ANNUAL REPORT

OF THE

AGRICULTURAL LABOR RELATIONS BOARD

FOR FISCAL YEARS

2000-01 AND 2001-02

Members of the Board

GENEVIEVE A. SHIROMA, Chairwoman[1]
IVONNE RAMOS RICHARDSON[2]
GLORIA A. BARRIOS
HERBERT O. MASON

J. ANTONIO BARBOSA, Executive Secretary

PAUL RICHARDSON, General Counsel[3]
NORMA TURNER, General Counsel[4]

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[1] Appointed January 12, 2001.
[2] Separated January 17, 2002.
[3] Term expired August 30, 2000.
[4] Appointed General Counsel August 31, 2000.

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INTRODUCTION

Labor Code section 1143 requires the Agricultural Labor Relations Board (ALRB or Board) to report in writing to the Legislature and to the Governor stating in detail the cases it has heard, the decisions it has rendered, the names, salaries, and duties of all employees and officers in the employ or under the supervision of the Board, and an account of all moneys (backpay)[5] it has disbursed.

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

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

[5] Backpay represents monetary awards to farm workers in unfair labor practice cases.

Genevieve Shiroma, Chair

Gloria Barrios, Member

Bert Mason, Member

J. Antonio Barbosa,
Executive Secretary

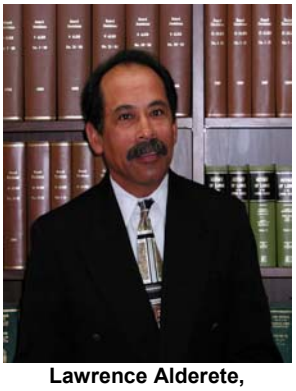
ANNUAL MESSAGE FROM THE BOARD

The close of Fiscal Year 2000-2001 marked the end of this agency's twenty-fifth year. Much happened in those years. Created by urgency legislation in 1975, the original Board was as controversial as the NLRB was upon its inauguration. Accused by unions of not being aggressive enough and by employers of being too aggressive, the Board was the target of severe and sustained criticism. During the 1980's, it suffered severe budget cutbacks, which resulted in its eventually being reduced from 250 employees statewide to fewer than 50 and from nine offices to three. Still, the Board endured, conducting elections, issuing decisions and laying down the main lines of a body of law.

The 25-year anniversary provided more than an occasion to look back; it marked what we hope will be the beginning of a renewed promise to California's farm workers and their employers. On the basis of a series of statewide meetings with representatives of labor and management, this Board took a hard look at the changes that have accrued over the past twenty-five years and concluded that the Board must

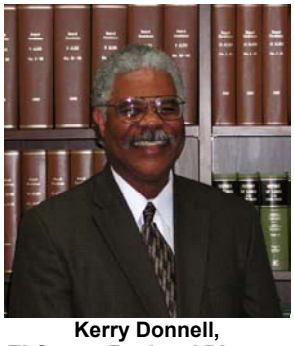
adopt new methods to deal with changes in the farm labor scene. This Board is especially proud that, in response to our conducting the first ever Needs Assessment, the Legislature and the Governor approved a series of initiatives that we hope will go a long way towards revitalizing this agency. We have sought to make the agency more accessible and to accelerate our response time. Though more must be done, we are committed to doing all we can do to serve California's farm labor community.

Norma Turner,
General Counsel



Lawrence Alderete,
Visalia Regional Director

Freddie Capuyan,
Salinas Regional Director



Kerry Donnell,
El Centro Regional Director

ANNUAL MESSAGE FROM THE GENERAL COUNSEL

As my tenure with the Agricultural Labor Relations Board began on the very day the Act went into effect, I come to my present position from the unique vantage point of 25 years as counsel to eight different Board members. From that experience I know that each case is different, that there are still open questions of law, and that we will continue to address emerging issues. And because our actions will be viewed as precedent for the manner in which parties conduct their relations with each other, it is incumbent upon us to examine all dimensions of an issue. Accordingly, we are obligated to proceed solely on the basis of sound principles of labor law, mindful of our duty to interpret the Act with clarity and predictability.

I

THE AGRICULTURAL LABOR RELATIONS BOARD

A. Mission

The mission of the ALRB, as set forth in the preamble to the Agricultural Labor Relations Act (ALRA or Act), is "to ensure peace in the fields by guaranteeing justice for all agricultural employees and stability in agricultural labor relations." This mission is carried out through vigorous, but fair, enforcement of the ALRA, so as to protect the right of agricultural workers to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, as well as to refrain from such activities. Moreover, it is the mission of the Board to resolve disputes arising under the Act by issuing timely, consistent, and impartial decisions, thus increasing the accountability and credibility so essential to engendering respect for the purposes and policies of the Act. Through these efforts, together with public outreach designed to educate both farm workers and their employers of their respective rights and obligations under the Act, the Board strives to fully effectuate the purposes of the Act as intended by the Legislature at the time of its passage in 1975.

B. Administration

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

The agency's authority is divided between a Board comprised of five members and a General Counsel, all of whom are appointed by the Governor and subject to confirmation by the Senate. Together, they are responsible for the prevention of those practices which the Act declares to be impediments to the free exercise of employee rights. When a charge is filed, the General Counsel conducts an investigation to determine whether an unfair labor practice has been committed. If the General Counsel believes that there has been a violation, he or she issues a complaint. The Board provides for a hearing to determine whether a respondent has committed the unfair labor practice alleged in the complaint.

Under the statute, the Board may delegate, and in practice has delegated, its authority to hear such cases to Administrative Law Judges (ALJ's) who take evidence and make initial recommendations in the form of written decisions with respect to issues of

fact or law raised by the parties. Any party may appeal the findings, conclusions or recommendations of the ALJ to the Board, which then reviews the record and issues its own decision and order in the case. Parties dissatisfied with the Board's order may petition for review in the Court of Appeal. Attorneys for the Board defend the decisions rendered by the Board. If review is not sought or is denied, the Board may seek enforcement of its order in superior court. When a final remedial order requires that parties be made whole for unfair labor practices committed against them, the Board has followed the practice of the National Labor Relations Board (NLRB) in holding supplemental proceedings to determine the amount of liability. These hearings, called compliance hearings, are also typically held before ALJ's who write recommended decisions for review by the Board. Once again, parties dissatisfied with the decision and order issued by the Board upon review of the ALJ's decision may petition for review of the Board's decision in the Court of Appeal. If the court denies the petition for review or orders the Board's order in a compliance case enforced, the Board may seek enforcement in superior court.

In addition to the Board's authority to issue decisions in unfair labor practice cases, the Board, through personnel in various regional offices, is responsible for conducting elections to determine whether a majority of the employees of an agricultural employer wish 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, another labor organization, or no labor organization at all.

Because of the seasonal nature of agriculture and the relatively short periods of peak employment, the Act provides for a speedy election process, mandating that elections be held within seven days from the date an election petition is filed, and within 48 hours after a petition has been filed in the case of a strike. Any party believing that an election was conducted in an inappropriate unit, or that misconduct occurred which tended to affect the outcome of the election, or that the election was otherwise not fairly conducted, may file objections to the election. The objections are reviewed by the Board's Executive Secretary, who determines whether they establish a prima facie case that the election should not have been held or that the conduct complained of affected its outcome. If such a prima facie case is found, a hearing is held before an 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, courts will not review the decisions of the Board in representation matters. In addition to, and as part of the agency's processing of unfair labor practices, elections, and compliance matters, the Executive Secretary and the Board are frequently called upon to process and decide a variety of motions filed by the parties. These motions may concern novel legal issues or requests for reconsideration of prior Board action, as well as more common requests for continuance of hearings, requests for extensions of filing deadlines for exceptions and briefs, motions to change the location of a hearing, requests by the parties

to take a case off calendar because of a proposed settlement agreement, and approvals of proposed settlements.

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

C. Review of Accomplishments and Goals

Fiscal Years 2000-2001 and 2001-2002 were a period of great activity and achievement, but also uncertainty as the legislature and the Governor grappled with a budget deficit. The Agency experienced an across the board increase in unfair labor practice (ULP) charges filed and election activity. There were 1,616 unfair labor practice charges filed with the ALRB during the 2000-01 and 2001-02 fiscal years. This represented a 430% increase from the previous year. The Agency also closed 1,659 ULP cases, representing a 715% increase. Election activity increased during the 2000-01 and 2001-02 fiscal years with 19 filings for either union certification or decertification. Following investigation, 13 elections were ultimately held. During this period of time, the Board issued 11 decisions involving allegations of ULP's or matters relating to employee representation. In addition, the Board issued 22 administrative orders.

The current Board has taken several steps to deal with compliance in cases where collection has been impossible because the employers against whom judgments were entered enforcing Board orders filed bankruptcy or went out of business. The Board, in a published decision, laid out clear and exacting standards for closure of these cases, requiring that the regional office recommending closure show that there is no reasonable likelihood of collecting any of the amount owed. The Board has exerted special efforts in collections in these cases, including the debtor examinations and retention of experts to assist in locating assets and in determining if other entities or persons may be made derivatively liable for the debts. Finally, where cases must be

closed without funds having been recovered after collection efforts have been exhausted, the passage of SB 1198 (Romero) establishing the Agricultural Employee Relief Fund makes it possible for the Board to provide some relief to the affected employees where no collection from any respondent or successor has been possible.

The General Counsel also established a target of 90 days for the first action on all unfair labor practice charges to emphasize immediate investigation and quick resolution. Regional Office staff was encouraged to fully explore all informal settlement possibilities to quickly and fairly resolve cases.

The Board also expanded its outreach efforts in a variety of ways. Regional staff attended and hosted events designed to inform the public of the availability of the agency and its resources. Examples of outreach efforts include: coordination of several multi-agency forums throughout southern California that included such agencies as the Department of Fair Employment and Housing, the Labor Commissioner, Cal-OSHA, and the Employment Development Department; participation in educational health forums for migrants; participation in the State Migrant Parent Conference, appearances on Spanish language radio programs, and attendance by ALRB staff at events such as the annual Farmworker Breakfast in Calexico. The Board also coordinated with the Employment Development Department to utilize One-Stop Centers for farm workers to obtain information about their rights while obtaining other vital services.

Because fiscal year 2000-2001 marked the Board's Twenty-fifth Anniversary, the Board decided to sponsor a Conference both to commemorate the passage of the ALRA,

as well as to provide a forum for practitioners and academic leaders to assess the changes in the farm labor scene since the passage of the Act. This Conference, held in October 2000, drew participants from up and down the state and produced a number of significant papers. The discussions that were generated by labor and management representatives provided a significant opportunity to appraise the Board's role in the changing agricultural labor relations scene.

The Agency also embarked on opening and staffing a field office in the south central coast. The Legislature approved the first increase in the agency's budget in nearly twenty years for the office because of the dramatic increase in organizing activity and in unfair practice filings during the preceding seasons. Since there was not an office in this area, the increased activity resulted in increased costs and decreased efficiency. Employees and employers located in this area had been forced to travel to El Centro, Salinas or Visalia, to file election petitions or unfair labor practice charges. Correspondingly, staff from one of these regions had to travel the same distances in order to conduct the routine business of the agency. In 1999, for example, staff from the regional offices had to travel to Ventura County to conduct elections at multiple locations of Coastal Berry over a period of several days resulting in considerable costs.

Under the aegis of the new General Counsel, Norma Turner, and the reappointed Chairperson, Genevieve Shiroma, the agency's efforts to find a suitable location and open the new office got underway during the 2000-01 Fiscal Year. By the early part of January 2001, the office in Oxnard was open and staffed.

Fiscal Year 2001-02 brought great change—and opportunity—to the ALRB. After standing alone since our creation, the Board became a constituent part of the State's newly created Labor and Workforce Development Agency. With our independence as a quasi-judicial body assured by the new legislation, the possibility of sharing resources in a time of pinched budgets makes us confident that we can continue to do our job as we contribute to a coordinated labor policy for the State of California. We have sought to overcome the scarcity of resources in other ways. The most critical has been the agency's effort to specially outfit vans to create mobile offices that can respond to emerging needs and situations throughout the state.

The Legislature also inquired about the Board's current ability to perform its statutory functions within its existing budget constraints. Specifically, the Board was asked:

1. To evaluate its current outreach and education efforts and project its future needs in this area;

2. To assess the ease with which members of the farm worker and grower communities can avail themselves of the Board's services and to recommend remedying shortfalls in this area;

3. To project anticipated workload changes that might result from changes in worker populations or industry practices; and

4. To assess its ability to monitor compliance and its ability to process unfair labor practice charges and to submit backpay and make-whole payments as directed by adjudication.

To answer these questions, the Board conducted a series of public meetings throughout the state. In January 2001 it made its report to the Legislature, essentially concluding that severe budget cuts, which had effectively reduced its presence throughout the state, had hampered its ability to enforce the Act. As a result, the Board was granted 4.5 additional positions in the Regional Offices and funding to undertake an outreach program. The actions taken by both the Legislature and the Governor recognized the agency's essential functions and signaled their intention to increase the effectiveness of the agency.

Although the new Mandatory Mediation and Conciliation legislation will not take effect until January 1, 2003, Fiscal Year 2001-02 saw debate begin over the first significant amendments to the ALRA since passage of the Act. While the agency was largely on the sidelines during the debate over the new legislation, the Board was prompt to respond to the Legislature and the parties alike whenever called upon to do so. We look forward to the implementation of the new legislation in the upcoming Fiscal Year.

D. Operational Summary for Fiscal Years 2000-01 and 2001-02

1. Unfair Labor Practices

During the 2000-01 fiscal year, 1,105 unfair labor practice (ULP) charges were filed with the ALRB (Chart I). Of the 1,105 charges, 1,078 were filed against employers and 27 were filed against labor organizations.

Subsequently, during the 2001-02 fiscal year, 511 ULP charges were filed. Of those 511 charges, 495 were filed against employers and 16 were filed against labor organizations.

Chart I: ULP Charges Filed

Type of Charge	FY 1998-99	FY 1999-00	FY 2000-01	FY 2001-02
Against Employers	281	322	1,078	495
Against Unions	14	54	27	16
Total	295	376	1,105	511

The General Counsel closed 610 charges, sent 136 charges to complaint, and issued 26 complaints in Fiscal Year 2000-01 (Chart II). Four hundred seventy-four (474) charges were closed due to dismissal, withdrawal or settlement.

During Fiscal Year 2001-02, the General Counsel closed 1,049 charges, sent 451 charges to complaint, and issued 34 complaints (Chart II). Five hundred ninety-eight (598) charges were closed due to dismissal, withdrawal or settlement.

Chart II: ULP Charges Closed

Type of Closure	FY 1998-99	FY 1999-00	FY 2000-01	FY 2001-02
Dismissed	175	109	337	463
Withdrawn	28	80	118	100
In to Complaint	18	42	136	451
Settled	7	1	19	35
Total	228	232	610	1049

Chart III: Disposition of Complaints
(Prior to ALJ or Board Decision)

Disposition	FY 1998-99	FY 1999-00	FY 2000-01	FY 2001-02
Withdrawn before hearing	2	0	1	1
Settled before hearing	7	2	18	6
Settled at hearing	3	2	4	8
Settled after hearing	1	0	0	0
Total	13	4	23	15

Administrative Law Judges commenced nine ULP hearings in 2000-01 and issued eight decisions (Chart IV).

In Fiscal Year 2001-02, the Administrative Law Judges commenced 11 ULP hearings and issued 6 decisions (Chart IV).

Chart IV: Hearings and ALJ Decisions

Hearings and Decisions	FY 1998-99	FY 1999-00	FY 2000-01	FY 2001-02
ULP Hearings	**5**	**3**	**9**	**11**
ULP Decisions	**3**	**3**	**8**	**6**

2. Elections

Five petitions for certification and four petitions for decertification were filed in 2000-01. After investigation, three of the petitions were dismissed, resulting in six elections being held during the fiscal year. In one case, objections were filed and the Board issued one certification in 2000-01.

Investigative Hearing Examiners (IHE's) commenced one hearing involving election-related matters in fiscal year 2000-01, and issued one decision.

During Fiscal Year 2001-02, eight petitions for certification and two petitions for decertification were filed. After investigation, two of the petitions were dismissed and one petition was withdrawn, resulting in seven elections being held during the fiscal year. In four cases objections were filed and the Board issued seven

certifications in 2001-02. No hearings involving election-related matters were held in fiscal year 2001-02.

3. Board Decisions Issued

The Board issued a total of four decisions involving allegations of ULP's or matters relating to employee representation during fiscal year 2000-01. Of the four decisions, three involved ULP's, and one was related to elections. A summary of each decision is contained in Attachment B.

During fiscal year 2001-02, the Board issued a total of seven decisions involving allegations of ULP's or matters relating to employee representation. Of the seven decisions, four involved ULP's, and three were related to elections. A summary of each decision is contained in Attachment C.

4. Board Administrative Orders

The Board issued 15 numbered administrative orders in fiscal year 2000-01. A description of each order is contained in Attachment D.

During fiscal year 2001-02, the Board issued seven numbered administrative orders. A description of each other is contained in Attachment E.

5. Compliance Activity

At the beginning of 2000-01, 31 cases were ready for compliance action. This included Board orders and ALJ decisions which had become final. Ten cases were closed in 2000-01.

During the 2000-01 fiscal year, a total of $549,764.94 was distributed to 716 agricultural employees.

As fiscal year 2001-02 began, 30 cases were ready for compliance action including Board orders and ALJ decisions which had become final. Five cases were closed in 2001-02.

During the 2001-02 fiscal year, a total of $154,213.28 was distributed to 510 agricultural employees.

II

LITIGATION

In the majority of cases, parties to decisions of the Board file petitions for review in the courts of appeal pursuant to Labor Code section 1160.8. Thus, a significant portion of the Board's workload is comprised of writing and filing appellate briefs and appearing for oral argument in those cases. Where final orders of the Board are not complied with voluntarily, the Board must seek enforcement in the superior courts. At times, the Board is also required to defend against challenges to its jurisdiction and other types of collateral actions in both state and federal courts.

Descriptive summaries of the Board's litigation docket are provided below.

VINCENT B. ZANINOVICH & SONS, INC. v. ALRB
5th District Court of Appeal, FO34095 (25 ALRB No. 4)

On September 24, 1999, Vincent B. Zaninovich & Sons, Inc. filed a petition for writ of review of a Board decision in which it was found that the Zaninovich's Vice President threatened employees with discharge if they again sought the assistance of a union. The Board dismissed an additional allegation that a crew was not rehired due to its central role in a union organizing campaign. On October 26, 2000, the Fifth DCA summarily denied the petition for writ of review. Zaninovich sought review by the California Supreme Court, but the Court denied the petition for review on December 20, 2000.

COASTAL BERRY COMPANY, LLC v. ALRB
6th District Court of Appeal, HO21585 (26 ALRB No. 3)

On June 6, 2000, Coastal Berry Company, LLC filed a petition for writ of review of a Board decision in which it was found that Coastal unlawfully discharged seven employees who allegedly engaged in serious strike misconduct. An additional employee was ordered reinstated pursuant to a settlement agreement reached at hearing. The Board found that, as to the seven individuals, it was not proven that they engaged in serious strike misconduct warranting discharge or they engaged only in conduct for which others suffered no discipline. On November 27, 2001, the Sixth District Court of Appeal reversed and remanded the case for reconsideration in accordance with its instructions.

Reconsideration of the case on remand became a lengthy matter due to the need to allow the parties to submit additional briefs and to the need to rule on a motion to reopen the record, which resulted in an interim Board order requiring the assigned Administrative Law Judge to conduct an in camera inspection of declarations submitted in related election cases. As of the end of the 2001-2002 fiscal year, the case remained pending before the Board.

TURCO DESERT COMPANY v. ALRB
4th District Court of Appeal, E030125 (27 ALRB No. 4)

On August 28, 2001, Turco Desert Company filed a petition for writ of review of a Board decision in which it was found that an employee was unlawfully discharged for making comments to a supervisor about the supervisor's rude treatment of the work crew in the context of a dispute over the length of breaks. As of the end of the 2001-2002 fiscal year, this matter remained pending before the court.

CIENIGA FARMS, INC. v. ALRB
2nd District Court of Appeal, B152844 (27 ALRB No. 5)

On September 10, 2001, Cieniga Farms, Inc. filed a petition for writ of review of a Board decision in which the Board found that a group of employees had been discharged unlawfully for refusing to work and questioning the rate of pay. On May 22, 2002, the court summarily denied the petition. The Petitioner did not seek review in the California Supreme Court.

THE ELMORE COMPANY v. ALRB
4th District Court of Appeal, D040054 (28 ALRB No. 3)

On May 6, 2002, The Elmore Company filed a petition for writ of review of a Board decision in which the Board found that an employee was unlawfully discharged for engaging in a group protest over schedule and work policy changes. The Board found that the employee's protest remained protected even though he used an obscene term towards his supervisor. The Board further found that even if the employee's epithet was unprotected he would not have been discharged but for his earlier activity that indisputably was protected. As of the end of the 2001-2002 fiscal year, this matter remained pending before the court.

III

REGULATORY ACTIVITY

During the 2000-2001 fiscal year, the Board did not engage in any formal rulemaking activity. However, the Board did preparatory work on various proposed changes to its regulations that were the subject of a formal rulemaking process initiated in December of 2001. Those proposals involved the following subjects: repeal of the Board's regulation on the content of authorization cards, simplification of procedures for the filing of unfair labor practice charges, clarification of where to file answers to complaints, clarification of procedures for the submission and approval of settlement agreements, clarification of restrictions against petitioners and supervisors acting as election observers, and confidentiality of employee declarations in challenged ballot proceedings. On February 6, 2002 and March 13, 2002, the Board adopted these proposals, as modified. The Office of Administrative Law approved the proposals on May 9, 2002, and they became effective on June 8, 2002.

On January 1, 2002, SB 1198, which created the Agricultural Employee Relief Fund, became effective. Under SB 1198 (creating new section 1161of the Agricultural Labor Relations Act), where employees cannot be located for two years after collection of monies on their behalf, those monies are to go into the Fund and distributed to employees in other cases where collection of the full amount owed is impossible. The Board immediately began formulating implementing regulations, with the assistance of its Ad Hoc Advisory Committee consisting of interested parties that often appear before

the Board. The formal rulemaking process was initiated with the publication of the notice of proposed regulatory action, published March 15, 2002. A public hearing was held on May 8, 2002, and the written comment period later was extended to July 1, 2002.

IV

LEGISLATION

While the Board on its own initiative does not propose legislation, nor publicly support or oppose pending legislation, it does track legislation that may have an impact on its operations. In this way, the Board is prepared to implement any such legislation should it become law.

Among the bills tracked during the 2000-2001 and 2001-2002 fiscal years were:

SB 25—This bill would create a cabinet level labor agency within which the ALRB would reside for administrative purposes (though it would remain independent in terms of policy and case adjudication). The bill was vetoed by the Governor on October 12, 2001.

AB 2799—This bill, which was signed by the Governor on September 29, 2000, provides, inter alia, that records kept in electronic format, which are obtainable under the Public Records Act, must be made available in that format and that denials of written requests for public records also be in writing.

SB 1198—This bill would create the Agricultural Employee Relief Fund consisting of moneys collected by the Board on behalf of employees who cannot be located after two years. The moneys would then be used to pay aggrieved employees the unpaid balance of any monetary relief owing where, after making reasonable efforts to collect the money from the employer, the Board deems collection impossible. The Governor signed the bill on September 29, 2001.

AB 192—This bill would make clarifying amendments to the Bagley-Keene Open Meeting Act and define "meeting" for the purposes of the act to include any congregation of a majority of the members of a state body at the same time and place to hear, discuss, or deliberate upon any item that is within the subject matter jurisdiction of the state body. The Governor signed the bill on September 5, 2001.

AB 805—This bill would require each state agency that maintains a website to provide links on the home page of its website to appropriate non-English information in any non-English language spoken by a substantial number of the public served by the agency. The bill died pursuant to Art. IV, sec. 10(c), as it was not passed by the house of origin by January 31, 2002.

AB 1015—This bill, prior to being amended on June 20, 2001, purported to allow claimants to file with the Department of Fair Employment & Housing claims of violations of the Agricultural Labor Relations Act (ALRA), the National Labor Relations Act, and the various statutes under the jurisdiction of the Public Employment Relations Board. In light of the June 20 amendments, the bill no longer has any impact on the Board or ALRA.

AB 471—This bill, inter alia, would establish collective bargaining rights for racetrack backstretch employees. The bill authorizes the California Horse Racing Board to contract with the ALRB for the services of investigators or counsel "to investigate, make findings of fact, and issue recommendations to the stewards with

respect to disputes and any alleged unfair labor practices." The bill was signed by the Governor on August 12, 2001.

AB 856—This bill contains the same provisions regarding backstretch employees as AB 471, but also includes various provisions on gambling and amends AB 471 to delete the language in AB 471 concerning contracting with the ALRB. The bill was signed by the Governor on October 13, 2001.

SENATE CONSTITUTIONAL AMENDMENT 7-- This resolution would propose a constitutional amendment that would provide that access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in the state. As of the end of the 2001-2002 fiscal year, the bill has passed the Senate and was pending in the Assembly.

SB 1236 (LABOR AGENCY)—This bill would create a Labor & Workforce Development Agency headed by an agency secretary appointed by the Governor. The new agency would include the ALRB for administrative purposes, though there is language in the bill intended to ensure that the ALRB retains the independent policymaking authority it currently enjoys. As of the end of the 2001-2002 fiscal year, the bill has passed the Senate and was pending in the Assembly.

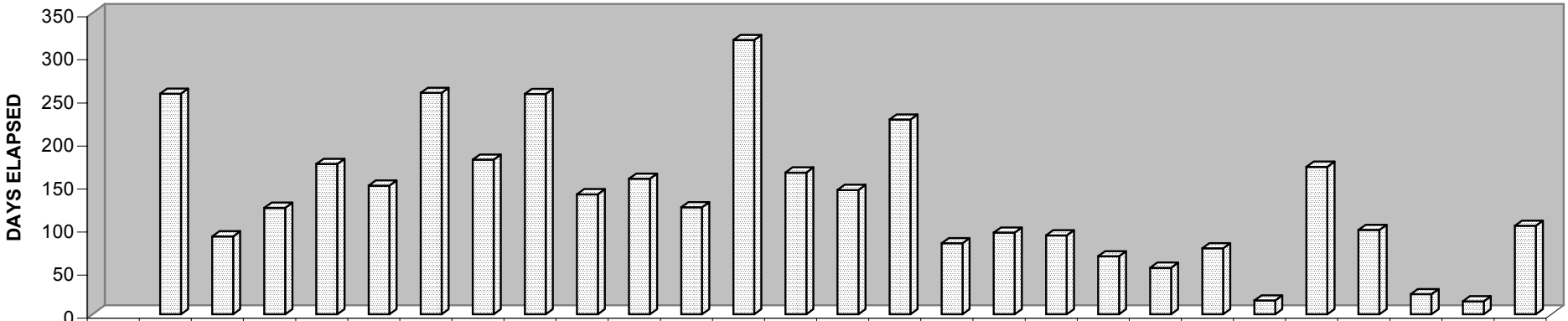
SB 1736 (AGRICULTURAL EMPLOYER-EMPLOYEE DISPUTES: BINDING ARBITRATION)—In its original form, this bill would have provided for binding interest arbitration in selected disputes between agricultural employers and labor organizations, including those situations where the parties reach impasse in negotiations

for an initial collective bargaining agreement. It was later amended to incorporate by reference the provisions of the Business and Professions Code relating to collective bargaining for backstretch employees (see AB 471 and AB 856, above). These provisions were later amended out of the bill and replaced by straightforward provisions requiring mandatory mediation, and if that fails, binding interest arbitration. As of the end of the 2001-2002 fiscal year, the bill as amended was pending in the Assembly.

SB 1818 (BACK PAY AWARDS)—Designed to counteract the U.S. Supreme Court's decision in *Hoffman Plastic Compounds v.* NLRB, in its original form this bill would have provided that where back pay awards are preempted by federal immigration law, the amount of the back pay award shall instead be levied as a civil penalty, and the affected employee may recover the amount of the penalty. If this latter provision were found to be preempted, the penalty would be deposited in a special fund named the "Victimized Workers Labor Rights Enforcement Fund, to be administered by the Director of Industrial Relations. As of the end of the 2001-2002 fiscal year, the bill had passed the Senate and was pending in the Assembly.

Petition to Certification

Average Days Elapsed for Filings Per Fiscal Year



Year	1975-76	1976-77	1977-78	1978-79	1979-80	1980-81	1981-82	1982-83	1983-84	1984-85	1985-86	1986-87	1987-88	1988-89	1989-90	1990-91	1991-92	1992-93	1993-94	1994-95	1995-96	1996-97	1997-98	1998-99	1999-00	2000-01	2001-02
Days Elapsed	256.2	90.5	123.6	174.5	149.5	257.1	179.6	256.0	139.3	157.4	124.4	318.6	164.6	144.4	226.2	82.5	94.8	91.7	67.3	54.0	76.7	16.0	171.3	98.0	23.3	15.0	102.7

Attachment A

Attachment B

DECISIONS ISSUED BY THE BOARD

Fiscal Year 2000-01

CASE NAME	OPINION NUMBER
GREWAL ENTERPRISES, INC.	26 ALRB No. 5
JOHN V. BORCHARD aka JOHN V. BORCHARD FARMS	27 ALRB No. 1
THE HESS COLLECTION WINERY	27 ALRB No. 2
COCOPAH NURSERIES, INC.	27 ALRB No. 3

CASE SUMMARY

Grewal Enterprises, Inc. (UFW)

26 ALRB No. 5
Case No. 98-CE-162-EC

ALJ Decision

The ALJ found that the Employer violated Labor Code sections 1153(a) and (e) by failing to inform the UFW of its decision to cease its grape operation until five months after the sale, thereby depriving the union of the opportunity to engage in meaningful effects bargaining. The ALJ also found that the employer violated sections 1153(a) and (e) by its unreasonable delay in providing information requested by the union. He recommended that the employer be ordered to cease and desist from its unlawful conduct. Relying on Valdora Produce Company and Valdora Produce Company, Inc. (1984) 10 ALRB No. 3, the ALJ rejected imposition of a limited back pay remedy, but recommended that the case be remanded to the Regional Director for further investigation and that, if appropriate, such remedy could be pursued informally with Respondent or through compliance procedures.

Board Decision

The Board affirmed the ALJ's decision but modified the ALJ's remedial order. The Board concluded that the Valdora decision cannot be reconciled with the well established principle that a violation is committed at the time that an employer fails to give advance notice of a closing so that meaningful effects bargaining may take place. Thus, the union in Valdora was well within its rights when it chose to file an unfair labor practice charge rather than to continue effects bargaining in which it had been stripped of all leverage due to the lack of timely notice of the closing. The Board overruled Valdora to the extent that it failed to find an effects bargaining violation and failed to award the Transmarine remedy. (Transmarine Navigation Corp. (1968) 170 NLRB 389 [67 LRRM 1419].) As the erroneous holding in Valdora was the sole basis stated by the ALJ for denying the Transmarine remedy in the present case, and there is no other basis in the record for denying this remedy, the Board reversed this portion of the ALJ's decision and provided for the Transmarine remedy in its order.

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CASE SUMMARY

JOHN V. BORCHARD, ET AL. Case No. 78-CE-33-E, et al.
One of 13 consolidated cases (UFW) 27 ALRB No. 1

Background

On October 16, 2000, the El Centro Regional Director filed motions to close thirteen cases, which were consolidated for the purposes of this decision. In each of these cases, full compliance with the underlying Board order(s) has not been achieved and, in the judgment of the Regional Director, there is no reasonable likelihood of achieving further compliance. These cases involve uncollected back pay or bargaining makewhole awards. In some instances, nonmonetary remedies, such as reinstatement or notices to employees, might also be uneffectuated where the respondent has gone out of business or otherwise is no longer an agricultural employer.

Board Decision

The Board first pointed out that presently there are no established procedures or standards for closing cases without full compliance and that, therefore, regional directors have been without guidance as to the circumstances in which the Board will consider closing such cases or as to the information required to support a motion to close. To resolve this problem, the Board utilized this decision to establish procedures and standards for motions to close cases without full compliance.

Where, in the judgment of the regional director, there is no reasonable likelihood that further efforts will result in full or additional compliance with the Board's order in a fully adjudicated case, the regional director may file a motion to close the case. Motions to close such cases shall be filed with the Board and served on the parties in accordance with Title 8, California Code of Regulations, sections 20160 and 20166. Parties shall have thirty (30) days from the date of service to file a response to the motion to close. A reply, if any, shall be filed within ten (10) days after service of the response. The motion shall contain the case name and number(s), the number(s) of the underlying Board decision(s), a brief summary of the case and the remedies ordered by the Board, the date the case was released for compliance, and a detailed description of what has been done and what remains to be done to achieve full compliance with the Board's order in the case, including monetary amounts still owing. In addition, the motion shall contain a chronological summary of key steps taken to achieve compliance and a detailed description of the steps taken to achieve full compliance, factors preventing full compliance, and the reasons why there is no reasonable likelihood that further efforts will

be successful. The regional director shall submit declarations and such other documents that evidence the efforts to achieve compliance. The Board denied the motions to close as filed on October 16, 2000, without prejudice to re-filing in accordance with these newly established procedures and standards.

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CASE SUMMARY

The Hess Collection Winery (UFCW)

27 ALRB No. 2
Case No. 99-CE-23-SAL

Background

Following an election in which the UFCW was selected as the exclusive representative of the Employer's agricultural employees, the Employer filed election objections alleging: improper designation of the bargaining unit; coercion of employees by supervisors; misconduct by board agents; cumulative interference with a fair election by the union and by the board agents; and UFCW's lack of status as a labor organization under the ALRA. The Board dismissed the objections without a hearing, for failure to establish a prima facie case. After the Board issued a certification of the UFCW, the Employer refused to bargain in order to test the certification by judicial review. Thereafter, General Counsel filed a complaint alleging that the Employer had refused to recognize or bargain with the UFCW and seeking a bargaining makewhole remedy to compensate the employees for economic losses suffered as a result of their employer's refusal to bargain. On March 31, 2000, the Employer announced its intention to drop the challenge to the certification and to bargain with the UFCW.

The case came before the Board by a Stipulation and Statement of Facts under which the parties agreed to waive their right to a hearing.

Board Decision

The Board found that the Employer's willingness to discuss changes in working conditions with the UFCW during the course of its technical refusal to bargain, which was the Employer's legal duty, and the Employer's decision, after ten months, not to pursue judicial review, were not probative of the Employer's good faith at the time it technically refused to bargain with the Union.

The Board also found that the Employer's election objections were not a reasonable basis to challenge the Union's certification in court. The objection to the scope of the bargaining unit was unreasonable given the mandatory provisions of the law and the absence of evidence that the designated unit was improper. The objections alleging coercion of employees by supervisors were unreasonable because, although the evidence shows that supervisors were briefly in the voting area, the Employer failed to provide evidence of coercive conduct. The objection alleging Board agent misconduct was unreasonable because the Employer's evidence shows that the Board agents acted

properly in excluding supervisors from the polling area once they became aware of their status. The objection alleging that the Union and the Board agents interfered with a fair election is not reasonable because it is well-settled law that there is no need to consider the cumulative effect of election objections which, individually, fail to state a prima facie case. The objection that the UFCW is not a labor organization under the ALRA is unreasonable because the ALRA definition of "labor organization" is not limited to unions that represent agricultural workers exclusively.

The Board rejected the Employer's argument that the bargaining makewhole remedy would be too speculative because, under well-established law, this remedy may be imposed in technical refusal to bargain cases despite the lack of bargaining history between the parties. The Board emphasized that any delay in bargaining undermines employee free choice.

After analyzing the parties' arguments in light of the relevant case law, the Board concluded that the Employer had not raised important issues concerning whether the election was conducted in a manner that protected employee free choice nor had the Employer raised any novel legal issues. The Board concluded that since the Employer's litigation posture was not reasonable within the meaning of J.R. Norton Co. v. ALRB (1979) 26 Cal.3d 1 and its progeny, a bargaining makewhole remedy should be included in its remedial Order.

The Board clarified its position with regard to the beginning of the makewhole period in a technical refusal to bargain case. Makewhole shall begin on the date the employer receives the union's request to bargain or, in the case of a written request where the date of receipt is unknown, three working days after the mailing of the request. Consistent with its normal practice, the Board ended the makewhole period on the date that good faith bargaining commences. Accordingly, in the present case, the Board ordered that the makewhole period extend from May 26, 1999, until March 31, 2000, unless it is determined that the Employer commenced good faith bargaining on a later date.

Concurrence and Dissent

Member Ramos Richardson concurred in the decision of the Board, with the exception of the beginning of the makewhole period. Member Ramos Richardson would begin the makewhole period on May 25, 1999, the date of the Employer's letter announcing its

intention to refuse to bargain in order to seek judicial review of the certification. In her view, this is the proper date because an employer's actual refusal to bargain is the legally significant act, not the receipt of the union's demand to bargain. In addition, she believes that, absent undue delay in responding to the union's request to bargain, using the date of the refusal better recognizes the common sense realities of an incipient bargaining relationship.

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CASE SUMMARY

Cocopah Nurseries, Inc. (UFW)

27 ALRB No. 3
Case No. 01-RC-1-EC(R)

Background

An election was conducted in the above-entitled case on March 27, 2001. The election petition was filed by the United Farm Workers of America, AFL-CIO (UFW). The initial tally of ballots showed 42 votes for the UFW, 47 votes for No Union, and 13 Unresolved Challenged Ballots. On May 22, 2001, the El Centro Regional Director (RD) issued his Report on Challenged Ballots, in which he recommended that three of the challenges be sustained, nine of the challenges be overruled and the ballots counted, and one challenge be held pending the resolution of a related unfair labor practice charge. The UFW timely filed exceptions to the RD's report, taking issue with the resolution of seven of the challenges. No exceptions were taken to the RD's recommendations to count the ballots of Jose Javier Garcia H., Reynaldo Alvarez, Jesus Alberto Garcia, and Jose Luis Suarez, to sustain the challenge as to Amelia Villa, and to hold in abeyance the challenge to the vote of Juan Berumen.

Board Decision

The ballot of Jose L. Navarro was challenged by a Board agent because Navarro's name was not on the eligibility list. He signed a challenged ballot declaration indicating that he was disabled and had not worked since a date that was three days prior to the eligibility period. The RD's investigation confirmed that Mr. Navarro had not worked during the eligibility period and, therefore, the RD recommended that the challenge be sustained. The UFW asserted that determination discriminates against Mr. Navarro based on his disability. Citing precedent that an individual is eligible to vote if he or she would have worked during the eligibility period but for an absence due to illness and where there is a reasonable expectation of returning to work (Rod McLellan Co. (1977) 3 ALRB No. 6; Valdora Produce Co. (1977) 3 ALRB No. 8), the Board concluded that it could not rule on the challenge without further investigation consistent with this standard.

The ballot of Ruben Angulo M. was challenged by the Employer's observer because Angulo failed to provide identification at the time of voting. The signature on the W-4 form provided by the Employer with the name Ruben M. Angulo is very similar to the signature on the challenged ballot declaration signed by Ruben Angulo M. During the investigation, the Employer stated that Angulo's ballot should be counted if the two signatures matched. The RD was unable to contact Angulo to obtain additional evidence, and concluded that there was insufficient evidence to show that the person who at the

election claimed to be Ruben Angulo M. is in fact the same person listed as Ruben M. Angulo on the eligibility list. The Board concluded that in this instance additional corroborative evidence was not necessary because it is determinative that the party making the challenge assented to reliance on matching signatures in deciding whether to count the ballot. Therefore, the Board ordered that the ballot of Mr. Angulo be counted.

Murray E. Burnaman, Karen Maust, William McCallum, Elva G. Munoz, and Jose Rodriguez, Jr. were challenged by the UFW's observer on the grounds that they are confidential employees. The RD found that these five individuals do not actively participate in the resolution of employee complaints and grievances along with any management person, and that their work does not involve labor relations matters. Therefore, the RD concluded that they do not perform any duties that would make them confidential employees. The Board concluded that the RD, contrary to the assertion in the UFW's exceptions, did not apply the wrong legal standard. Citing the well-established rule that confidential employees are only those who assist and act in a confidential capacity to persons who formulate, determine, and effectuate management policies in the field of labor relations, the Board affirmed the RD's recommendation that these challenges be overruled. The Board also noted that the exceptions must be rejected for failure to provide material facts that contradict the RD's findings.

Pursuant to its decision, the Board ordered that the RD open and count the ten ballots to which the challenges have been overruled. If necessary, after a revised tally of ballots issues, determinations with regard to the two remaining unresolved challenges may proceed in accordance with the Board's decision.

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Attachment C

DECISIONS ISSUED BY THE BOARD

Fiscal Year 2001-02

CASE NAME	OPINION NUMBER
TURCO DESERT COMPANY, INC.	27 ALRB No. 4
CIENIGA FARMS, INC.	27 ALRB No. 5
PETE VANDERHAM DAIRY, INC.	28 ALRB No. 1
ALBERT GOYENETCHE DAIRY	28 ALRB No. 2
THE ELMORE COMPANY	28 ALRB No. 3
PICTSWEET MUSHROOM FARMS	28 ALRB No. 4
ALBERT GOYENETCHE DAIRY	28 ALRB No. 5

CASE SUMMARY

Turco Desert Company, Inc.
(Alberto B. Ramirez)

27 ALRB No. 4
Case No. 00-CE-29-EC

ALJ Decision

The ALJ found that Alberto Ramirez was discharged unlawfully after he made comments to a supervisor about the supervisor's rude treatment of the work crew in the context of a dispute over the length of breaks.

In his analysis of concerted activity, the ALJ rejected the Respondent's argument that Ramirez was acting solely on his own behalf. The ALJ reasoned that Ramirez engaged in concerted activity when he intervened on behalf of another employee, spoke up about a supervisor's verbally abusive conduct in the presence of other employees, and protested the treatment of the crew as a whole.

The ALJ concluded that Ramirez's conduct was protected, and not insubordinate behavior as argued by Respondent. Although Ramirez used one obscene term and spoke in an angry manner while voicing his concerns, his conduct did not rise to the level of egregious behavior that would cause him to lose the Act's protection.

The ALJ rejected the Respondent's argument that Ramirez was not terminated, but voluntarily quit. The ALJ concluded that Ramirez left the work site following the dispute with a reasonable belief that he had been fired, and that under such circumstances it was the employer's responsibility to clarify Ramirez's employment status if he did not intend to terminate Ramirez.

Board Decision

The Board adopted the rulings, findings and conclusions of the ALJ. The Board noted that with regard to its review of the ALJ's analysis of concerted activity, it was not relying solely on the ALJ's finding that the employee spoke about a group concern in the presence of others, but also on other facts supported by the record, namely, that the employee intervened on behalf of another, attempted to instigate group activity, and was understood by the employer as speaking of a group concern.

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CASE SUMMARY

Cieniga Farms, Inc. (UFW)

27 ALRB No. 5
Case No. 00-CE-334-EC(SM)

ALJ Decision

The ALJ found that the group of alleged discriminatees was not unlawfully discharged. He found that the group had engaged in protected concerted activity when they and the rest of the crew refused to enter the field on the morning of March 20, 2000, pending clarification of the rate of pay. However, he also found that that the group had voluntarily quit when the employer told the crew that she did not yet know the piece rate but would pay them by the hour. He discredited in its entirety the testimony of the three witnesses for the General Counsel who testified that they did not voluntarily quit, but were fired when they entered the field and attempted to work.

Board Decision

The Board decided not to affirm the ALJ Decision except to the extent consistent with its own decision. The Board, upon its de novo examination of the record, found the testimony of the witnesses for the General Counsel persuasive, noting its consistency of detail. The Board found that the discriminatees had been asked by the owner to stay back when the crew entered the field to work hourly and that the owner encouraged them to leave at that time. The Board further credited the testimony of the witnesses for General Counsel that the group was unsure whether they had been fired, entered the field to demonstrate a willingness to work, and was fired by the owner when she saw them.

The Board found that the employees were fired in retaliation for their participation in the refusal to work and questioning about the rate of pay. The Board held that the action of the employees is clearly protected as it pertained to terms and conditions of employment. Thus, the employer violated section 1153(a) of the Act by retaliating against this group of employees for their participation in protected concerted activity.

Dissent

Member Mason would affirm the ALJ's dismissal of the complaint. In his view, the General Counsel failed to prove that the employees were fired or reasonably

believed they were fired. He believes that the ALJ was correct in concluding that the record provides no plausible rationale for the employer to have singled out the nine alleged discriminatees from the entire crew that refused to work until their rate of pay was clarified. He also believes the ALJ was correct in concluding that inconsistencies between the scenario painted by the General Counsel's witnesses and other evidence in the record cast grave doubt on the claim that after the initial confrontation the alleged discriminatees grabbed boxes and attempted to enter the field and begin picking berries, only to be stopped by the Employer and told that they were fired.

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CASE SUMMARY

PETE VANDERHAM DAIRY, INC.
(Dairy Employees Union Local 17)

Case No. 01-RC-3-EC (R)
28 ALRB No. 1

Background

An election was held at Pete Vanderham Dairy, Inc. (Employer) on November 9, 2001. The tally was two votes for Dairy Employees Union Local 17 (Union), no votes for "no union," and no unresolved challenged ballots. By order dated December 21, 2001, the Executive Secretary (ES) dismissed in their entirety election objections filed by the Employer. The ES held that the Employer failed to allege facts, supported by declarations, which would constitute grounds for setting aside the election. The Employer timely filed a request for review of the dismissal of its election objections. Of the four numbered election objections, the Employer sought review of the dismissal of Objections 2, 3, and 4.

Board Decision

The Board affirmed the Executive Secretary's dismissal of the election objections for the reasons stated in his order, but added additional comments summarized below.

In Objection 2, the Employer alleged that the Regional Director improperly determined that two sons of the Employer's owner, even though they were long time employees, were not eligible to vote in the election. The Board explained that since, as a threshold matter, only agricultural employees are eligible to vote, the obvious purpose of the exclusion of family members listed in subdivision (b)(5) of Regulation 20352 is to render ineligible those who otherwise would be considered employees eligible to vote. In Objection 3, it was alleged that the eligible employee who did not vote in the election was intimidated because he feared that if he voted and the results became public the employees who supported the Union would retaliate against him. The Board held that a claim of intimidation requires more than an expression of fear that an employee's vote will be ascertainable from the public tally of the ballots. Here, there were no facts provided in the original objections petition to indicate any actions by Union supporters or agents that would constitute intimidation or coercion. The Board also noted that the vote of the employee in question could not have been outcome determinative. In Objection 4, the Employer questioned whether the two employees who voted were members in good standing of the Union before the election or whether they were newly signed members. The Employer also posited the question of whether there is a waiting period before new members may call for an election. The Board explained that there is no requirement that

those who support the union or vote for the union in an election be members of the union in any capacity or for any length of time prior to the filing of an election petition.

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CASE SUMMARY

ALBERT GOYENETCHE DAIRY,
A Sole Proprietorship
(U.F.C.W. AFL-CIO CLC,
Fresh Fruit & Vegetable Workers Local 1096)

Case No. 02-RC-1-VI
28 ALRB No. 2

Background

An election was held on February 22, 2002 among the agricultural employees of Albert Goyenetche Dairy, a Sole Proprietorship (Employer). The tally of ballots shows that fifteen votes were cast for the Petitioner, U.F.C.W. AFL-CIO CLC, Fresh Fruit & Vegetable Workers Local 1096 (Local 1096), fourteen votes were cast for "no union," and there was one unresolved challenged ballot. As the challenged ballot was outcome determinative, the Regional Director conducted an investigation. He issued his Challenged Ballot Report on March 8, 2002. In that report, the Regional Director concluded that the challenged voter was a supervisor and that, therefore, the challenge should be upheld. The Employer timely filed exceptions to the Challenged Ballot Report.

The Regional Director obtained declarations from three employees that indicated that the challenged voter gave them orders, and that they contacted him when they could come to work or to obtain authorization to take time off. The Regional Director also relied on a newsletter distributed by the Employer in December 2000 that indicated that the challenged voter was being transferred from a dairy in Chino to be the new "director," and that he would have authority over all the employees. The Regional Director also noted that the challenged voter was not on the eligibility list provided by the Employer, thus indicating that he was not considered a rank and file employee when the list was submitted.

The Employer submitted declarations from the challenged voter and one of the managers of the dairy. Neither declaration had been presented to the Regional Director. The declarants assert that the challenged voter, while originally hired to be a supervisor, was never actually given any supervisory duties. Rather, according to the declarations, the challenged voter merely groups cows by age for feeding purposes and pregnancy status and fills in for other employees when they are absent. Furthermore, it is asserted in the declarations that any perception that the challenged voter is a supervisor stems from the fact that, because he is bilingual, he acts as a translator in relaying instructions and decisions from management.

Board Decision

The Board found that the Employer's declarations place in dispute facts material to the Regional Director's determination of the challenge and, therefore, ordered that an evidentiary hearing be set to resolve the dispute.

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

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CASE SUMMARY

The Elmore Company
(Isauro Lopez Cortez)

28 ALRB No. 3
Case No. 00-CE-306-EC

Background

This case involves the discharge of a single employee, irrigator Isauro Lopez Cortez (Lopez). At a meeting with the irrigation crew, on August 8, 2000, supervisor Samuel Solorio Quevedo (Solorio) announced a work schedule change and a change in the company drinking water policy. Lopez spoke up during the meeting and questioned the schedule change, voicing his and the crew's displeasure with having their paid hours reduced. Respondent stipulated that Lopez engaged in protected concerted activity during the meeting. The following morning before the workday began, supervisor Solorio approached Lopez and gave him a photocopied excerpt on federal law governing payment for meal and break time. The excerpt was in English. Lopez, who could not read English, asked for a copy of the information in Spanish. Solorio refused to do so, and Lopez uttered an expletive toward Solorio. Solorio immediately discharged Lopez for his use of obscene language.

ALJ Decision

The ALJ found that Lopez was discharged unlawfully the day after he engaged in the group protest over schedule and work policy changes. In his analysis, the ALJ reasoned that the exchange between Lopez and Solorio on the morning after the meeting was a continuation of the previous day's protected concerted activity. The primary issue addressed in the ALJ's decision was therefore, whether Lopez lost the protection of the Act when he used profanity toward Solorio.

The ALJ concluded Lopez's conduct was protected, and not insubordinate behavior as argued by Respondent. In reaching this conclusion, the ALJ applied the four-part balancing test outlined in Atlantic Steel Co. (1979) 245 NLRB 814. The ALJ found that although Lopez used one obscene term towards his supervisor while voicing his concerns, his conduct did not rise to the level of egregious behavior that would cause him to lose the Act's protection. As Lopez's conduct remained protected, his discharge violated Section 1153 (a) of the Act.

The ALJ also reasoned that a dual motive analysis under Wright Line, a Division of Wright Line, Inc. (1980) 251 NLRB 1083 was not necessary in this case as he found that the employee's conduct remained protected, and a violation was found on that basis.

Board Decision

The Board adopted the rulings, findings and conclusions of the ALJ. The Board rejected the Respondent's argument that the exchange between Lopez and Solorio on August 9, 2000 was not a continuation of the previous day's protected concerted activity. The Board reasoned that Solorio, in presenting Lopez with the excerpt on payment for meal times, was directly responding to the group's protest during the meeting on the previous day, and Lopez, in asking for the information in Spanish, was clearly reacting to the Employer's response. The conversation on August 9 was therefore a logical outgrowth of group action, and a continuation of the protected concerted activity from the day before.

The Board also rejected the Respondent's argument that the ALJ had erred in not applying a Wright Line dual motive analysis in the case. The Board found that in circumstances where the conduct for which the employer claims to have discharged the employer remains protected, a Wright Line analysis is not appropriate. The proper test for determining whether the employee's conduct remained protected in the Atlantic Steel balancing test. Only if the employee's conduct is found to be unprotected under an Atlantic Steel analysis should Wright Line then be applied.

In finding that the Atlantic Steel balancing test weighed in favor of finding that Lopez's outburst remained protected, the Board noted that it was not relying solely on the fact that his profane comment was unaccompanied by threats or violence. The Board found that the record as a whole supported the conclusion that the use of vulgar language was prevalent in this work place, Lopez was insulted and irritated by Solorio's refusal to provide the information in Spanish, and in light of all surrounding circumstances, Lopez's single expletive was an expression of frustration during the course of an otherwise protected discussion. In addition, the Board found no merit in the Respondent's argument that it was improper for the ALJ to consider, for purposes of background information, conduct that was not alleged in the complaint as an unfair labor practice. The Board agreed that the record supported the ALJ's finding that Solorio, in responding to the crew's protest of the schedule change on August 8 by telling those who didn't like it could go home or leave, arguably violated the Act. The Board concluded that this unlitigated unfair labor practice had a chilling effect on future concerted activity and was provocative to Lopez on the following day.

The Board further held that even assuming, arguendo, that Lopez's swearing at Solorio caused him to lose the Act's protection under the Atlantic Steel analysis, a subsequent application of the Wright Line dual motive analysis would have also resulted in the conclusion that the discharge was unlawful. The Respondent did not meet its burden of proving that Lopez would have been discharged even in the absence of his protected concerted activity, therefore his termination violated section 1153(a).

Concurrence and Dissent

Member Mason concurred with the majority's conclusion that Respondent violated section 1153(a) of the Act when it discharged Lopez. However, because he does not agree with the majority's conclusion that Lopez' outburst on the morning of August 9, 2000 was protected, he would base the finding of a violation solely on the application of the Wright Line dual motive analysis. In Member Mason's view, there are no circumstances reflected in the record that would significantly lessen the facial severity or otherwise provide any excuse for Lopez' outburst on August 9. Moreover, he would find that the record fails to support the conclusion that Lopez' outburst was provoked by unlitigated unfair labor practices. In his view, any confusion as to the crew's employment status that was created by learning of Lopez' discharge on August 9 was not due to any legally cognizable breach of duty by Respondent and, therefore, could not have constituted a violation. In addition, he believes that the cases cited by the ALJ are either distinguishable or inapposite.

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CASE SUMMARY

Pictsweet Mushroom Farms,
Division of United Foods, Inc.
(United Farm Workers
of America, AFL-CIO)

28 ALRB No. 4
Case No. 01-CE-620-EC(OX)

Background

This case involves the suspension and discharge of mushroom picker, Fidel Andrade Fernandez (Andrade). Andrade, who had worked for Respondent, Pictsweet Mushroom Farms (Pictsweet) for nine years before he was discharged, became a supporter of the United Farm Workers of America, AFL-CIO (UFW) in January 2000, and was named as a crew representative in July 2000. Throughout the year 2000 and during the Spring of 2001, there was an increasing amount of friction among employees with respect to the UFW, and between Pictsweet and the UFW.

On the morning of May 27, 2001, Andrade protested about the way Foreman Augustine Villanueva Navarro (Villanueva) had spoken to his co-worker, Jesus Torres (Torres), when assigning Torres work. Andrade and Villanueva engaged in a brief argument before Andrade went back to work. Later that afternoon, Andrade and Villanueva were involved in another exchange that ultimately lead to Andrade's discharge. Andrade was in the process of harvesting mushrooms, when Villanueva walked past and threw some mushrooms towards Andrade's basket. Villanueva then approached close to Andrade after Andrade asked him not to throw mushrooms, pointed at his face, and asked loudly "what's the matter with you today?" When Villanueva persisted in pointing and speaking in a loud voice even when Andrade told him not to, Andrade grabbed Villanueva's hand and lowered it from his face. Andrade was suspended and subsequently discharged for "physical aggression" after management investigated the incident.

ALJ Decision

The ALJ found that Respondent's suspension and subsequent termination of Fidel Andrade violated section 1153(a) and (c) of the Act.

The ALJ found that Andrade engaged in protected concerted activity when he protested Villanueva's treatment of co-worker Torres on the morning of May 27,
and that Pictsweet was aware of this conduct, as well as Andrade's various union activities. The ALJ further found that the circumstances indicated that the discharge was motivated by the protected concerted activity. Therefore, the ALJ concluded that the General Counsel established a prima facie case that the suspension and discharge of Andrade violated section 1153(a) and 1153(c) of the Act.

The ALJ then turned to the question of whether the Respondent had met its burden of showing that it would have discharged Andrade even in the absence of his protected concerted and union activities. The ALJ reasoned that under the provocation doctrine, in establishing its defense, the Respondent could not rely on Andrade's conduct to the extent it was provoked by Villanueva's actions. In reaching this conclusion, the ALJ relied on Opelika Welding, Inc. (1996) 305 NLRB 561, a case with facts the ALJ found similar to those in the instant case. The ALJ found that Villanueva, in throwing the mushrooms, yelling at Andrade and pointing in his face, acted to provoke Andrade, and caused the conflict to escalate. The ALJ held that Andrade's single, brief physical contact was in line with the degree of Villanueva's provocation, and therefore concluded that Respondent could not rely on Andrade's behavior in establishing a defense that it would have taken the same action despite Andrade's protected concerted and union activities.

Board Decision

The Board adopted the rulings, findings and conclusions of the ALJ. The Board rejected the Respondent's argument that the provocation doctrine only applies when the provoking conduct involves concerted activity or exceptional circumstances. The Board indicated that under its interpretation of the doctrine, the employer's provocation must consist of unlawful conduct or be motivated by the employee's protected activity. The Board also found that the ALJ's reliance on Opelika Welding was appropriate, and rejected the Respondent's contention that the Opelika Welding case represented an erroneous application of the provocation doctrine.

The Board concluded that Villanueva's conduct towards Andrade on the afternoon of May 27 was related to and motivated by Andrade's protected concerted activity in coming to Torres' aid. The Board also found that the operative events leading to Andrade's discharge were motivated by Andrade's support of the UFW. The Board held that under these circumstances, Andrade's response in grabbing and removing Villanueva's hand from his face was proportional to and in line with Villanueva's behavior, and the Respondent, in establishing its defense could not rely on Andrade's conduct to the extent it was provoked by Villanueva's actions.

The Board further reasoned that even if the provocation doctrine had not precluded the Respondent from presenting its Wright Line defense, the Board would still have found that the Respondent had not met its burden of showing it would have discharged Andrade even in the absence of his Union and other protected concerted activities. In reaching this conclusion, the Board considered inter alia, the timing of the discharge, comparisons with other discharges by Pictsweet for workplace violence, Villanueva's exaggeration of Andrade's conduct, Andrade's work history, and evidence that Pictsweet was annoyed by Andrade's earlier union activity.

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CASE SUMMARY

ALBERT GOYENETCHE DAIRY,
A Sole Proprietorship
(U.F.C.W. AFL-CIO CLC,
Fresh Fruit & Vegetable Workers Local 1096)

Case No. 02-RC-1-VI
28 ALRB No. 5

Background

An election was held on February 22, 2002 among the agricultural employees of Albert Goyenetche Dairy, a Sole Proprietorship (Employer). The tally of ballots shows that fifteen votes were cast for the Petitioner, U.F.C.W. AFL-CIO CLC, Fresh Fruit & Vegetable Workers Local 1096 (Local 1096), fourteen votes were cast for "no union," and there was one unresolved challenged ballot. As the challenged ballot was outcome determinative, the Regional Director conducted an investigation and issued his Challenged Ballot Report on March 8, 2002. In that report, the Regional Director concluded that the challenged voter was a supervisor and that, therefore, the challenge should be upheld. Upon review of the Employer's exceptions to the challenged ballot report, the Board ordered a hearing to take evidence on the issue of whether Jose Luis Isusquiza (Isusquiza) is a supervisor and, thus, ineligible to vote in the election. (Albert Goyenetche Dairy (2002) 28 ALRB No. 2.) The hearing was held on April 18, 2002. On May 8, 2002, the Investigative Hearing Examiner (IHE) issued her decision, in which she found that Isusquiza is a statutory supervisor and recommended that the challenge to his ballot be sustained. The Employer filed timely exceptions to the IHE's decision.

Board Decision

The Board summarily affirmed the IHE's decision and certified Local 1096 as the exclusive bargaining representative. In reaching her conclusion that Isusquiza was a supervisor, the IHE relied, inter alia, on the following: 1) credited testimony reflecting that Isusquiza had hired employees or at least effectively recommended such actions and had granted requests for time off, 2) Isusquiza's declaration at the time of the election in which he stated that he supervised employees and could recommend hiring and firing, 3) the Employer's admission that at the time Isusquiza was hired it was intended that he would be a supervisor and this was announced to the employees, 4) the Employer's admission that neither the employees nor Isusquiza was informed that he would not be a supervisor as planned, 5) Isusquiza's listing on payroll records as a "foreman" at the time

of the election, and 6) Isusquiza's salary, which was $500 dollars per month more than the next highest paid employee.

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

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Attachment D

ADMINISTRATIVE ORDERS
ISSUED DURING FISCAL YEAR
2000-01

ADMIN. ORDER NUMBER	CASE NAME	CASE NUMBER	ISSUE DATE	DESCRIPTION
2000-11	Grewal Enterprises, Inc.	97-CE-1-EC	7/26/00	Order Denying Request to File Appeal of Administrative Law Judge's Denial of Motion to Quash Subpoena
2000-12	Scheid Vineyards	92-CE-51-SAL	8/23/00	Order Approving Formal Bilateral Settlement Agreement
2000-13	Gallo Vineyards	92-CE-49-SAL	9/07/00	Order Granting Request To Withdraw Motion Under Board Regulation 20393(b) For Review of the Actions Of the Salinas Regional Director Regarding the Appropriate Bargaining Unit With Prejudice; Order Approving Regional Director's Decision That Respondent Has Fully Complied With the Board's Order in its Entirety

ADMIN. ORDER NUMBER	CASE NAME	CASE NUMBER	ISSUE DATE	DESCRIPTION
2000-14	Claassen Mushroom, Inc.	84-CE-12-OX(SM)	9/20/00	Order Approving Formal Settlement Agreement
2001-1	John V. Borchard	78-CE-33-E	3/14/01	Order Setting Time For Response to Regional Director's Amended Motion To Close Case
2001-2	Ruline Nursery	80-CE-61-SD	5/15/01	Order Setting Time For Response to Regional Director's Amended Motion To Close Case
2001-3	Sun Gold, Inc.	94-CE-12-EC	3/15/01	Order Setting Time for Response to Regional Director's Amended Motion To Close Case
2001-4	Buxton Ranches	82-CE-172-EC	3/15/01	Order Setting Time for Response to Regional Director's Amended Motion to Close Case
2001-5	Sunrise Mushroom, Inc.	93-CE-43-SAL	3/28/01	Order Approving Formal Bilateral Settlement Agreement
2001-6	Ruline Nursery	80-CE-61-SD	5/3/01	Order Approving Regional Director's Amended Motion to Close Case

ADMIN. ORDER NUMBER	CASE NAME	CASE NUMBER	ISSUE DATE	DESCRIPTION
2001-7	Sun Gold, Inc.	94-CE-12-EC	5/3/01	Order Approving Regional Director's Amended Motion to Close Case
2001-8	Buxton Ranches Steve Buxton	82-CE-172-EC 83-CE-22-EC	5/16/01	Order Approving Regional Director's Amended Motion To Close Case
2001-9	Gallo Vineyards	95-CE-49-SAL	5/16/01	Order Correcting Makewhole Specification
2001-10	John Borchard	78-CE-33-EC	5/17/01	Order Directing Further Investigation and Written Report
2001-11	John Borchard	78-CE-33-EC	6/27/01	Order Approving Regional Director's Amended Motion To Close Case

Attachment E

ADMINISTRATIVE ORDERS
ISSUED DURING FISCAL YEAR
2001-02

ADMIN. ORDER NUMBER	CASE NAME	CASE NUMBER	ISSUE DATE	DESCRIPTION
2001-12	Pictsweet Mushroom Farms	01-RC-2-EC(OX)	7/9/01	Order Denying Request For Review Of Regional Director's Decision To Block Election
2002-1	Andreas Farms	96-CE-141-SAL 96-CE-237-SAL	1/11/02	Order Denying RD's Motion To Close Case
2002-2	Coastal Berry Company, LLC	99-CE-1-SAL, et al.	1/11/02	Order Setting Briefing Schedule
2002-3	Coastal Berry Company, LLC	99-CE-1-SAL	3/13/02	Order To Show Cause Why Board Should Not Conduct In Camera Inspection Of Declarations Filed In Case Nos. 98-RC-1-SAL and 99-RC-4-SAL
2002-4	Coastal Berry Company, LLC	99-CE-1-SAL	4/19/02	Order Providing For In Camera Inspection Of Declarations Filed In Case Nos. 98-RC-1-SAL and 99-RC-4-SAL

ADMIN. ORDER NUMBER	CASE NAME	CASE NUMBER	ISSUE DATE	DESCRIPTION
2002-5	Ventura Coastal Corp., et al.	02-RC-2-EC(R)	6/24/02	Order Directing Supplemental Report On Challenged Ballots
2002-6	Sonoma Cutrer Vineyards, Inc.	02-RC-1-SAL	6/25/02	Order Setting Challenged Ballots For Investigative Hearing; And Order Adopting Regional Director's Recommendation To Sustain Challenged Ballots And To Open And Count Challenged Ballots, As Modified