parties participated, the Investigative Hearing Examiner (IHE) found that there was insufficient evidence that the acts complained of occurred and/or caused interference with the election. The IHE denied the UFW's request for attorney's fees, and recommended that the results of the election be certified.

Board Decision

The Board reviewed the IHE's Decision in light of the exceptions and briefs of the parties, and decided to affirm the rulings, findings, conclusions and recommendations of the IHE. Though the Board upheld the IHE's dismissal of the Employer's objection to the Board agents' handling of the Union's challenge of 17 voters as "agent/consultant" of the Employer for their anti-union campaigning during work hours the day before the election, the Board cautioned its agents that the process used in this matter was not completely satisfactory. Since the challenged individuals met the eligibility requirements of Labor Code section 1157, and since the asserted basis for the challenge was not among the specific categories to which challenges must be limited under

8 Cal. Admin. Code section 20355(a)(1) - (8), the challenge should have been rejected as either improper on its face or more properly the subject of a post-election objection. Labor Code section 1152 protects agricultural employees' concerted activities in opposition to representation by a union as well as in support thereof.

* * * * *

This Case Summary is furnished for information only and is not the official statement of the case, or of the ALRB.

CASE SUMMARY

David Freedman & Co., Inc. (UFW)

15 ALRB No. 9
Case No. 86-CE-49-EC

Background

This case involved the alleged discriminatory discharge of a single employee, Jesus Canedo, because of his protected concerted and union activities. The complaint alleged that Canedo was discharged because of his participation in a work stoppage called by the UFW. The Employer stipulated that the work stoppage was protected activity, but contended that it discharged Canedo because of his insubordinate use of profane, abusive language to a company supervisor.

ALJ Decision

The ALJ credited the testimony of Canedo and a co-worker that Canedo did not utter the abusive language attributed to him, and concluded that the Employer's stated reason for the discharge was pretextual. The ALJ concluded that the Employer had violated the ALRA by discharging Canedo for his participation in the work stoppage.

Board Decision

The Board found that Canedo's testimony was inconsistent with the testimony of his co-worker on several important points. The Board further found that Canedo's credibility was seriously undermined by his inconsistent and contradictory testimony concerning his application for unemployment benefits. After also finding that the ALJ erred in discrediting the testimony of two supervisors who testified that Canedo had uttered the language attributed to him, the Board concluded that the clear preponderance of all the relevant evidence demonstrated that the ALJ's credibility resolutions were incorrect. The Board therefore overruled the ALJ's credibility resolutions and found that Canedo did in fact utter the words attributed to him.

The Board then examined Canedo's conduct under NLRA precedent, under which an employee's use of profanity during the course of concerted activity does not necessarily take the activity outside the protection of the NLRA. Rather, the employee's right to engage in such activity requires some leeway for impulsive behavior, which must be balanced against the employer's right to maintain order and respect. The Board analyzed Canedo's conduct under the standards of Atlantic Steel Company (1979) 245 NLRB 814 [102 LRRM 1247], which held that even an employee who is engaged in concerted protected activity can, by opprobrious conduct, lose the protection the NLRA. Determining whether an employee has crossed the line involves consideration of several factors: 1) the place of the discussion, 2) the subject matter of the

discussion, 3) the nature of the employee's outburst, and 4) whether the outburst was in any way provoked by an employer's unfair labor practice. Applying the Atlantic Steel factors, the Board found that the Employer had a greater interest in controlling Canedo's conduct because it occurred on the work site rather than off the Employer's property, since the Employer had a legitimate interest in maintaining order and respect among the workers while they were present on the Employer's property. Considering the subject matter of the disucssion, the Board found it significant that Canedo made no claim that the supervisor made any comments that were derogatory towards him or towards the Union. The Board also found that Canedo had repeated his profanity several times although the supervisor never responded in like fashion. The Board thus concluded that Canedo's abusive use of profanity was unprovoked and demonstrated a lack of respect for the Employer which was not germane to carrying out his legitimate concerted activity. The Board concluded that because Canedo's conduct occurred on the work site and in the presence of other employees, it constituted insubordinate conduct that tended to undermine the Employer's legitimate need to maintain order and respect among employees on his property. In light of all the circumstances, the Board found that Canedo's profanity amounted to opprobious conduct exceeding the bounds of protected activity under the ALRA, and thus constituted insubordination.

The Board also found that the Employer had a dual motive for discharging Canedo. However, in applying a Wright Line analysis, the Board concluded that the Employer's primary motive for discharging Canedo was his abusive, disrespectful use of profanity toward a supervisor. The Board concluded that Canedo would have been discharged for his abusive language even if he had been engaged in activity merely on his own behalf rather than in concerted activity. Therefore, the Board concluded that the Employer had not committed a violation of the ALRA, and it dismissed the complaint.

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This Case Summary is furnished for information only and is not the official statement of the case, or of the ALRB.

CASE SUMMARY

United Farm Workers of America, AFL-CIO (The Careau Group, dba Egg City)

15 ALRB No. 10
Case Nos. 86-CL-14-SAL(OX)
86-CL-14-1-SAL(OX)
86-CL-21-SAL

Background

Following the collapse of contract negotiations, the United Farm Workers of America, AFL-CIO (UFW or Union) commenced strike action against The Careau Group dba Egg City (Egg City or Charging Party). In conjunction with that strike activity, the Union engaged in secondary conduct against sellers and distributors of Egg City's products. The Union picketed numerous commercial entities including restaurants, food stores, and intermediate distributors requesting the public to withdraw its patronage from the picketed entities. In conjunction with these picketing activities, Union agents made statements to agents or representatives of the picketed entities warning that picketing would continue in the absence of actions specified by the Union. The Union also followed trucks containing Egg City products to the Long Beach Terminal and Terminal Island, and picketed Egg City products at those locations.

ALJ Decision

The ALJ found that the legislative intent of the secondary boycott provisions of the Agricultural Labor Relations Act (ALRA or Act) was to balance labor organizations' interest in publicizing as widely as possible their primary labor disputes and appealing to consumers to support them in those disputes, with the interest of secondary entities to avoid undue entanglement in labor disputes not of their own making. The publicity provisos of the Act create an ordered sequence of publicity techniques that accommodate both interests. The ALJ therefore found that a certified labor organization, such as the Union herein, could engage in picketing publicity that requests the public to withdraw its patronage from picketed entities as long as that publicity truthfully advises the public of the existence and nature of the Union's primary labor dispute and the relationship of picketed secondary entities to that dispute. Where the publicity adequately disclosed the required information, the ALJ found no violation; where the Union's informational disclosure was inadequate, the ALJ found violations. The ALJ also determined that statements by the Union's agent to picketed secondary employers that informational picketing would continue while the secondaries continued to receive Egg City products was protected under the ALRA as a warning to engage in legal consumer picketing. The Union agent's threat to continue picketing secondaries even in the absence of Egg City products at the picketed sites was found by the ALJ to violate the Act. The Union's conduct at the Long Beach Terminal and Terminal Island, which resulted in members of the longshoremen's union refusing to load Egg City products, was found by the ALJ to violate the Act as illegal work stoppage inducements.

The ALJ also found that the Union illegally threatened the driver of a delivery truck carrying Egg City products to the Long Beach Terminal, and illegally threatened the manager of the Terminal Island facility with an illegal work stoppage.

Board Decision

The Agricultural Labor Relations Board (ALRB or Board) adopted the ALJ's interpretation of the legislative balance struck by the secondary boycott provisions of the ALRA, and affirmed his finding of violations. The Board, however, rejected the ALJ's totality of the circumstances test for determining the adequacy of a labor organization's information disclosure under the Act's publicity provisos. The various channels of communication used by the union, e.g. picket signs, chanting, and union flags, cannot be aggregated to create one composite acceptable message. Rather, at least one channel of communication must contain all elements of information necessary to meet the truthfully advising requirement of the statute, while other media used by the union must abstain from false or misleading statements. The Board, while finding in two instances that the General Counsel had failed to establish a prima facie case, also rejected the ALJ's reliance on the Union's testimonial proof of picket sign content in the absence of foundational proof of sign loss or destruction as required by the best evidence rule. The Board found additional instances of illegal threats when it credited a witness discredited by the ALJ who stated that the Union's agent had warned of continued picketing even in the absence of Egg City's products at the secondary's customers' businesses, when the agent stated that illegal picketing would continue in the absence of compliance with the Union's demands, and when the agent warned that picketing would continue as long as secondaries did business with a particular intermediate distributor even in the absence of receipt of Egg City products. The Board rejected the Charging Party's arguments that all information used by the Union to truthfully advise the public had to be contained on each and every picket sign used, that the Union could only make indirect appeals to the public to withdraw its patronage from picketed entities, and that the Union's ability to engage in do not patronize picketing lapsed at the end of the Union's initial certification year. The Board also rejected the Union's argument that its picketing was absolutely protected under the federal and California constitutions as guaranteed by the fourth publicity proviso of the Act. In addition to ordering the Union to cease and desist from its illegal conduct, the Board ordered the Union to mail copies of its remedial notice to workers employed by Charging Party during the illegal conduct, and to secondary employers as to whom the Union's conduct was found to violate the Act. The Board also ordered the Union to compensate any person injured in his or her business or property by reason of conduct found to have violated the secondary boycott provisions of the Act.

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CASE SUMMARY

Mann Packing Co., Inc.
(UFW)

Case No. 88-RD-3-SAL
15 ALRB No. 11

Background

The results of a decertification election among Mann Packing Company's (Employer) agricultural employees revealed the following results: the United Farm Workers of America, AFL-CIO (UFW or Union), the incumbent representative, 11 votes; No Union, 29 votes; and, 30 challenged ballots. As the latter were sufficient in number to determine the outcome of the election, the Regional Director (RD) conducted an investigation and issued a Report in which he recommended that 26 of the challenges be sustained, that two additional challenges be overruled, and that the remaining two challenges be held in abeyence. Thereafter, the UFW filed exceptions to the RD's determination as to 20 of the ballots, all of which were cast by employees who were challenged by Board agents because they had not worked during the qualifying pre-petition eligibility period. The Union had filed unfair labor practice charges on behalf of those same challenged voters, alleging therein that they would have worked but for the employer's unlawful contracting out of bargaining unit work to non-union labor contractor crews. Following an investigation of the unfair labor practice allegation, the RD dismissed the charge. The Union now asks that the Board consider, in the context of a representation hearing, the issue alleged in the unfair labor practice charge in order to determine the eligibility question.

Board Decision

The Board affirmed the RD's recommendation that the challenges to the 20 ballots be sustained, but on the basis of a somewhat different theory and therefore was not required to reach the arbitration question. The Board held that where, as here, eligibility to vote turns on a matter which is uniquely within the province of the General Counsel (e.g., whether employees have been laid off in violation of the Act) and thus can only be determined in the context of an unfair labor practice proceeding, the Board must look to the result of that proceeding in order to resolve the representation question. Thus, where such unfair labor practice charges have been dismissed, the Board is powerless to resolve the same issue in a representation proceeding. In so ruling, the Board looked to the express statutory authority which sets forth the respective duties and spheres of original jurisdiction of the General Counsel in unfair labor practice matters and the Board in representation matters. On that basis, the Board concluded that were it to grant the Union's request to litigate in the representation context the same allegations which served as the basis for the dismissed charges, the Board would invade the statutory authority of the General Counsel.

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CASE SUMMARY

Kubota Nurseries, Inc. (UFW)

15 ALRB No. 12
Case No. 87-RC-13-SAL

IHE Decision

Following a petition for certification filed by the United Farm Workers of America, AFL-CIO (UFW or Union) on November 9, 1987, an election was conducted by the Agricultural Labor Relations Board (ALRB or Board) on November 16, 1987, to determine whether the Union would become the certified collective bargaining representative of all the agricultural employees of Kubota Nurseries, Inc. (Employer). The election results were as follows: 22 votes for the UFW, 9 votes for no union, and 0 challenged ballots for a total of 31 votes cast. The Employer timely filed objections to the conduct of the election, of which the Executive Secretary of the Board set two for hearing, and also asked the parties to brief the impact, if any, of the decision of the Court of Appeal in Adamek & Dessert, Inc. v. ALRB (1986) 178 Cal.App.3d 970 [224 Cal.Rptr. 366] on the issues presented by the Employer's objections. The Employer contended that it was not at peak for purposes of the requirements of Labor Code sections 1156.3(a)(1) and 1156.4 due to the absence of the name of employee Adan Mercado from the pre-petition payroll. Mercado was on unpaid disability leave during the relevant period. The Investigative Hearing Examiner (IHE) recommended that the Employer's objections be dismissed, and that the Union be certified as the collective bargaining agent of the Employer's employees.

Board Decision

The Board affirmed the IHE's recommended decision. Noting that the Employer had stipulated to Mercado's status as an eligible voter, and that the Employer had failed to bear its burden of demonstrating that Mercado would not have worked during the relevant payroll period, the Board agreed that Mercado should have been included in the peak determination despite the absence of his name from the Employer's payroll for the relevant period. The Board observed that the proper standard for determining whether an employee was "currently employed" for purposes of Labor Code sections 1156.3(a)(1) and 1156.4 was the same as that for determining whether an employee was an eligible voter under section 1157, viz., whether the employee would normally have worked during the relevant period because work was available for the employee, as distinguished from an employee who had been laid off, or not yet recalled, because there was no work to be performed by that employee. (Rod McLellan Company (1977) 3 ALRB No. 6.) The Board also disapproved of the Regional Attorney's conduct in filing a brief requesting sanctions against the Employer for advancing an argument considered by the Regional Attorney to be frivolous, in bad faith, and advanced for purposes of delay. The Board found the Regional Attorney's conduct to have exceeded the limited intervention allowed Regional Directors in election

proceedings in order to develop a full and complete record and to protect the integrity of the Board's election processes. The Board disapproved and overruled language in earlier cases which allowed regional directors "full party" status, and might have seemed to justify the Regional Attorney's partisan stance.

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CASE SUMMARY

CAPCO Management Group Inc., IBEW

15 ALRB No. 13
Case No. 88-RC-8-VI

Background

On December 22, 1988, pursuant to a Petition for Certification filed by Local 1245, International Brotherhood of Electrical Workers, AFL-CIO (IBEW or Union), the Agricultural Labor Relations Board (ALRB or Board) conducted a representation election among all agricultural employees of CAPCO Management Group Incorporated (Employer). The Official Tally of Ballots revealed 9 votes for the Union, 12 for No Union, and 11 Unresolved Challenged Ballots. As the latter were sufficient in number to determine the outcome of the election, the Regional Director (RD) of the Board's Visalia Regional Office commenced an administrative investigation, during which the Employer and the Union were requested to provide their positions on the challenged ballots. In its response, the Union unilaterally withdrew its 11 challenges, whereupon the RD, in his Report on Challenged Ballots issued on January 24, 1989, recommended the ballots be opened and counted. The Employer filed exceptions to the RD's recommendation contending that his acceptance of the Union's unilateral withdrawal of its challenges several weeks after the Official Tally of Ballots allows the Union to misuse the administrative processes of this Agency by which the integrity of the challenged ballots is compromised.

Board Decision

The Board reviewed the RD's Challenged Ballot Report in light of the Employer's exceptions and supporting brief and declaration, and has decided to affirm the recommendation of the RD. The Board noted that the Employer does not take exception to factual findings by the RD as none were made, but rather, contests his interpretation and application of the Board's challenged ballot procedures as set forth in Title 8, California Code of Regulations, sections 20355 through 20363. The Board found that the Employer, as well as the Union, no longer contests the eligibility of the challenged voters, leaving the RD without an issue to investigate. When the eligibility of a challenged voter is no longer contested, the Board's challenged ballot procedures no longer apply, and as neither party contests the eligibility of any of the challenged voters, it was proper for the RD to recommend that the ballots be opened and counted. To do otherwise would result in the disenfranchisement of 11 voters who are presumptively eligible and entitled to vote.

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CASE SUMMARY

HARRY CARIAN, individually, and dba HARRY CARIAN SALES (UFW)

Case No. 80-CE-57-SD

15 ALRB No. 14
(10 ALRB No. 51)
(9 ALRB No. 13)

Background

In 1983, the Agricultural Labor Relations Board (ALRB or Board) issued a decision in which it found that Jose Luis Godinez, as well as two other employees, had been unlawfully discharged by Respondent Carian in retaliation for their having engaged in protected concerted activity; namely, for having sought legal representation in regard to their complaints about the condition of housing which Respondent provided for its employees. The Board ordered Respondent to reinstate the employees and to compensate them for lost wages. In 1984, the Court of Appeal affirmed the Board's findings with regard to the violations discussed above. Thereafter, the Board's Regional Director prepared a backpay specification setting forth his account of the amount of backpay due each of the discriminatees. As Respondent filed an answer contesting the backpay specification, the matter was set for a full evidentiary hearing before an Administrative Law Judge (ALJ).

ALJ's Decision

Prior to hearing, the parties reached agreement on all aspects of the backpay specification, but did not limit Respondent's right to mitigate its overall monetary liability. In that regard, Respondent focused primarily on the discriminatee's interim earnings. Godinez admitted that he had fabricated Social Security numbers when securing interim employment, but had neither a recollection of the numbers used nor any records such as W-2 forms reflecting that employment. The ALJ found that Godinez had not used false Social Security identification in order to deceive either Respondent or the Board in order to reap a backpay windfall. On that basis, the ALJ concluded that the conduct did not rise to the level of culpability which would warrant withholding from Godinez the whole of his backpay award. The ALJ determined the monetary amounts due each of the three discriminatees and, in addition, found that Respondent's backpay liability to Godinez would continue to run until Respondent tendered to him a reinstatement offer which would serve to terminate the running of backpay.

Board Decision

Respondent excepted only to that portion of the ALJ's Decision concerning Godinez's backpay. In its exceptions brief Respondent contended that the use of false Social Security numbers precluded Respondent from using Social Security records in order to verify

Godinez's interim employment and therefore, until Godinez made such verification possible, backpay should be withheld. The Board reduced Godinez's backpay award on the basis of a different analysis. The Board found that the initial offer of reinstatement to Godinez was not received by him because Respondent relied on the Region's last known, albeit incorrect, address for him. On that basis, the Board tolled Respondent's backpay liability to Godinez from April 8, 1985, the earliest date on which Respondent could reasonably have been expected to rely on the Region's incorrect address, until October 17, 1985, the latest date at which Respondent could reasonably be expected to recommence good faith efforts to contact Godinez. Respondent failed to demonstrate that it thereafter made reasonable attempts to ascertain Godinez's whereabouts in order to redirect the offer.

Concurring and Dissenting Opinion

Member Ellis differed from the majority position only in that he would continue tolling backpay until such time as it became apparent that Respondent had access to a source of information from which to determine Godinez's correct address.

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CASE SUMMARY

Paul W. Bertuccio, dba
Bertuccio Farms
(UFW)

Case Nos. 81-CE-91-SAL
82-CE-29-SAL

15 ALRB No. 15
(10 ALRB No. 16)

Board Decision

Pursuant to the remand order of the Sixth District Court of Appeal entered in Paul W. Bertuccio v. ALRB (1988) 202 Cal.App.3d 1369 [249 Cal.Rptr. 473], the Board annulled its prior findings in Paul W. Bertuccio, dba Bertuccio Farms (1984) 10 ALRB No. 16 that Paul W. Bertuccio, dba Bertuccio Farms (Respondent) had failed to timely furnish bargaining-related information to Charging Party United Farm Workers of America, AFL-CIO (UFW or Union), and had bargained directly with members of the collective bargaining unit. In accordance with the court's order, the Board entered a new finding that the record was insufficient to support a violation in those areas. The Board, again pursuant to the court's remand order, annulled its finding that Respondent's acceptance on July 25, 1982, of the Union's package proposal of April 8, 1982, was ineffective to bind the Union to the terms of that proposal, and entered instead a new finding that Respondent's acceptance was effective to achieve that result. In conformity with that portion of the court's remand order to provide Respondent the opportunity to offer evidence of Union strike violence and to reconsider the makewhole award in light of William Dal Porto & Sons, Inc. v. ALRB (1987) 191 Cal.App.3d 1195, and in agreement with the parties' stipulation approved by the Board on May 17, 1989, the Board vacated its prior award of bargaining makewhole for the period litigated, April 2, 1981, to July 25, 1982. Finally, the Board modified other provisions of its former remedial order to accommodate the court's finding that Respondent was bargaining in good faith as of the date of its acceptance of the Union's offer, July 25, 1982.

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CASE SUMMARY

Valley-Wide, dba Mona, Inc. (UFW)

15 ALRB No. 16
Case No. 87-CE-7-1-EC

Background

The complaint alleged that Francisco Gonzalez, who was hired by the Employer's forewoman Maria Luisa Moreno on March 16, 1987, was unlawfully discharged by the Employer's owner, Oscar Ortega, on March 23, 1987, because of Gonzalez' prior union activities at E. T. Wall Company. The complaint also alleged that on one occasion when Gonzalez asked Moreno to give work to some friends of his, Moreno unlawfully questioned him about their union affiliations and told him the boss did not want anybody who was pro-union.

ALJ Decision

The ALJ discredited Gonzalez' account of Moreno's alleged statements concerning his friends' union affiliations. He therefore recommended dismissal of that portion of the complaint. No party filed an exception to the recommended dismissal.

The ALJ found that Oscar Ortega was aware of Gonzalez' extensive union activities from 1985 to 1986, when Gonzalez was on a year's leave of absence from E. T. Wall to work as a volunteer union organizer. During his leave of absence, Gonzalez participated in an organizing campaign directed at employees working in citrus groves which were managed by Ortega as a custom harvester. In early 1986, Ortega was hired by E. T. Wall to administer its contract with the UFW. Ortega admitted having contact with Gonzalez in relation to grievance matters at Wall.

On the day of Gonzalez' discharge, Ortega came to the field and was surprised to see Gonzalez working. Ortega went to speak to the forewoman, returned five or ten minutes later and fired Gonzalez. The ALJ discredited Gonzalez' claim that Ortega admitted firing him because of his work for the Union. However, the ALJ also did not credit the testimony of Ortega's father that on one occasion during the prior year, when Gonzalez was discussing work procedures with E. T. Wall workers, Gonzalez told the employees that the Ortegas were "importamadristas" and thieves. Since he did not credit the testimony of Ortega's father that this incident had in fact occurred, the ALJ also discredited Oscar Ortega's claim that he told Gonzalez he was discharged for insulting Ortega and his father the previous year.

The ALJ credited the testimony of Gonzalez' co-worker, Martin Mosqueda, who stated that when Ortega discharged Gonzalez, he told him, "After what you did last year in the grapefruit you come back to work for me? I want you to leave." The ALJ construed Ortega's comment as meaning that he was disturbed about Gonzalez' union activities on behalf of E. T. Wall employees and that Ortega would

not employ such a vociferous union representative. The ALJ found that the Employer's defense, that Gonzalez was discharged for insulting the Ortegas the previous year, was a pretext. He concluded that the Employer had unlawfully discharged Gonzalez because of his connection with the UFW and his efforts for the Union on behalf of E. T. Wall workers.

Board Decision

The Board found that the evidence was inconclusive regarding Gonzalez' status as an employee or non-employee during his leave of absence from E. T. Wall. The Board concluded, however, that Gonzalez' union-related activities at E. T. Wall constituted protected activity regardless of his employment status at the time. The Board agreed with the ALJ's finding that the testimony of Manuel Ortega regarding Gonzalez' alleged insults was confusing. The Board concluded, however, that even if the name-calling incident occurred, it was part of Gonzalez' protected concerted activity in discussing work procedures with employees, and thus could not provide a legitimate reason for Gonzalez' discharge. The Board noted that Gonzalez' specific act of urging employees to refrain from providing legally required information may not have been protected activity, but found that the evidence indicated that the specific act was not a significant part of the totality of Gonzalez' protected conduct which caused the employer to discharge the discriminatee.

The Board affirmed the ALJ's crediting of the testimony of Mosqueda, who stated that Ortega said he could not have Gonzalez working for him "after what you did last year in the grapefruit," and affirmed the ALJ's construction of Ortega's comment as meaning that he was disturbed about Gonzalez' union activities at E. T. Wall and was concerned that Gonzalez would engage in similar activities at Mona. The Board determined that the Employer had failed to show that any of Gonzalez' union-related activities at Wall were unprotected, and therefore found that none of them could furnish a legitimate reason for Gonzalez' discharge from Mona. The Board concluded that the Employer had unlawfully discharged Gonzalez because of his pre-employment protected concerted activities at E. T. Wall.

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CASE SUMMARY

SAM ANDREWS' SONS
(UFW)

15 ALRB No. 17
Case No. 81-CE-258-D
(11 ALRB No. 29)
(8 ALRB No. 87)

CASE SUMMARY

The Board issued a supplemental decision and modified order in accordance with the Court of Appeal and California Supreme Court remand of 11 ALRB No. 29. In conformity with the court decisions, the Board retained its previous unfair labor practice findings, but revised its labor camp access order, acknowledging the Employer's right to establish reasonable time, place and manner restrictions on labor camp access.

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CASE SUMMARY

Ventura County Fruit Growers, Inc. (UFW)

15 ALRB No. 18
Case Nos. 83-CE-109-OX, et al.

Background

In Ventura County Fruit Growers, Inc. (1984) 10 ALRB No. 45, the Board found that the Employer (Ventura or Respondent) had failed to bargain in good faith with the United Farm Workers of America, AFL-CIO (UFW or Union), its employees' certified bargaining representative and concluded that makewhole was an appropriate remedy for Respondent's violation of the Agricultural Labor Relations Act (ALRA or Act). Accordingly, Respondent was ordered to pay its employees the difference, if any, between what they had been earning and what they likely would have earned had Respondent entered into a collective bargaining agreement with the Union.

After a California Court of Appeal denied Respondent's Request for Review of 10 ALRB No. 45, the Regional Director (RD), acting for the General Counsel in compliance matters, prepared a makewhole specification setting forth his assessment of the amount of pay Respondent owed its employees. As a general rule, the makewhole obligation for the general hourly wage rate is measured according to the average of such rates in contracts derived from comparable operations. Although the RD acknowledged at the outset that there were at least two farming operations comparable to that of Respondent's, and that each of them had a contract with the Union, he rejected one of the contracts on the grounds that it had an employee housing component which allegedly influenced final contract proposals whereas Respondent herein did not provide such housing. As Respondent filed an answer in opposition to the RD's reliance on a single contract, the matter was set for an evidentiary hearing.

ALJ's Decision

At the outset of the hearing, the RD agreed that the contract which he had previously rejected might be included in the averaging formula but only after the housing was costed out and factored into the general hourly wage rate. The ALJ found that: (1) under the RD's single-contract formulation, Respondent owed $24,000 in makewhole wages and fringe benefits; (2) under the rejected contract alone, no makewhole was due unless housing was added in accordance with the RD's computations in which event Respondent would owe $119,000; and (3) were the two contracts averaged, without any allowance for housing, no makewhole would be due.

Given the critical importance that the housing element appeared to have, the ALJ ruled that General Counsel had an initial and affirmative obligation to prove that the general wage rate in the excluded contract included an offset for housing. He ultimately found that while the requisite level of proof with regard to the

housing issue had not been met by General Counsel, the RD's reliance on a single contract, under the circumstances of this case, did not constitute an abuse of discretion and therefore his specification should stand.

Board Decision

Immediately after the ALJ issued his decision, the Board decided another case in which it emphasized that, wherever possible, makewhole should be measured by averaging multiple contacts. (O. P. Murphy Company (1987) 13 ALRB No. 27). The Board granted Respondent's motion to reopen the record in light of Murphy, supra, and ultimately held that under Murphy, the averaging of two or more contracts, where available, produced a more appropriate result. Thus, the Board remanded the matter to the RD for a new makewhole specification, if necessary, in accordance with Murphy.

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CASE SUMMARY

Perez Packing Company, Inc. 15 ALRB No. 19
UFW Case No. 88-RC-6-VI

Background

On July 27, 1988, the Employer's employees went out on strike. The following day, the UFW filed a representation petition alleging therein that a majority of the unit employees were engaged in a strike. Finding that a majority of the workers were indeed on strike, the RD directed an expedited election pursuant to Labor Code section 1156.3(a). A pre-election conference was held at the Employer's premises on July 29, 1988, and at that time the Union made an unconditional offer to return to work on behalf of the striking workers. Concluding therefrom that the strike was over and that, therefore, an expedited election was no longer necessary, the Employer objected to the 48-hour election, contending that it was improper to proceed with the election when it was evident that the strike had ended. The RD dismissed the objection for the following reasons: (1) the Notices and Direction of Election had already been posted; (2) picketing was still taking place, and (3) the Employer had not been prejudiced. Later in the evening of July 29, 1988, the Employer went to the labor camp to campaign in connection with the upcoming election, which was held on July 30, 1988. The Official Tally of Ballots revealed 108 votes for the UFW, 47 for No Union, and 1 Unresolved Challenged Ballot. The Employer filed an objection to the election contending that it was an abuse of discretion for the RD to proceed with an expedited election when it was evident the strike was over the day before the election.

IHE's Decision

Following a hearing in which all parties participated, the IHE found that the RD did not abuse his discretion in deciding to proceed with the expedited election and that the Employer had an opportunity to campaign in connection with the election. The IHE dismissed the Employer's election objection and recommended that the results of the election be certified.

Board Decision

The Board found that at the time the RD made his decision to proceed with the expedited election, strike circumstances were ongoing in that picketing was still taking place several hours after the Union made its unconditional offer to return to work on behalf of the striking workers. On the basis of the evidence before the RD, the Board did not find that he abused his discretion in refusing to postpone the election since the Act's mandate is clear that elections under strike circumstances are to be held in an expedited fashion wherever possible.

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CASE SUMMARY

Limoneira Company
(UFW)

15 ALRB No. 20
Case No. 85-CE-13-OX

Background

This technical refusal to bargain case came before the Agricultural Labor Relations Board (ALRB or Board) for findings of fact and conclusions of law on a stipulated record under the provisions of Title 8, California Code of Regulations, section 20260. That record shows that the United Farm Workers of America, AFL-CIO (UFW or Union) was certified by the Board as the exclusive bargaining representative of the agricultural employees of Limoneira Company (Respondent) in 1978. Thereafter, a petition for decertification of the Union having been duly filed, a decertification election was conducted by the Board among Respondent's agricultural employees on February 20, 1985. The results of the election showed 79 votes in favor of "no union," 75 in favor of the UFW, and 2 unresolved challenged ballots remained outstanding. On the basis of the tally of ballots, Respondent refused to bargain further with the UFW. The UFW, however, timely filed objections to the conduct of the election in which it alleged that Respondent had made an impermissible promise of improved medical benefits that tended to affect the outcome of the election. At hearing on this and other objections, the Investigative Hearing Examiner (IHE), refused to place any reliance on the testimony of the Union's sole witness to the alleged promise of benefit, and recommended that the election results be certified. The Board, however, upon consideration of the Union's timely filed exceptions to the decision of the IHE, credited the Union's witness to the promise of benefit, and set aside the decertification election on that basis. (Limoneira Company (1987) 13 ALRB No. 13.) Thereafter the General Counsel issued a complaint on the Union's refusal to bargain charge in this matter, and this proceeding followed.

Board Decision

The Board refused to allow the relitigation of the election objections previously resolved in 13 ALRB No. 13, as Respondent had presented no newly discovered or previously unavailable evidence, alleged no extraordinary circumstances, nor demonstrated facts sufficient to allow relitigation under the limited exceptions recognized under T. Ito & Sons Farms (1985) 11 ALRB No. 36 or Ace Tomato Company, Inc./George B. Lagorio Farms (1989) 15 ALRB No. 7. The Board, however, determined that an award of the bargaining makewhole remedy would not be appropriate since Respondent had demonstrated a "close case" under the decision of the California Supreme Court in J. R. Norton Company v. ALRB (1979) 26 Cal.3d 1 [160 Cal.Rptr. 716] on the factual question whether a promise of benefit had actually been made. The Board noted that the weak and ambiguous quality of the sole testimony in

support of the alleged promise, together with the IHE's explicit rejection of that testimony as a basis for setting aside the election, and the agreement with the IHE and Respondent of two dissenting Board members in the representation proceeding (13 ALRB No. 13), satisfied the Norton reasonableness inquiry. The Board specifically rejected the contention that only legal, as opposed to factual, questions could present a "close case" under Norton. Since the stipulated record was devoid of facts that would support a finding of bad faith, the Board also found that Respondent had asserted its reasonable litigation posture in good faith.

Concurrence

In her concurring opinion, Member Ramos Richardson expressed her concern that portions of the majority decision may create a false impression that the Board no longer supports its findings and conclusions in 13 ALRB No. 13. Nevertheless, because of the Board's acknowledgment of ambiguities in the record and the varying interpretations to which the primary witness's testimony was susceptible, she agreed that the Employer's litigation posture was reasonable under Norton and that makewhole was consequently not an appropriate remedy herein.

Concurrence/Dissent

Member Ellis is in agreement with the majority in its characterization of Hinojosa's testimony as containing inherent implausibilities and a number of gaps and uncertainties, and that the Board's application in Limoneira Company (1987) 13 ALRB No. 13, of the evidentiary rule from Martori Brothers Distributors v. Agricultural Labor Relations Bd. (1981) 29 Cal.3d 721 was "wholly fortuitous", if not erroneous. However, instead of simply finding that makewhole may not be appropriately awarded in this case under the standards of J. R. Norton Co. v. Agricultural Labor Relations Bd. (1979) 26 Cal.3d 1, Member Ellis would relitigate the Union's objections in the underlying representation proceeding, and thereby find that because of its faulty findings of facts and conclusions of law, 13 ALRB No. 13 should be vacated and the complaint herein dismissed.

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This Case Summary is furnished for information only and is not an official statement of the case, or of the ALRB.

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CASE SUMMARY

The Careau Group, dba Egg City (UFW)

15 ALRB No. 21
Case No. 86-RD-6-SAL(OX)

Background Facts

The Agricultural Labor Relations Board (ALRB or Board) certified the United Farm Workers of America, AFL-CIO (UFW or Union) as the certified exclusive collective bargaining agent of all the agricultural employees of Julius Goldman's Egg City in 1978. (See certification order in Case No. 75-RC-21-M.) The Careau Group, dba Egg City (Employer) purchased the operations and succeeded to the prior owner's obligations under the Board certification in May 1985. The collective bargaining agreement in effect between the prior owner and the Union expired in September 1985, and the Union commenced a strike and boycott activities against the Employer in June 1986. (See The Careau Group dba Egg City, et al. (1989) 15 ALRB No. 10.) Petitioners Ramon R. Ornelas and Jose Zaragoza filed separate petitions to decertify the Union on October 27, 1986, and the Board conducted a decertification election among the Employer's agricultural employees on November 3, 1986. The results of the election showed 105 votes in favor of "no union," 79 in favor of the Union, and 9 unresolved challenged ballots. The Union thereafter filed 30 objections to the election, of which the Board set 5 for hearing before Investigative Hearing Examiner (IHE) Thomas Sobel.

Investigative Hearing Examiner's Decision

The IHE granted the Employer's motion at the close of the Union's case to dismiss the Union's objection alleging that statements attributed to the Employer and published in a local newspaper shortly before the election reasonably tended to interfere with employee free choice. The Union's attempted interim appeal of the IHE's ruling under the provisions of Title 8, California Code of Regulations, section 20242 was denied by the Board without prejudice to subsequent presentation as an exception to the IHE's Decision. The Union presented no proof, and withdrew at the hearing, its objection alleging that Board agents acted improperly in failing to notify and/or process for voting eligible voters resident in Mexico. The IHE found that a purportedly violent confrontation between petitioner Ramon Ornelas and Union representative Alberto Escalante, in which Ornelas allegedly grabbed Escalante off the ground by his collar and threatened to kill him, in reality consisted of a fairly innocuous shoving match in which Ornelas knocked a stack of caricatures of himself and petitioner Zaragoza from Escalante's grasp, but returned them at the direction of a security guard. The IHE further decided that Escalante's distorted description of the incident to workers on a picket line could not serve as the basis for overturning the election. The IHE also found that no denial of access to hatchery workers had occurred that could reasonably affect employee free choice since the Union, in its efforts to persuade employees to

vote against the decertification petitioners, was not entitled to post-certification access under O. P. Murphy (1978) 4 ALRB No. 106, or strike access under Bruce Church (1981) 7 ALRB No. 20, and had failed to prove the Employer had waived the prohibition of hatchery access established under Title 8, California Code of Regulations, section 20901(a)(2)(A). Finally the IHE found the Union's sole witness provided insufficient proof to establish that the Employer's security guards seized Union leaflets from employees entering the Employer's property on the morning of the election. The IHE recommended that all the Union's objections be dismissed and the results of the decertification election certified.

Board Decision

At an earlier stage of these proceedings, the Board had determined that non-agricultural employees could file decertification petitions under the provisions of Labor Code section 1156.3(a). The Union subsequently filed timely exceptions to the IHE's dismissal of its objections, and again presented, as authorized by the Board, its objection alleging that statements attributed to the Employer and published shortly before the election had tended to affect employee free choice. The Board upheld the IHE's rulings, findings of fact, and conclusions of law, and adopted his recommendation to certify the results of the election. The Board noted that, while it could not determine with certainty whether an objection alleging that statements unattributed to the Employer concerning the effect of the election on the Employer's ongoing operations had been litigated, it had treated them as litigated, and on that basis determined that insufficient evidence had been presented to support a finding that such statements had created a atmosphere of fear or reprisal rendering employee free choice impossible.

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CASE SUMMARY

Mario Saikhon, Inc.
(UFW)

16 ALRB No. 1
Case No. 86-CE-47-EC

Background

The complaint alleged that the Employer, through its agents, discharged Andres Reyes from all company operations, and thereafter modified the discharge to a loss of seniority in the melon operations, because of his union and other concerted activities. The Employer, who admitted taking such adverse actions, asserted that it was justified in doing so because Reyes had taken time off without permission and/or later took time off after having been denied permission. Reyes had been granted a one-day leave of absence, but was admittedly absent from work for more than one day as a result of his incarceration in Mexico.

ALJ Decision

The ALJ found the Employer's absence policy to be rather lenient such that unexcused absences for whatever periods of time were frequently tolerated so long as "good" reasons were provided therefor, and that incarceration was not necessarily a "bad" reason for being absent from work. In applying the absence policy to the facts of this case, the ALJ concluded that Reyes was unlawfully terminated and the Employer's reasons therefor were pretextual. In reaching her conclusions, the ALJ discredited the testimony of the Employer's witnesses over that of the General Counsel's witnesses.

On two procedural matters raised by the Employer, the ALJ dismissed as without merit (1) the contention that the ALJ was biased from having decided unfavorably prior cases against the Employer; and (2) the Employer was denied due process when the ALJ permitted one of General Counsel's witnesses in her case in chief to later provide rebuttal testimony.

Board Decision

The Board affirmed the ALJ's rulings, findings and conclusions and ordered that the discriminatee be reinstated and made whole for losses incurred. In its analysis, the Board did not place the same degree of emphasis on the Employer's prior history of anti-union animus, noting that such evidence is but one factor to be considered in determining whether there was a violation of section 1153(c) of the Act. The Board was satisfied that the ALJ's analysis of the testimony provided a more than adequate basis for finding a causal connection between the employee's union activity and the Employer's corresponding adverse action. The Board also noted that the Employer failed to demonstrate bias and prejudice warranting disqualification of the ALJ.

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CASE SUMMARY

International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO, Local Union No. 389 (ADAM FARMS)

Case Nos. 87-RC-4-SAL(SM)
87-RC-4-1-SAL(SM)

16 ALRB No. 2

Background

On September 18, 1987, the Agricultural Labor Relations Board (ALRB or Board) certified Local 865, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO (Local 865) as the exclusive bargaining representative of all the agricultural employees of Adam Farms (Employer) in San Luis Obispo and Santa Barbara counties, State of California. Thereafter the parties held preliminary discussions in October and November, 1987, and met on January 7 or 8, 1988, at which meeting representatives of Local 865 informed the Employer that Local 865 was in the process of merging into Local 389, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO (Local 389). In effectuation of that merger, the membership of Local 865 had been notified of a ratification election to be held on November 12, 1987. At that meeting, 250 out of Local 865's membership of 450 approved the merger by voice vote. Unit members represented by Local 865 at the Employer's operations did not participate in the merger election due to the absence of a contract between the Employer and Local 865 at that time, but had presented a petition to Local 389 requesting representation. On February 16, 1988, representatives of Local 865 informed the Employer that Local 865 was disclaiming any interest in representing its employees, but rescinded that disclaimer on February 19, 1988, at the same time informing the Employer that Local 865 would request an amendment of its certification under the provisions of Title 8, California Code of Regulations, section 20385 to name Local 389 as the certified bargaining representative. In response, the Employer petitioned the Board to revoke the certification of Local 865 on March 1, 1988. Local 865's petition to amend certification was filed on October 10, 1989.

Regional Director's Report

The Regional Director of the Salinas Regional Office issued a Report and Recommendation to Amend Certification pursuant to 8 CCR section 20385(c) on December 26, 1989, in which he applied the standard for union affiliations, mergers, or other organizational changes found in NLRB v. Financial Institution Employees of America, Local 1182 (SeaFirst) (1986) 475 U.S. 192 [106 S.Ct. 1007, 121 LRRM 2741]. Pursuant to that standard, he found adequate due process in the notification of and attendance at Local 865's ratification election of November 12, 1987. He found no evidence of pressure, coercion, or restraint in the

conduct of the election. Noting that the Employer's workers were not present at the vote, he observed that by petition of September 8, 1987, those employees had expressed their willingness to be represented by Local 389, and further observed that SeaFirst explicitly rejects a requirement that non-members vote in union affiliation or merger decisions. The Regional Director likewise found sufficient continuity of representation as required by SeaFirst in the merger of one Teamsters local into another where the merger meets the requirements for such actions as set forth in the Teamsters constitution, the business manager of Local 865 responsible for administering the representation of Employer's workers would continue in that capacity with Local 389 and would maintain a business office at the same location as previously maintained by Local 865, and all the assets and liabilities of Local 865 were assumed by Local 389. Under such conditions the Regional Director found no question concerning representation was raised sufficient to require setting aside the merger. The Regional Director therefore recommended that the Board approve the merger and dismiss the Employer's petition to revoke certification.

Board Decision

The Board adopted the Regional Director's recommendation and approved the amendment of certification. The Board found SeaFirst, supra, applicable precedent under Labor Code section 1148, and concurred in the Regional Director's analysis thereunder. The Board particularly noted that no evidence of improper denial of voting opportunity, unfair disenfranchisement, manipulative foreclosure from participation, or deliberate exclusion appeared in the record or was argued by the Employer so as to require a finding of inadequate due process in the merger decision. The Board also observed that where, as here, no evidence indicates that unit employees were denied the opportunity to join the pre-merger certified local voluntarily, and the unit employees did, in fact, indicate their approval of the new local by signing a petition to that effect, adequate due process was maintained. The Board found that the merger of one local of an international labor organization with a lengthy history of representing agricultural employees into another local of the same organization was not a "dramatic change" under SeaFirst requiring a finding that a question concerning representation existed. In conclusion, the Board noted that employee dissatisfaction with the merger, if it came to exist, had an effective statutory remedy in the decertification process available under the ALRA, and that the Employer's interest in such matters was adequately protected by means of judicial review following a refusal to bargain.

Dissent

Member Ellis finds that the present state of the record does not permit the Board to amend the certification as petitioned, but rather, obligates it to dismiss the petition without prejudice to file another request upon showing by objective facts that the

amendment reflects the desires and wishes of the employees. Not only is the record devoid of any objective evidence of the employees' wishes, but there is reasonable cause to believe that the employees could have been informed of the prospective merger prior to the ALRB-conducted election causing this Board to be uncertain of whether the employees would have voted for Local 865 in light of its prospective merger with Local 389. Even if this Board were to find that evidence of majority support is neither necessary nor required so long as the continuity of representation analysis indicates that the new local is merely a continuation of the old, the majority fails dramatically to provide sufficient justification for a finding of continuity in this case for two reasons. The majority's per se rule of continuity for mergers of sister locals of the same international is contrary to prevailing precedent, and the analysis and consequent holding in Factory Services, Inc. (1971) 193 NLRB 722 [78 LRRM 1344], in which the National Labor Relations Board (NLRB or national board) denied the union's petition to amend the certification on the basis of a factual scenario almost identical to the one presently before this Board, is controlling. Member Ellis concludes that NLRB v. Financial Institution Employees of America, Local 1182 (1986) 472 U.S. 192 [106 S.Ct. 1007, 121 LRRM 2741] does not provide any authority for this Board to depart from the national board's traditional continuity of representation test, since the holding therein addresses only one narrow issue and that was to overturn the national board's Amoco IV rule. By proceeding to grant the petition to amend the certification not only in the absence of objective evidence of the employees' wishes, but also in the absence of an appropriate analysis of continuity of representation of the pre- and post-merger locals, the majority has in effect guaranteed a representational vacuum for the agricultural employees of Adam Farms. Member Ellis would rather ascertain whether the amendment of certification reflects the desires and wishes of the employees before he, by default, allows the Union to select for the employees their collective bargaining representative.

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CASE SUMMARY

Bruce Church, Inc.
(UFW)

16 ALRB No. 3
Case Nos. 87-CE-87-SAL
87-CE-87-1-SAL
87-CE-89-SAL
87-CE-89-1-SAL

Arturo Jimenez

Testimony

On July 23, 1987, Jimenez was working in the Employer's ground crew. When his crew began its morning break, he walked over to foreman Lizaola's machine crew, which was just beginning its break, and started talking to them about the Union. Jimenez told the workers they were being paid less than the ground crew, and that they shouldn't be so dumb but should be united to support the Union. Foreman Lizaola told Jimenez to shut up, and not to talk about the Union or Lizaola would punch him out. Jimenez responded that Lizaola should not be a "buey" and was not the owner of the company. Jimenez denied swearing at Lizaola or making any obscene gestures. Lizaola then called over two supervisors, who took Jimenez back to his crew. Lizaola later sent a message through Jimenez' foreman that he was going to attack Jimenez physically after work. The following morning, Jimenez asked Lizaola why he had sent such a message. Lizaola replied with a threat, and Jimenez responded as he had the previous day. Supervisors then arrived and proceeded to discharge Jimenez.

Jimenez' testimony was corroborated by several coworkers. However, Lizaola testified that Jimenez interrupted his crew while they were working and called Lizaola obscene and derogatory names when Lizaola asked him politely not to insult the workers and to leave the area. Lizaola denied threatening Jimenez or sending him any threatening message. Supervisor Gonzalo Estrada testified that during the July 23 incident Jimenez made an obscene gesture and referred to Lizaola in unflattering and obscene terms. Both Estrada and Jimenez' foreman, Marcelino Sepulveda, stated that on July 24 Jimenez again uttered obscenities before Sepulveda suspended him pending termination.

ALJ Decision

The ALJ credited General Counsel's witnesses regarding Lizaola's threats to Jimenez, and did not believe that Lizaola's mild request that Jimenez "please not insult the workers" would elicit from Jimenez a barrage of obscenities and complete unconcern about being fired. On the further basis of Jimenez' temperament and the corroboration of his testimony by coworkers, the ALJ concluded that Jimenez had not uttered obscenities during either the July 23 or the July 24 incident. The ALJ found that the Employer had given false and inconsistent reasons for discharging Jimenez. She

concluded that the Employer's asserted reasons for the discharge were pretextual, and that the real reason was Jimenez' union activities.

Board Decision

The Board declined to decide the case wholly on the basis of credibility determinations, but concluded that Jimenez was engaged in protected union activity during the July 23 incident and would not have been discharged in the absence of such activity. Regarding the issue of insubordination, the Board noted that under National Labor Relations Act (NLRA) precedent, an employee's use of profane or obscene language during the course of concerted or union activity does not necessarily take the activity outside the realm of protection of the NLRA, since the employee's right to engage in such activity must be balanced against the Employer's right to maintain order and respect.

In reviewing Jimenez' conduct, the Board applied the four-factor analysis established in Atlantic Steel Company (1979) 245 NLRB 814 [102 LRRM 1247]: (1) the place of the discussion; (2) the subject matter discussed; (3) the nature of the employee's outburst; and (4) whether the employee's outburst was in any way provoked by the employer. The Board affirmed the ALJ's finding that Lizaola's crew was on break when Jimenez talked to them, as well as her finding that the subject matter of Jimenez' remarks was within the realm of protected union activity. The Board found that while Jimenez may have used disrespectful language to Lizaola, he did not engage in any violent or threatening conduct. Further, Jimenez did not use any intemperate language on July 23 until Lizaola told him to "shut up" and threatened to "punch him out." The Board distinguished this case from David Freedman and Co., Inc. (1989) 15 ALRB No. 9, in which the employee's abusive use of profanity was unprovoked and no disciplinary action was taken until after the employee had engaged in several outbursts. The Board concluded that even if Jimenez' conduct on July 23 was as abusive as Respondent alleged, it was not sufficiently flagrant to take it outside the realm of protected activity.

Because the Employer alleged that Jimenez was discharged for his conduct on July 24 as well as July 23, the Board found it necessary to examine the Employer's motivation to determine whether Respondent would have discharged Jimenez for his alleged misconduct on July 24 even in the absence of his protected union activity on July 23. On the basis of Lizaola's open hostility to previous union activities of Jimenez and other employees, the timing of Jimenez' discharge (which occurred the very next day after his talking to Lizaola's crew about the Union), and the fact that the Employer gave shifting, inconsistent reasons for its adverse action, the Board concluded that Respondent would not have suspended and discharged Jimenez but for his protected union activity. Therefore, the Board affirmed the finding of a violation of section 1153(c) and (a) of the Act.

The Board also affirmed the ALJ's findings that Lizaola's threats to Jimenez violated section 1153(a), and that Respondent did not commit a violation through statements by Estrada that Jimenez would continue to "have problems" if he continued his union activities.

Victor Ramirez

Testimony

On August 6, 1987, Respondent was assigned to cut lettuce. Before starting work, he asked Foreman Lizaola for permission to get his lettuce knife from a member of Barajas' crew, which had not yet begun to work. As he was retrieving his knife, he asked nearby workers why they had not attended a union meeting the day before. Barajas told him to leave and said he should not be talking to the workers about the Union. Ramirez made no reply but simply left and walked back to his machine. Barajas followed him, saying the company would fire him and, to Lizaola, Barajas added, "And these s..o..b..'s we don't want here." Ramirez then went to the machine but found there was no place to work. When he told Lizaola there was no place for him, Lizaola replied that they were going to fire him in any case. Lizaola then suspended Ramirez pending termination, saying the reason was that Ramirez had insulted Barajas' mother. Ramirez denied that he had sworn at or threatened Barajas or insulted his mother.

Barajas claimed that the crew had been working for 20 to 30 minutes when Ramirez interrupted them, and that when he asked Ramirez not to interrupt the workers, Ramirez replied with an obscenity. Barajas claimed that when he complained to Lizaola, Ramirez again swore and insulted Barajas, and that Lizaola thereupon suspended him pending termination.

ALJ Decision

The ALJ found that General Counsel had established a causal connection between Ramirez' union activities and Ramirez' discharge, partly because the discharge came so close in time to Ramirez' talking to Barajas' crew about the Union. She found it significant that Ramirez' discharge occurred less than two weeks after Jimenez' under virtually identical circumstances. She discredited supervisor Estrada's account of the August 6 incident because of inconsistencies in his testimony, and concluded that the Employer's asserted reasons for suspending and discharging Ramirez were pretextual and that the true reason was his union activities. She concluded that Respondent had violated 1153(c) and (a) by suspending and discharging Ramirez. The ALJ also credited Ramirez as to anti-union remarks made to him by Barajas on August 6, and found that those remarks constituted a threat and violated section 1153(a).

Board Decision

As with Jimenez, the Board declined to decide this matter wholly on the basis of credibility resolutions. The Board found that Ramirez' remarks to Barajas' crew clearly constituted union activity, and that Ramirez' interruption of the crew, if any occurred, was very brief, so that production was not impeded. Although the evidence indicated Ramirez may have used intemperate language in responding to Barajas, there was no testimony that Ramirez engaged in any violent or threatening conduct. The Board concluded that Ramirez' conduct was not sufficiently flagrant to take it outside the realm of protected activity.

Regarding the Employer's motivation for discharging Ramirez, the Board found that Respondent would not have discharged Ramirez for his alleged misconduct in the absence of his protected union activity. The Board noted that both Barajas and Lizaola had previously expressed hostility toward the Union, and found that Barajas was disturbed by Ramirez talking to the crew specifically because he was talking to them about the Union. The Board also inferred anti-union motivation from Respondent's denial of any knowledge of Ramirez' union activity when there was uncontradicted evidence that it had such knowledge. The Board further inferred an improper motive from the timing of Ramirez' discharge (less than two weeks after Jimenez' discharge under nearly identical circumstances) and the fact that Lizaola brought one too many workers to the field on August 6, suggesting that Respondent intended to set Ramirez up for discharge that day.

The Board concluded that Respondent's suspension and discharge of Ramirez constituted violations of section 1153(c) and (a). The Board also affirmed the ALJ's finding of an 1153(a) violation for Barajas' threat to Ramirez on August 6. Finally, the Board affirmed the ALJ's findings of no violation for an incident when Lizaola allegedly threw a bundle of lettuce boxes at Ramirez.

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CASE SUMMARY

Namba Farms, Inc.
(UFW)

16 ALRB No. 4
Case No. 88-CE-39-EC(OX)

ALJ Decision

Following a full evidentiary hearing based on an unfair labor practice charge filed by the United Farm Workers of America, AFL-CIO, the ALJ determined that all of Respondent's asserted reasons for its failure to recall a six-member lettuce cutting crew were a pretext. Having disposed of all of Respondent's proposed reasons for its action, and following established precedents of both the National and Agricultural Labor Relations Boards in such matters, she drew an inference that Respondent's true motive was an unlawful one. Accordingly, she concluded that the crew was not recalled because it had attempted to effectuate a change in its terms and conditions of employment and thereby engage in concerted activity protected by the Agricultural Labor Relations Act. She recommended that the crew be offered reinstatement and be compensated for all economic losses it may have suffered as a result of the discriminatory refusal to rehire them at the start of the season for which they otherwise would have been recalled.

Board Decision

The Board affirmed the ALJ's rulings, findings and conclusions and adopted her recommended order.

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CASE SUMMARY

Triple E Produce Corporation (UFW)
16 ALRB No. 5
Case No. 89-RC-3-VI

Background

On July 31, 1989, pursuant to a Petition for Certification filed by the United Farm Workers of America, AFL-CIO (UFW or Union), the Agricultural Labor Relations Board (ALRB or Board) conducted a representation election among all agricultural employees of Triple E Produce Corporation (Employer) in San Joaquin County, California. The petition alleged that a strike was in progress. The initial Tally of Ballots revealed 173 votes for the UFW, 59 votes for no union, and 268 Challenged Ballots. As the latter were sufficient in number to determine the outcome of the election, the Regional Director (RD) of the Board's Visalia Regional Office conducted an administrative investigation. The RD determined that 132 of the challenged ballots were cast by economic strikers. The RD recommended that the 132 challenges be overruled and that those ballots be counted. Further, he recommended that the remaining challenged ballots be held in abeyance. Thereafter, the Employer and the UFW timely filed challenged ballot exceptions.

Board Decision

The Board adopted the RD's recommendation that the challenges to the 132 ballots cast by economic strikers be overruled. The Employer contended that the employees withheld their labor solely due to fear and that therefore there were no legitimate "strikers". The Employer submitted no authority for the proposition that violence rendered the strike void ab initio. The Board concluded that this case involved challenged ballot procedures rather than election objections. The issue for determination was one of eligibility. The Board found that the eligibility of "economic strikers" as determined by the RD under Board cases relating to pre-Act strikers was consistent with applicable NLRA precedent. The strikers were therefore eligible under this Act. In response to the Employer's argument that it had been denied due process because there had not been a hearing and opportunity to cross-examine the challenged voters, the Board concluded that no hearing was required absent material issues in dispute. The assertions of the Employer regarding the impact of the alleged violence on the individual challenged balloters were unsubstantiated. The Board consequently relied on the adequacy of the RD's investigation. The Board directed the RD to open and count the 132 "economic striker" ballots. The Board decided to hold in abeyance the remaining ballots and to consider them only if they proved outcome determinative following the issuance of a revised tally of ballots. Two Board members objected to holding the remaining ballots based on the belief that all challenged ballots should be investigated immediately following the election.

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CASE SUMMARY

Sam Andrews' Sons
(UFW)

16 ALRB No. 6
Case Nos. 81-CE-127-D, et al.
(8 ALRB No. 69)

General Counsel's Decision on Compliance

Pursuant to Labor Code section 1142(b), the United Farm Workers of America, AFL-CIO (UFW or Union) appealed to the Agricultural Labor Relations Board (ALRB or Board) from the General Counsel's conclusion that Sam Andrews' Sons (Respondent) had complied with the Board's Order in Sam Andrews' Sons (1982) 8 ALRB No. 69 to offer an irrigator position to Francisco Larios and to compensate him for all losses resulting from Respondent's discriminatory refusal to honor his application for work in the spring of 1981. Shortly after the discriminatory failure to hire Larios, Respondent's employees engaged in an economic strike. Five weeks after the onset of the strike, Larios indicated in his testimony in an ALRB hearing that he had not reapplied for work because he is not a strikebreaker. On that basis, General Counsel concluded that Larios probably would not have accepted an offer of employment had one been tendered at any time during the entire course of the strike and therefore his backpay should be tolled for the duration of the strike. Although the strike continued until at least July of 1982, Larios was not employed by Respondent until May of 1983. It was not clear whether Respondent ever offered Larios employment or the circumstances by which he ultimately commenced working for Respondent.

Board Decision

Relying on NLRB precedents which hold that the employer had the burden of demonstrating a good faith effort to extend a valid offer of reinstatement - that is, an offer of a specific position, with certainty as to the terms and conditions of employment, in circumstances which would afford an opportunity for consideration and response - the Board concluded that Larios' spontaneous response to a hypothetical question posed to him during the course of a hearing did not constitute a bona fide offer of reinstatement sufficient to either waive Respondent's obligation to offer him employment or to toll his backpay. In these circumstances, the Board followed the NLRB rule that any controversy as to the amount of loss suffered by a discriminatee was caused by the wrongdoer who created the uncertainty in the first instance and therefore should be resolved against the wrongdoer. On that basis, the Board remanded the matter to the General Counsel for a redetermination as to whether, and when, Respondent complied with the Board's Order in 8 ALRB No. 69 to offer Larios employment in its irrigation crew and to compute his backpay accordingly.

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CASE SUMMARY

Certified Egg Farms
and Olson Farms, Inc.
(Teamsters)

16 ALRB No. 7
Case Nos. 86-CE-86-SAL,
88-CE-6-SAL

Background

In 1985 and 1986, members of the Olson family engaged in a stock transfer among themselves whereby previously held family shares in Certified Egg Farms would be wholly absorbed by those family members who controlled Olson Farms and the former Certified operations would thereafter be known only as Olson Farms. Certified adopted the position that, as a result of the change in ownership among family members, Certified would cease to exist as would its status as an agricultural employer subject to the jurisdiction of the Agricultural Labor Relations Act (ALRA or Act). Thus, Certified reasoned, it was no longer obligated to honor the existing collective bargaining agreement between Certified and its employees' exclusive representative, General Teamsters, Warehousemen and Helpers, Local 890 (Teamsters or Union). Following Certified's repudiation of the contract, the Union filed unfair labor practice charges. Pursuant to an investigation of the charges, the Regional Director issued a complaint alleging that Certified had failed or refused to bargain in good faith within the meaning of the Act by, among other things, refusing to provide information requested by the Union, ceasing to deduct and remit Union dues and initiation fees, refusing to hear and resolve grievances filed pursuant to the agreement, particularly those concerning layoffs and the use of non-union drivers, refusing to acknowledge the Union's request to commence negotiations for a new contract and implementing the stock transfer without providing prior notice to the Union and the opportunity to bargain over the effects of the change in ownership. Matters alleged in the unfair labor practice charges and complaint were the subject of a full evidentiary hearing before an Administrative Law Judge (ALJ) in which all parties participated.

ALJ's Decision

As a preliminary matter, the ALJ found that Certified continued to exist as a corporate entity after the transfer of 100 percent of its stock to the Olson brother who also acquired all of Olson Farms and that there were no legally significant changes in Certified's organization for purposes of ALRA jurisdiction since its product line, mode of operation and business purpose remained constant. She concluded that Certified and Olson comprise an integrated agricultural enterprise and thus are a single employer under the Act. Therefore, the collective bargaining agreement remained viable. The ALJ also found that Certified/Olson had failed to meet its bargaining obligations in essentially the same manner as alleged in the unfair labor practices and complaint and recommended that the Board follow standard remedial provisions.

Board's Decision

Following the filing of exceptions to the ALJ's Decision, the Board found that Respondents had failed to assert a meritorious challenge to the ALJ's Decision and thus adopted her findings of fact and conclusions of law, as well as her recommended Order, with the exception that the Board struck her provision ordering Respondent to, upon request of the Union, offer to bargain about the effects of the stock transfer as the Board believes that a mere transfer of stock should not materially change an operation so as to require an employer to notify and bargain with the union concerning the change.

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CASE SUMMARY

Gerawan Ranches
(Independent Union of Agricultural Workers, International Brotherhood of Painters and Allied Trades, AFL-CIO; United Farm Workers of America, AFL-CIO, Intervenor)

16 ALRB No. 8

Case No. 90-RC-2-VI

Background

A representation election was conducted among all the agricultural employees of Gerawan Ranches (Employer) on May 9, 1990, by the Regional Director of the Visalia Regional Office of the Agricultural Labor Relations Board (ALRB or Board). The choices on the ballot were the Independent Union of Agricultural Workers, International Brotherhood of Painters and Allied Trades, AFL-CIO, the United Farm Workers of America, AFL-CIO (UFW or Union), and No Union. As the number of challenged ballots resulting was sufficient to affect the outcome of the election, the Regional Director investigated the eligibility of the challenged voters and issued a revised Tally of Ballots on May 11, 1990. That revised tally indicated that the remaining unresolved challenged ballots were not outcome determinative, and that no choice had obtained a majority. Pursuant to 8 CCR § 20375, the Regional Director therefore gave notice of a run-off election on May 14, 1990, to be conducted on the following day between the two choices that had obtained the greatest number of votes, the UFW and No Union. The initial Tally of Ballots in the run-off election indicated that the number of challenged ballots was outcome determinative so that the Regional Director again conducted an investigation of the challenged ballots.

Regional Director's Report

The Regional Director determined that 66 ballots containing the votes of workers whose names did not appear on lists maintained at their polling sites, but whose names did appear on the Employer's master list or on lists of crews furnished by the Employer or labor contractors, should be opened and counted. He further recommended that the challenges to 43 ballots cast by workers whose names did not appear on any applicable eligibility lists, and who executed sworn statements under penalty of perjury that they had not worked in the applicable eligibility period, should be sustained. The Employer took no exception to the Regional Director's recommendation to open and count the first group of 66 ballots, but excepted to the Regional Director's determination that the challenges to the second group of 43 ballots should be sustained. The Employer argued that the ballots should be counted because the workers casting those ballots had either worked for the Employer previously, and/or had worked a substantial number of days prior to the run-off election. The Employer also argued that

the Board's regulations governing run-off election eligibility did not foreclose the inclusion of workers who had not worked in the eligibility period for the original election. The Employer argued in conclusion that pursuant to the Board's decisions in Jack T. Baillie Co., Inc. (1978) 4 ALRB No. 47 and Mel-Pak Vineyards, Inc. (1979) 5 ALRB No. 32, as well as the decision of the National Labor Relations Board in Interlake Steamship Co. (1969) 178 NLRB 128 [72 LRRM 1008], the Board should establish the two and one-half week period intervening between the end of the original eligibility period and the run-off election as the eligibility period for the run-off election.

Board Decision

In the absence of exception taken to the Regional Director's recommended resolution of the challenges to the group of 66 voters, the Board adopted pro forma the Regional Director's recommendation to open and count those ballots. The Board, however, rejected the Employer's exception to the Regional Director's recommended resolution of the challenges to the group of 43 voters. The Board found no precedential support for the Employer's contention that workers be deemed eligible to vote merely because they had worked previously for the Employer and/or had worked for a substantial number of days in the interval between the end of the original eligibility period and the run-off election. The Board further determined that its run-off election regulations, read in context with the statute and its Election Manual, made clear that in the absence of extraordinary circumstances only those employees who worked in the original eligibility period were eligible to vote in the run-off election. Finally, the Board rejected the Employer's contention that extraordinary circumstances were present in this matter under Jack T. Baillie, supra, Mel-Pak, supra, and Interlake, supra. First, the cases do not permit an eligibility period of the kind sought by the Employer. Rather than a two and one-half week period between the end of the first eligibility period and the run-off election the cases allow only the payroll period ending immediately prior to the notice of the run-off election to be used as an alternative eligibility period to enhance representativeness. The Employer did not seek an eligibility period as permitted by the cases. Moreover, the six days intervening between original and run-off elections do not constitute a substantial period of time under the cases, nor does the turnover of employees in the unit constitute a substantial portion of the workforce (18.4%). Since the Employer set forth no precedent in support of its desired eligibility period and failed to satisfy the predicates for invocation of an altered eligibility period, the Board dismissed the Employer's exception and directed the Regional Director to open and count the 66 ballots whose challenges it had overruled and thereafter to issue and serve on the parties a revised Tally of Ballots.

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III

BOARD ORDERS ISSUED

A. 1989/90 Board Orders

Adm. No.	Case Name	Case Number	Date	Description
89-23	Sam Andrews' Sons	81-CE-127-D, et.al	7/14/89	Grant Charging Party Request for Review
89-24	Roberts Farms, Inc.	80-CE-66-D	7/12/89	Settlement Approval
89-29	Careau Group/Egg City	86-RD-6-SAL	7/20/89	Deny Interim Appeal
89-30	UFW & Careau/Egg City	86-RD-14-SAL	9/8/89	Deny Reconsideration
89-31	Carian/UFW	76-CE-37-R	9/20/89	Settlement Approval
89-32	Robert J. Lindeleaf	82-CE-54-SAL 84-CE-8-SAL	9/29/89	Deny Makewhole Reconsideration
89-33	Furukawa Farms, Inc.	89-RC-7-SAL (SM)	10/24/89	Deny CRLA Intervention In Investigative Hrng.
89-34	S & J Ranch	89-RC-2-VI	11/27/89	Objections Dismissal
89-35	Clark Produce	83-CE-130-SAL	12/5/89	Settlement Approval
89-36	San Clemente Ranch	77-CE-11-X	12/6/89	Close Case Approval
90-1	Ukegawa Brothers	75-CE-59-R	1/10/90	Deny GC's leave to Amend Backpay Spec and Motion to Reopen Hrng.
90-2	Paul W. Bertuccio	79-CE-140-SAL	1/24/90	Show Cause
90-3	Pleasant Valley	82-CE-16-OX	1/25/90	Grant Req. for Review
90-4	Careau dba Egg City	86-RD-6-SAL	2/6/90	Deny Reconsideration
90-5	Certified Egg Farms	88-CE-6-SAL	3/13/90	Deny GC to Strike Resp. Exceptions to ALJD
90-6	IUAW & Jack T. Baillie, Inc.	89-UC-1-SAL	3/30/90	Set Unit Clarification Pet. for Hrng.
90-7	Grow Art	82-CE-39-SAL	4/4/90	Settlement Approval
90-8	Robert J. Lindeleaf	82-CE-54-SAL	4/6/90	Settlement Approval

Adm. No.	Case Name	Case Number	Date	Description
90-9	O.P. Murphy Produce	77-CE-31-M	4/12/90	Grant Request for Reconsideration
90-10	San Clemente Ranch	77-CE-11-X	4/13/90	Makewhole Close Case
90-11	H.P. Metzler/Sons	87-PM-2-VI	4/18/90	Remand Case to RD
90-12	Paul W. Bertuccio	79-CE-140-SAL	4/25/90	Set Aside Makewhole
90-13	Sunny Cal Egg/Poultry	86-CE-2-EC	5/16/90	Settlement Approval
90-14	Paul W. Bertuccio	79-CE-140-SAL	5/18/90	Deny Reconsideration
90-15	J.R. Norton Company	79-CE-78-EC	5/22/90	Request for Review
90-16	J.R. Norton Company	86-CE-16-EC	6/14/90	Settlement Approval
90-17	J.R. Norton Company	79-CE-78-EC	6/21/90	Deny GC/Respondents Dismissal of Union's Petition for Review
90-18	Triple E Produce	89-RC-3-VI	6/22/90	Deny Reconsideration

IV

LITIGATION

A. Introduction

The majority of the Board's litigation continues to be defending Petitions for Writ of Review of Board decisions filed in the District Courts of Appeal. The law is continuing to evolve with regard to the legal basis for imposing a makewhole award and the appropriate method of measuring damages. The California Supreme Court addressed a makewhole issue in an opinion published during the past fiscal year. The Board has requested remand in some cases in light of the Supreme Court decision. Other cases involving these issues remain pending before the appellate courts. It is anticipated that new decisions of the Board applying the recent Supreme Court decision to pending cases will be appealed until the parties to the litigation are fully satisfied that all questions have been fully answered and the law is clearly established.

With the exception of the Supreme Court case and one other published decision of the Court of Appeal, the appellate courts have abided by the Board's construction of the ALRA and the policies it has established in furtherance of the Act. Other litigation has involved the Board's procedures and enforcement of Board orders.

B. Review of Board Decisions by the Appellate Courts

The trend of the Courts of Appeal to summarily deny hearing to parties petitioning for review of Board decisions has

continued during the 1989-90 fiscal year. The Courts of Appeal and Supreme Court uniformly denied review without opinion as to all new Petitions acted upon during the fiscal year. Some Petitions For Review filed in the latter part of the year remain pending in the Courts.

The Sixth District Court of Appeal issued a published decision in Giles Breaux v. ALRB (1990) 217 Cal.App.3d 730 (Breaux). The Breaux case dealt with an employee's objections to the use of his mandatory union dues for political purposes. The Board decision in the matter consisted of the approval of a unilateral settlement agreement between the General Counsel and the union. When the Board decision issued, the Board required the union to comply with federal precedent regarding the use of mandatory dues as it was then understood. The federal law continued to develop while the Breaux case was pending in the Court of Appeal. In supplemental briefing and oral argument to the court, the Board modified its position and urged the court to adopt existing federal precedent. The Court of Appeal adopted the federal precedent and established restrictions limiting the use of an employee's mandatory dues to collective bargaining related activities. The decision also set forth minimum procedures unions must follow to allow an employee to challenge the union's use of the mandatory dues for political purposes.

C. The Developing Law of Makewhole

The decision of the Third District Court of Appeal, Dal Porto v. ALRB (1987) 191 Cal.App.3d 1195 (Dal Porto) has

resulted in more litigation before the Board and the courts regarding "makewhole" than any other single subject matter. Unlike the federal statutes upon which the ALRA is based, the ALRA specifically requires the Board to make employees whole for the losses they incur as a result of an employer's unfair labor practice of refusing to bargain in good faith (Labor Code 1160.3). Dal Porto held that the Board cannot impose a makewhole award if the employer can prove that no contract would have been entered into by the employer and union even if the employer had bargained in good faith.

Following the Dal Porto decision, the Board was called upon to determine whether an employer should be permitted to present a "Dal Porto" defense to liability for a makewhole award if it totally refused to bargain. The Dal Porto decision dealt with a case where the employer bargained, but it was determined by the Board that the employer bargained in bad faith. The employer claimed that legitimate issues that appeared during the course of bargaining prevented the possibility of agreement between the parties. The Board decided that with regard to absolute refusals to bargain, there was no history of bargaining to support a determination that legitimate issues prevented agreement, and refused to allow a Dal Porto showing in those cases. The California Supreme Court addressed the issue in Arakelian v. ALRB (1989) 49 Cal.3d 1279 (Arakelian).

The employer in Arakelian totally refused to bargain with the union and in bad faith alleged as a defense that the

union was improperly certified as the bargaining representative of its employees. The employer claimed that no contract would have been entered into between the parties had it bargained in good faith. The employer cited as evidence a later history of bargaining and the results of the union's bargaining with other employers. The Supreme Court held that absent a history of bargaining, any evidence that may be offered by an employer who has not bargained is too speculative to be considered relevant to the question of whether a contract would have been agreed to. However, the court further held that the evidence that would tend to show that no contract would have been entered into by the parties may be introduced in evidence at the compliance hearing "to the extent it is relevant" to the question of the amount of makewhole to be awarded. Neither the Board nor the courts have yet defined what evidence is relevant to a determination of damages. The question appears to be fertile ground for further litigation at all levels.

D. Other Court Activity

There has been little new litigation other than appeals of Board decisions during fiscal year 1989-90. A case involving an employer's claim to a constitutional right to jury trial in a makewhole and backpay case remains pending before the Fourth District Court of Appeal. Another appeal is pending before the Fifth District Court of Appeal. In that case, the Board sought judicial enforcement of a Board order in the Superior Court. Judgment was entered for the Board, and the Employer has appealed in an attempt to reopen the Board proceedings.

APPENDIX A: STATISTICAL TABLE

FISCAL YEAR JULY 1, 1989 - JUNE 30, 1990

Petitions for Elections[1]

	Visalia	El Centro	Salinas	Total
1. Filed:				
RC[2]	7	4	3	14
RD[2]	9	3	0	12
2. Withdrawn:				
RC	0	0	1	1
RD	1	0	0	1
3. Dismissed:				
RC	0	1	0	1
RD	1	1	0	2
4. Elections Held:				
RC	8	3	3	14
RD	7	2	0	9

Unfair Labor Practices - Action Taken[3]

	Visalia	El Centro	Salinas	Total
Charges Filed:				
CE[4]	89	80	100	269
CL[4]	38	2	21	61
Charges Into Complaint:				
CE	52	9	20	81
CL	6	3	4	13
Complaints Issued:				
CE	10	5	7	22
CL	1	1	2	4

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[1]The number of petitions withdrawn, dismissed, and resulting in elections does not equal the number of petitions filed because of the carryover of workload from one fiscal year to the next.

[2]RC - Representation; RD - Decertification.

[3]Data reflects actual work performed during Fiscal Year 1989-90. Because the Agency is actively working on cases from each of the previous fiscal years, there will be discrepancies between the data reported.

[4]CE - Charge against employer; CL - Charge against labor union.