STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

GALLO VINEYARDS, INC.	)	
	)	
Employer,	)	Case No. 07-RD-1-SAL
	)	
and	)	34 ALRB No. 6
	)	
ROBERTO PARRA,	)	(November 7, 2008)
	)	
Petitioner,	)	
	)	
and	)	
	)	
UNITED FARM WORKERS OF AMERICA,	)	
	)	
Certified Bargaining Representative.	)	

DECISION AND ORDER

A petition for decertification in the above-entitled case was filed on June 18, 2007 by Petitioner Roberto Parra (Petitioner). The election was held on June 25, 2007 for all agricultural employees of Gallo Vineyards, Inc. (Gallo or Employer) in Sonoma County. The tally of ballots, dated June 25, 2007, showed 125 votes for No Union, 95 votes for the United Farm Workers of America (UFW or Union), the incumbent certified bargaining representative, and 12 unresolved challenged ballots.

The UFW filed two letter motions with the Salinas Regional Director in advance of the election on June 19, 2007, arguing that the decertification petition was untimely because an existing contract barred the filing of the petition under Labor Code section 1156.7[1], and that the election should be blocked pursuant to *Cattle Valley Farms* (1982) 8 ALRB No. 24, on the grounds that the Employer had not fully complied with a remedial order issued by the Board in *Gallo Vineyards* (2004) 30 ALRB No. 2. The order required, among other provisions, that the Employer provide copies of a Board Notice to each agricultural employee hired by the Employer during the 12-month period following the date the order became final. The case had been closed by the Salinas Regional Director prior to the end of the 12-month period following the date the order became final, conditional upon continued compliance.[2] The Salinas Regional Director denied the letter motions on June 20, 2007 on the grounds that the premature extension doctrine applied such that the decertification petition was timely, *Phelan & Taylor Produce Co.* (1981) 7 ALRB No. 8, and the matter of 30 ALRB No. 2 had been remedied.

The UFW filed a Request for Review of Action by the Salinas Regional Director on June 20, 2007. The Request for Review was denied by Administrative Order

[1] All statutory references are to the Agricultural Labor Relations Act (ALRA), California Labor Code section 1140 *et seq.*, unless otherwise specified.

[2] The Board's decision in 30 ALRB No. 2 was appealed to the California Courts of Appeal, case number C048387, and review was denied on December 19, 2005. A petition for review was filed with the Supreme Court of California, case number S139715, and review was denied on January 25, 2006. The order became final after the period for seeking review in the United States Supreme Court passed on April 25, 2006.

2007-04 on June 22, 2007 on the grounds that a Regional Director's decision to direct an election is final and reviewable only by means of filing election objections pursuant to Labor Code section 1156.3(c) and sections 20363, 20365, and 20370 of the Board's regulations.

The UFW timely filed its election objections on July 2, 2007. The election objections dismissed by the Executive Secretary were Objections One and Three, in which the UFW argued that a contract extension agreed to by the UFW and Gallo had no effect on the time in which to file a decertification petition and, as a result, the decertification petition was untimely and contained incorrect factual allegations as to the existence of a statutory contract bar; Objection Two, in which the UFW argued that Gallo's failure to comply with all the requirements of the Board Order in 30 ALRB No. 2 in advance of the election rendered the election *per se* improper; Objections Four and Five, in which the UFW argued that the Executive Secretary erred in relying on *Mann Packing, Inc.* (1989) 15 ALRB No. 11 and *Richard's Grove and Saralee's Vineyard, Inc.* (2007) 33 ALRB No. 7, in dismissing the objections solely because the Regional Director had dismissed parallel unfair labor practice charges; and Objection Eight, in which the Union alleged that it did not have sufficient time to respond to representations made by Petitioner in a flyer.

We find that the Executive Secretary was correct in dismissing Objections One and Three, and that he properly found that the decertification petition was filed timely and there was no contract bar to the petition. We affirm the Executive Secretary's dismissal of Objection Two, the UFW's allegation that Gallo failed to comply with the

Board's order in 30 ALRB No. 2, with grave concerns. The UFW's showing was insufficient to establish that sufficient numbers of employees were affected by Gallo's non-compliance so as to have potentially affected the outcome of the election. However, the fact that 30 ALRB No. 2 was closed before the compliance period had expired and, on the record before us, there appears to have been no means available to the UFW to ensure Gallo's compliance after the case was closed, is disconcerting at best.

The Executive Secretary's decision to dismiss Objections Four and Five on the grounds that they were also the basis of dismissed unfair labor practice charges is correct, as the General Counsel's refusal to issue a complaint regarding an unfair labor practice charge precludes litigation of the issues raised in those dismissed charges in a representation proceeding. Finally, the Executive Secretary was correct in his decision to dismiss Objection Eight in that the UFW had sufficient time to respond to a flyer circulated by Petitioner.

DISCUSSION

Statutory Contract Bar

In Objection One, the UFW argues that a contract extension executed by it and Gallo during the term of their previous collective bargaining agreement was immaterial to the determination of the statutory contract bar under Labor Code section 1156.7, and the dismissal of its objection because of the premature extension doctrine was erroneous. The UFW further argues that the Board's adoption of the National Labor Relations Board's (NLRB's) premature extension doctrine in *Phelan & Taylor Produce Co.* (1981) 7 ALRB No. 8 was an error, as the premature extension

doctrine is inapplicable under the ALRA. In Objection Three, the UFW argues that the decertification petition was erroneous because Petitioner Roberto Parra (Petitioner) alleged that there was no collective bargaining agreement in effect that would bar the petition. The UFW's contentions are without merit.

a. Premature Extension Doctrine and Effect of Contract Extension

The parties' previous collective bargaining agreement was executed effective September 23, 2005 and had a term of thirty months, expiring March 23, 2008. On May 3, 2007, Gallo and the UFW signed an amendment to the contract that, *inter alia*, extended its expiration date to March 23, 2011. Petitioner filed the decertification petition on June 18, 2007.

On June 19, 2007, the UFW filed a "Position Statement in Support of Applying Statutory Contract Bar Contained in Labor Code Section 1156.7" with the Salinas Regional Director, in which it argued that, under the express terms of the ALRA, the statutory contract bar contained in Labor Code section 1156.7 operated to prevent the filing of a decertification election petition until September 23, 2008, i.e., three years following the execution of the original collective bargaining agreement. The UFW further argued that the amendment during the contract term was immaterial except where it created a contract term of more than three years. This argument was rejected by the Salinas Regional Director on the grounds that the premature extension doctrine adopted by the Board in *Phelan & Taylor Produce Co.* applied in this case. Under the premature extension doctrine, any extension of a collective bargaining agreement beyond its original expiration date during the duration of the agreement will not bar an otherwise timely filed

representation petition. (*Phelan & Taylor Produce Co.*, *supra*, 7 ALRB No. 8 at p. 7.) As stated in *Phelan & Taylor Produce Co.*,

> Parties to collective bargaining agreements have the right to extend those agreements. The premature extension doctrine merely establishes that such extensions may not bar rival-union or decertification petitions.

Id. The Executive Secretary upheld the Salinas Regional Director's decision. In its Request for Review before this Board, the UFW argues that "a plain reading of [Labor Code section 1156.7], at subdivision (b), however, shows that the statutory contract bar is in place for a period not to exceed three years, regardless of when the last year of the contract term is fixed." (Request for Review at p. 3.)

A plain and complete reading of section 1156.7 compels a different conclusion. Subdivision (b) of section 1156.7 provides that a collective bargaining agreement shall be a bar to a petition for election <u>for the term of the agreement, but in any event such bar shall not exceed three years</u>. (Lab. Code § 1156.7(b) (emphasis added).) Subdivision (c) provides, *inter alia*, that a petition shall not be deemed timely unless it is filed during the year preceding the expiration of a collective bargaining agreement which would otherwise bar the holding of an election. (Lab. Code § 1156.7 (b).) When Labor Code section 1156.7 is applied in its entirety to the facts, the unavoidable conclusion is that a petition filed during the year beginning March 23, 2007 would be considered timely because (1) it would have been filed during the term of the agreement; and (2) it would have been filed during the last year of the agreement. The decertification petition in this case was filed on June 18, 2007. In essence, the UFW argues that the statutory contract bar would have applied, regardless of the contract

extension, until September 23, 2008, three years from when the original agreement was executed and more than six months after the original agreement would have expired. Were we to accept this argument, the maximum three-year statutory bar would apply to all collective bargaining agreement even if those agreements were of a shorter duration.

b. Premature Extension Doctrine As Applied

The UFW argues that the premature extension doctrine should not be applied and that the Board's decision in *Phelan & Taylor Produce*, in which the Board applied the NLRB's premature extension doctrine to a rival union's certification petition, was erroneously decided. The UFW argues that, under *Cadiz v. ALRB* (1979) 92 Cal.App.3d 365, "NLRB precedent in this situation [i.e., the premature extension doctrine] is inapplicable because there is no federal statute comparable to section 1156.7." (Request for Review at 3, *quoting Cadiz v. ALRB*, *supra*, 92 Cal.App.3d 365 at p. 374.) The UFW further argues that the provisions setting forth the statutory contract bar in the ALRA are plain and unambiguous.

The UFW has misinterpreted the *Cadiz* decision. At issue in *Cadiz* was whether a decertification petition could be filed at any time during the term of a one-year collective bargaining agreement. The Board ruled in the underlying decision that, as to one-year contracts, a decertification petition would be considered timely only if filed during the last year of the contract and during the eleven months succeeding expiration of the agreement. The Board reached this conclusion in reliance on NLRB precedent that established a rule allowing for a 30-day open period (between 90 to 60 days before the expiration of a contract) during which representation petitions could be filed and a 60-day

insulation period thereafter immediately preceding the expiration of the contract during which no petition could be filed. (*Cadiz v. ALRB, supra,* 92 Cal.App.3d 365 at pp. 373-374.) The Court of Appeal held that NLRB precedent was not applicable *in that situation* because there was no federal statute comparable to section 1156.7, *subdivision (c),* establishing a contract bar to elections and no statutorily authorized open period for filing. (*Cadiz v. ALRB, supra,* 92 Cal.App.3d 365 at 374 [emphasis added].)[3]

In this situation there is no California statute addressing the effects of the extension of an existing collective bargaining agreement during the term of the agreement. This was noted in the Board's decision in *M. Caratan* (1978) 4 ALRB No. 68, *rev'd on other grounds, Cadiz v. ALRB* (1979) 92 Cal.App.3d 365. In *M. Caratan*, the Board was presented with an existing one-year collective bargaining agreement during which a decertification petition was filed to divest the UFW of its status as certified bargaining agent. The Board erred in holding that, contrary to section 1156.7 (c), a petition for an election could not be filed at just any point during a one-year contract. However, the Board did note in dicta that a renewal of the existing contract or the execution of a new contract prior to the filing of a petition would not act as a bar to

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[3] The UFW misquoted the *Cadiz* decision, stating that it read, "NLRB precedent in this situation is inapplicable because there is no federal statute comparable to section 1156.7." The decision actually stated that because there was no federal statute comparable to section 1156.7(c), which allows for a petition to be filed during the year prior to the expiration of a collective bargaining agreement, the NLRB's precedent regarding the time when representation petitions could be filed was inapplicable. The NLRB precedent in that regard clearly conflicted with the unambiguous terms of section 1156.7(c). To credit the UFW's argument would mean that all NLRB precedent regarding statutory contract bar rules would be inapplicable *even if* there were no state statute or ALRB precedent addressing such issues.

the petition. (*M. Caratan*, *supra,* 4 ALRB No. 68 at p. 11.) In essence, the Board applied the premature extension doctrine to decertification petitions. In *Phelan & Taylor Produce*, the Board simply expanded the application of the premature extension doctrine, holding that it "constitutes applicable NLRA precedent and applies also to the filing of certification petitions," citing section 1147. (*Phelan & Taylor Produce, Inc.*, *supra,* 7 ALRB No. 8 at p. 6.)

The application of the premature extension doctrine is in keeping with the statutory contract bar provided in section 1156.7(c). To rule otherwise would allow employers and unions to circumvent the filing of decertification petitions by constantly extending collective bargaining agreements. This would frustrate the will of the employees.

The dismissals of Objections One and Three by the Executive Secretary are affirmed.

Employer Non-Compliance with a Board Order

The UFW argues that the Executive Secretary erred in dismissing Objection Two, in which it objected to Gallo's failure to comply with a remedial Board Order in an unfair labor practice case, *Gallo Vineyards, Inc.* (2004) 30 ALRB No. 2, and the Regional Director's refusal to block the election for that reason. In 30 ALRB No. 2, Gallo was found to have provided unlawful assistance, through its supervisors and/or statutory agents, to an effort to decertify the UFW and, along with other remedies in the Board's order, was ordered to provide new employees with copies of a required Board

Notice during the twelve-month period following the date the Board's Order became final.

The Board's decision in 30 ALRB No. 2 was appealed to the California Courts of Appeal, case number C048387, and review was denied on December 19, 2005. A petition for review was filed with the Supreme Court of California, case number S139715, and review was denied on January 25, 2006. The order became final after the period for seeking review before the United States Supreme Court ended on April 25, 2006. On May 15, 2006, the Regional Director sent a closing letter to counsel in 30 ALRB No. 2 stating that '[b]ecause all the terms and conditions of this Board Order have been satisfactorily met, I have closed the case as of the date of this letter. Please be aware, however, that this closing is conditional upon continued compliance with the terms of the Order." The parties were free to seek review of the Regional Director's decision closing the case, and the docket does not reflect that such review was sought.

On June 19, 2007, the UFW requested blocking of the decertification election in a letter to the Regional Director. The UFW argued that Gallo could not have complied with the requirement that it provide copies of the Board Order to all employers during the twelve-month period following the date the order became final since the twelve-month period had not expired at the time the closing letter was sent. The UFW's request was denied, and the decertification election was held on June 25, 2007.

The UFW argues that Gallo's non-compliance in 30 ALRB No. 2 made the election in this matter *per se* improper. Additionally, the UFW argues that the Regional Director erred in denying its request to block the election pursuant to *Cattle Valley Farms*

(1982) 8 ALRB No. 24, although that point is moot because the decision not to block an election is not reviewable. Instead, a party who is allegedly aggrieved by conduct which a regional director found insufficient to block the election may file election objections alleging that the conduct indeed interfered with employee free choice. (*ConAgra Turkey Co.* (1993) 19 ALRB No. 11 at p. 2-3 ["[T]he mechanism provided for addressing the conduct that a regional director either rejected or did not consider in deciding not to block an election is the filing of election objections."].) The Executive Secretary dismissed the objection on the grounds that the UFW submitted only two declarations showing non-compliance, and this showing was insufficient to have affected the outcome of the election.

Section 1156.3(c) creates a presumption in favor of certification, whether of a representation or decertification election. (*Mann Packing Co.* (1990) 16 ALRB No. 15 at p. 4; see generally *Ruline Nursery Co. v. ALRB* (1985) 169 Cal.App.3d 247, 254 ["[T]he Legislature has in substance established a presumption in favor of certification with the burden of proof resting on the objecting party to show why the election should not be certified."].) The touchstone in ALRB precedent regarding overturning elections is an "outcome-determinative" test to determine whether unlawful acts occurred and whether these acts interfered with employees' free choice to such an extent that they affected the results of the election. (*Mann Packing Co.*, *supra*, 16 ALRB No. 15 at p. 4.) The burden of proof is on the party seeking to overturn an election to come forward with specific evidence to this effect. (*Furukawa Farms, Inc.* (1991) 17 ALRB No. 4 at p.16, fn. 9.) The burden is met by a showing of specific evidence that misconduct occurred

and that this misconduct tended to interfere with employee free choice to such an extent that it affected the results of the election. (*Mann Packing Co.*, *supra*, 16 ALRB No. 15 at p. 4.)

There are several aspects of this matter that are troubling in terms of compliance with the Board's order in 30 ALRB No. 2. The case in 30 ALRB No. 2 was closed "conditional upon continued compliance" despite the fact that the compliance period for distribution of the Board Order to new hires had not ended. Nothing in the closing letter indicated the existence of means of insuring "continued compliance" by Gallo upon which closure of the matter was conditioned. Although the proper means of addressing a Regional Director's decision to close a case after compliance proceedings is by seeking review pursuant to Section 1142(b), *Pleasant Valley Vegetable Co-Op* (1990) 16 ALRB No. 2, on the record before us, there is nothing to indicate that the UFW would have had cause to question whether Gallo was continuing to comply with the Board's order and seek review of the decision to close the case. There is no way to know on the record before us how many of Gallo's employees who voted were new hires who had been hired after the Board Order became final, how many of them actually received the Board Notice, and what effect, if any, Gallo's alleged non-compliance had on the election.

As stated above, we cannot review the Regional Director's decision to direct an election; we are constrained to judge the conduct the UFW has alleged as a basis for blocking the election, i.e., Gallo's alleged non-compliance with the Board's order, to determine if, indeed, the conduct, if true, had an effect on the election.

The two declarations provided in support of this Objection are insufficient to show that a sufficient number of employees were so affected by Gallo's alleged non-compliance so as to have potentially affected the outcome of the election. The two declarants failed to provide any indication that the failure of Gallo to provide them a copy of the Board Notice had any effect on them or tended to affect their free choice or the free choice of any other Gallo employee.

We would urge the Regional Director to cease the practice of closing cases prior to the expiration of the compliance period. Closing a case before the compliance period has expired gives the imprimatur of the Board that compliance has been met and unnecessarily places the onus on the prevailing party to disprove compliance with little, if any, tools at its disposal to do so. The fact that the Regional Director who closed the matter in 30 ALRB No. 2 also decided whether or not to direct the election in this case based on his conclusion that there had been compliance in 30 ALRB No. 2 further compounds the problem.

The Executive Secretary's dismissal of Objection Two is affirmed.

Mann Packing Preclusion

In Objection Four, the UFW alleged that Gallo unlawfully assisted in the gathering of signatures for the decertification petition and unlawfully assisted in the decertification campaign. In Objection Five, the UFW alleged that the decertification petition was invalid because support for it was obtained by employer agents and filed by an employer agent. The UFW also filed the following two related unfair labor practice charges on July 20, 2007:

> 07-CE-23-SAL: On or about June 18, 2007, the employer violated the Act by having one of its agents, Roberto Parra, file a Petition for Decertification, in an unlawful attempt to decertify the UFW, the employees' certified bargaining representative.
>
> 07-CE-26-SAL: On or about the beginning of March 2007, and continuing to date, the employer, through its supervisors, representatives and/or agents unlawfully assisted in, and supported the gathering of signatures for a decertification petition and lent other unlawful support to a campaign to decertify the UFW, the certified bargaining representative, in violation of the ALRA.

The Salinas Regional Director dismissed the charges in 07-CE-23-SAL and 07-CE-26-SAL, and the General Counsel sustained the dismissals.

The Executive Secretary dismissed the election objections, noting that the reason for dismissing these objections was not solely because the issues in the dismissed unfair labor practice charges and the election objections were identical. He noted that dismissal of an election objection based on the same facts as a dismissed unfair labor practice charge is merited only when the issues in the two proceedings are coextensive in their legal merits, i.e., that the conduct in question cannot be objectionable election conduct if it did not also constitute an unfair labor practice, or that there is no independent basis upon which the conduct could constitute election misconduct.

The UFW requests that the Board revisit its decisions in *Mann Packing Co., Inc.* (1989) 15 ALRB No. 11 and *Richard's Grove and Saralee's Vineyard, Inc.* (2007) 33 ALRB No. 7. The UFW argues that the Board's current application of the *Mann Packing* rule should be reversed for the following reasons: 1) The Board's current application of the rule improperly requires automatic dismissal of election objections any time dismissed unfair labor practice (ULP) charges mirror the objections, 2) the Board

improperly applies *Mann Packing* where ULP charges have been dismissed following only an investigation rather than to cases where the General Counsel's dismissal of charges is based on fully litigated facts, 3) *Mann Packing* principles only apply to cases involving voter eligibility and not to election objection cases, 4) the Board's rule leaves parties with a "Catch-22" choice between filing objections or ULPs, and 5) the Board has relinquished its responsibility to protect the integrity of elections.

a. The Board's Application of the *Mann Packing* Rule

The UFW asserts that the Board has adopted an automatic rule "that any time objections allegations mirror unfair labor practice charges which have been dismissed, then the election objections must be dismissed." This argument is without merit. In *Richard's Grove and Saralee's Vineyard, Inc.*, *supra*, 33 ALRB No. 7, the Board noted that while the Board is precluded from adjudicating representation matters when the same issues were the subject of a dismissed ULP and the issues in the two proceedings are coextensive in terms of their legal merit, the rule is not automatically triggered simply because the facts in both proceedings are the same. (*Richard's Grove, supra,* 33 ALRB No. 7 at p. 6 citing *ADIA Personnel Services, Inc.* (1997) 322 NLRB 994.) The Board has clearly stated, consistent with NLRB precedent, that the Board is not bound by the General Counsel's dismissal of a ULP charge in circumstances where it is not necessary to conclude that an employer committed a ULP to find that conduct affected the outcome of an election. In other words, if the Board can find the conduct objectionable on an independent legal basis, without determining the conduct is a ULP, then the Board will proceed with adjudicating the election objection.

The UFW cites *ADIA Personnel Services, Inc.*, *supra*, 322 NLRB 994 and *General Shoe Corp*. (1948) 77 NLRB 124 for the proposition that the Board has "total and unlimited authority to apply its own standards in representation cases regardless of what the RD (Regional Director) has done regarding ULP charges." (UFW's Request for Review at p. 15.) This is an incorrect reading of these cases.

The NLRB stated in *General Shoe Corp*. that "conduct that creates an atmosphere which renders improbable a free choice will sometimes warrant invalidating an election, even though that conduct may not constitute an unfair labor practice." (*Id*. at p. 126.) The Board's application of the *Mann Packing* rule is consistent with this principle. Indeed, the Board specifically noted in *Mann Packing* and in *Richard's Grove* that conduct sufficient to warrant setting aside an election need not rise to the level of an unfair labor practice. (*Mann Packing, supra,* 15 ALRB No. 11 at pp. 8-9; *Richard's Grove, supra*, 33 ALRB No. 7 at p. 6.) [4]

Contrary to the UFW's assertion that these cases give the Board "total and unlimited authority to apply its own standards in representation cases," *ADIA Personnel* and *General Shoe Corp*. are examples of cases where the NLRB proceeded with the

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[4] The *General Shoe* decision established the "laboratory conditions" test for judging conduct in representation proceedings. This Board has declined to apply the laboratory conditions test in ALRB elections because the seasonal nature of agricultural work and the migratory status of agricultural workers make application of the doctrine unrealistic; (*D'Arrigo Bros. Co. of California* (1977) 3 ALRB No. 37; *S & J Ranch* (1986) 12 ALRB No. 32) however, this does not undercut the general principle acknowledged in *Mann Packing* and *Richard's Grove* that conduct that may not amount to a ULP may nonetheless be the basis for setting aside an election**.**

adjudication of an election objection because the related ULP was <u>not</u> coextensive in terms of its legal merit with the objection.

In *ADIA Personnel*, the union had filed an election objection alleging that the employer had told employees on the day before the election that if the union won the election, wages and bonuses would be "frozen" because the employer would have to negotiate with the union about these matters. The union also filed a ULP charge alleging that this statement violated section 8(a)(1) of the National Labor Relations Act (NLRA). The ULP charge was dismissed. Nevertheless, the NLRB found that because it was not necessary for it to determine that the employer's conduct was a ULP to conclude that it was objectionable conduct which warranted setting aside the election, it was within the NLRB's authority to adjudicate the objection. (*ADIA Personnel Services, Inc.*, *supra*, 322 NLRB 994, fn 2.)

The NLRB has long followed the rule that an employer's predictions concerning the probable effect of unionization, such as the statement made in *ADIA Personnel*, shall not be "evidence of an unfair labor practice," so long as such expression contains "no threat of reprisal or force or promise of benefit." (*NLRB v. Gissel Packing Co*. (1969) 395 U.S. 575, 618-620.)

On the other hand, in the election objections context, pre-election statements like the one made in *ADIA Personnel* have been found to be objectionable without determining whether the statements are ULPs. (*ADIA Personnel Services, Inc.*, *supra,* 322 NLRB 994, citing *W.F. Hall Printing* (1978) 239 NLRB 51.). Therefore, even though the dismissed ULP charge and the election objection were based on the same

conduct, the NLRB was able to determine that under the particular circumstances, the speech affected the outcome of the election without having to determine whether the speech rose to the level of a ULP. The NLRB reasoned that the objectionable conduct in *ADIA Personnel* could be found without regard to whether the interfering conduct would be a ULP, and so the NLRB was not bound by the General Counsel's dismissal of the ULP charge alleging the same conduct. (*ADIA Personnel Services, Inc.*, *supra*, 322 NLRB 994, fn 2.)

The UFW also incorrectly states that *Virginia Concrete Corp*. (2003) 338 NLRB 1182, supports its argument that the Board retains total authority to act on representation matters, regardless of whether the General Counsel has dismissed related ULP charges. In that matter, the NLRB refused to consider an election objection to a decertification election asserting that the employer interfered with the election by refusing to recognize and bargain with the union. The NLRB found that the gravamen, or most substantial part, of the objection was that the employer had violated section 8(a)(5) of the NLRA, and because no ULP charge had been filed alleging such a violation, the NLRB held that it could not consider the union's assertion in the context of an election objection. (*Virginia Concrete Corp*., *supra,* 338 NLRB 1182, at p.1185-1186, citing *Texas Meat Packers* (1961) 130 NLRB 279 [where the gravamen of an objection would require a finding of a ULP violation, making such a finding in a representation case would conflict with the General Counsel's exclusive authority with respect to the issuance of ULP complaints].) The NLRB noted that it could find conduct objectionable, even in the absence of ULP charges <u>unless</u> it was the type of conduct that could only be

held to interfere with the election upon an initial finding that a ULP was committed. (*Virginia Concrete Corp.*, at p. 1186, fn 8 [emphasis added].)[5]

The Board's application of the *Mann Packing* rule is consistent with NLRB precedent in that it has recognized that if the Board can find the conduct objectionable on an independent basis, without determining the conduct is a ULP, then the Board will proceed with adjudicating the election objection.

In the instant case, however, it is impossible to resolve the election objections in question without evaluating whether the unfair labor practices alleged in charges 07-CE-23-SAL and 07-CE-26-SAL did or did not occur.

The acts alleged in Objections Four and Five -- that Gallo unlawfully assisted in the gathering of signatures for the decertification petition and had one of its agents file the decertification petition at issue -- would, if true, constitute unfair labor practices in violation of section 1153(a) as alleged in the dismissed unfair labor practice charges.

Were the Board to determine, as alleged in Objection Four, that Gallo unlawfully assisted in the gathering of signatures for the decertification petition and unlawfully assisted in the decertification campaign, it would have reached *and* decided the merits of the dismissed unfair labor practice charge in 07-CE-26-SAL, by finding that

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[5] The NLRB also held in *Virginia Concrete Corp*. that the withdrawal of a ULP charge does not operate as a waiver of a party's right to file objections based on the same conduct. Presumably it is this language that the UFW is relying on. However, this holding does not undermine the established rule followed elsewhere in the decision that if sustaining an objection would require a ULP finding, the NLRB is precluded from considering the objection.

Gallo "through its supervisors, representatives and/or agents unlawfully assisted in, and supported the gathering of signatures for a decertification petition and lent other unlawful support to a campaign to decertify the UFW . . . ." Similarly, were the Board to determine, with respect to Objection Five, that "the decertification petition was invalid because support for it was obtained by employer agents and filed by an employer agent," it would have reached *and* decided the merits of the dismissed unfair labor practice charge in 07-CE-23-SAL, by finding that Gallo "through its supervisors, representatives and/or agents unlawfully assisted in, and supported the gathering of signatures for a decertification petition and lent other unlawful support to a campaign to decertify the UFW . . . ." It is impossible for the Board to find the conduct alleged objectionable on an independent legal basis without finding the conduct to be an unfair labor practice; therefore, under *Mann Packing,* the Board is bound by the General Counsel's dismissal of the charges.

b. UFW's Request to Restrict *Mann Packing* to Cases Where the General Counsel's Dismissal of Charges is Based on Fully Litigated Facts and to Cases Involving Voter Eligibility

The UFW argues that since there was no full adjudication of the dismissed unfair labor practice charges at issue, to dismiss election objections based on the same facts amounts to "a form of issue preclusion," (*Richard's Grove, supra,* 33 ALRB No. 7 at p. 6) that is not supported by law in that it equates prosecutorial discretion with full litigation. The UFW argues further that *Mann Packing* and *Times Square Stores* (1948) 79 NLRB 361 require the Executive Secretary and Board to apply *Mann Packing* under

only two circumstances: (a) where voter eligibility is necessarily tied to a General Counsel proceeding and the General Counsel's finding has prevented the objecting party from "prevailing" in a General Counsel proceeding; or (b) the General Counsel's dismissal of charges or similar findings is based on fully litigated facts and decisions pursuant to Chapter 6 standards.

The UFW makes too much of the phrase "form of issue preclusion" in *Richard's Grove*. Like adjudicated facts, the General Counsel's sole authority under section 1149 regarding unfair labor practice charges, *regardless of whether the charges result in a complaint or dismissal,* (cf. *Agri-Sun Nursery* (1987) 13 ALRB No. 19 [election objections based on the same facts alleged in unfair labor practice charges were held in abeyance until the General Counsel could decide whether to issue a complaint]) is what "precludes" the Board from addressing election objections based on the same conduct alleged in dismissed unfair labor practice charges if adjudicating the election objections would require factual findings that would inherently resolve the dismissed unfair labor practice charges. In *Richard's Grove*, the Board made it clear that the General Counsel's resolution of an investigation of an unfair labor practice charge is a *form* of issue preclusion, not issue preclusion itself (*Richard's Grove, supra,* 33 ALRB No. 7 at p. 6), and that *Times Square Stores* did not require full litigation of an underlying dismissed unfair labor practice charge in order to dismiss the mirroring election objection. (*Richard's Grove*, *supra,* 33 ALRB No. 7 at p. 10-11 [noting that in *Times Square Stores*, there had been no adjudication of the unfair labor practice charge at issue, but simply a decision by the NLRB General Counsel to dismiss the charge].) Thus, the

Board doesn't equate the General Counsel's prosecutorial discretion with full litigation; it *analogizes* the General Counsel's sole prosecutorial discretion to issue preclusion, noting that the General Counsel's sole authority under section 1149 to investigate charges and issue complaints, regardless of whether that exercise of discretion results in findings that the charges are unsubstantiated, of no merit, or are of sufficient merit to support the filing of a complaint, is final and beyond review *just as if the charges had been fully litigated.* (Cf. *Belridge Farms v. ALRB* (1978) 21 Cal.3d at 557.) The issue is not issue preclusion, but the fact that the investigation and issuance of complaints regarding unfair labor practices is not within the jurisdiction of the Board.

The cases the UFW cites for the proposition that a dismissed unfair labor practice charge is not *res judicata* with respect to election objections are inapposite because they do not involve the effect of a dismissed unfair labor practice charge in an election objection proceeding, but in *other* unfair labor practice charge proceedings. (See, e.g., *W. Ralston & Co., Inc.* (1961) 131 NLRB 912, fn.3; *Jersey City Welding & Machine Works, Inc.* (1950) 92 NLRB 510; *R.E. Dietz Co.* (1993) 311 NLRB 1259.) Similarly, the UFW's assertion that *Times Square Stores,* and, as a result, *Mann Packing* must be limited to facts where voter eligibility must be resolved in order to resolve an election objection, is simply incorrect. (See, e.g., *Parker Brothers & Co.* (1954) 110 NLRB 1909, 1911 ["Although the *Times Square Stores* case did involve the question of voter eligibility, the principle of that case has not been limited to that type of situation, but has been extended generally to all cases where the subject matter of unfair labor practice charges has later been the basis for objections to an election"].)

The UFW is again incorrect in its assertion that *Mann Packing* requires that there be fully litigated facts in an unfair labor practices proceeding in order for an election objection based on those same facts to be dismissed. "The *Times Square* principle has been followed by this Board," where resolution of an election objection "turns on a finding which is uniquely within the province of the General Counsel and can only be determined in an unfair labor practice proceeding," (*Mann Packing*, *supra,* 15 ALRB No. 11 at p. 8.). *Times Square Stores* clearly applies but does not require that the underlying unfair labor practice charges were indeed litigated.

c. Effect of *Mann Packing* on Parties' Choice to File ULPs, Election Objections or Both

The UFW argues that the Board's application of *Mann Packing* creates a "Catch-22 choice" of filing objections or ULP charges, and that parties may decline to file ULP charges "for fear the charges and objections will be dismissed." We do not find this argument persuasive. As explained above, the rule is not automatically triggered simply because the facts in both proceedings are the same, and the Board may adjudicate an objection even where a related ULP charge has been dismissed if it can do so on an independent legal basis. Parties always have the option of filing ULPs or objections or both depending on the type of remedy sought. In addition, where a party withdraws ULP charges, the Board has stated that it is not precluded from litigating a parallel issue in an election proceeding. (*Richard's Grove, supra,* 33 ALRB No. 7 at p. 6 citing *Bayou Vista Dairy* (2006) 32 ALRB No. 6.) The choice faced by the UFW is not wholly unlike the choice faced by litigants under the doctrine of election of remedies, where a litigant who

has two inconsistent remedies to obtain relief on the same set of facts must choose between those remedies. (See generally 3 Witkin Cal. Procedure (5th ed. 2008) Actions, § 179, p. 259.)

d. The *Mann Packing* Rule and the Board's Authority Over Representation Proceedings

Finally, the UFW argues that the Board's application of the *Mann Packing* rule is a "relinquishment of its duty to evaluate election objections," and improperly gives the General Counsel the authority to control the outcome of representation proceedings, thus interfering with the Board's exclusive authority over representation matters. The UFW raised this argument previously in the *Richard's Grove* matter. The Board, in rejecting the argument in that case, pointed out that this argument was "the very consideration that was central to the analysis in *Times Square Stores* (79 NLRB 361at pp. 364-365) and *Mann Packing Co., Inc.* (15 ALRB No. 11 at pp. 7-8)." The Board explained that in both cases, "it was determined that the General Counsel's final authority over the investigation of unfair labor practice charges and the issuance of complaints acts as a narrow limitation on the Board's exclusive authority over representation matters." (*Richard's Grove and Saralee's Vineyard*, *supra*, at p. 10.) The UFW has provided no new basis for the Board to reconsider this argument.

For the reasons discussed above, we affirm the Executive Secretary's dismissals of Objections Four and Five.

Insufficient Time to Respond to Petitioner's Flyer

The UFW argues in Objection Eight that although it was aware four days prior to the election of a flyer distributed by Petitioner Parra, it was not aware until after the election that the flyer had been *distributed* two days prior to the election and thus had no opportunity to respond. The objection is without merit. Notice that there was a flyer was sufficient notice to the Union that it needed to respond, and NLRB authority has held that two days is sufficient for such a response. (*General Electric Company* (1967) 162 NLRB 912, *enf'd*, (4th Cir. 1967) 383 F.2d 152.) In fact, the decision in *General Electric* noted that the testimony of company officials "present[ed] no reason why management could not have secured a copy of [the Union's leaflet] . . . in time for preparation of a reply . . . ." (*General Electric*, *supra*, 162 NLRB at p. 918.) In this case, the UFW had a copy of Petitioner's flyer four days before the election, so it was on notice as to the allegations in it and had an acceptable amount of time to respond. The UFW's argument is without merit. We affirm the Executive Secretary's dismissal of Objection Eight.

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ORDER

In accordance with the discussion above, the Executive Director's dismissals of Objections One, Two, Three, Four, Five and Eight are affirmed.

Dated: November 7, 2008

GUADALUPE G. ALMARAZ, Chair

GENEVIEVE A. SHIROMA, Member

CATHRYN RIVERA-HERNANDEZ, Member

CASE SUMMARY

GALLO VINEYARDS, INC. 34 ALRB No. 6
(United Farm Workers of America) Case No. 07-RD-1-SAL

Background

A petition for decertification of the United Farm Workers of America (UFW or Union) as the certified bargaining representative of agricultural employees of Gallo Vineyards, Inc. (Gallo or Employer) in Sonoma County was filed on June 18, 2007 by Petitioner Roberto Parra. Prior to the election, the UFW filed two letter motions with the Salinas Regional Director on June 19, 2007 arguing that the decertification petition was untimely because an existing contract barred the filing of the petition under Labor Code section 1156.7 and that the election should be blocked pursuant to *Cattle Valley Farms* (1982) 8 ALRB No. 24 on the grounds that Gallo had not fully complied with a remedial Board Order issued in *Gallo Vineyards, Inc.* (2004) 30 ALRB No. 2. The Salinas Regional Director denied the letter motions on the grounds that the premature extension doctrine applied such that the decertification petition was timely, and the matter of 30 ALRB No. 2 had been remedied.

The UFW filed a Request for Review of Action by the Salinas Regional Director on June 20, 2007. The Request for Review was denied by administrative order on June 22, 2007 on the grounds that a Regional Director's decision to direct an election is final and reviewable only by means of filing election objections.

The election was held on June 25, 2007 for all agricultural employees of Gallo Vineyards, Inc. in Sonoma County. The results of the election were as follows: 125 votes for No Union, 95 votes for the UFW, and 12 Unresolved Challenged Ballots.

The UFW timely filed its election objections on July 2, 2007. The Executive Secretary dismissed Objections One and Three, in which the UFW argued that a contract extension agreed to by the UFW and Gallo had no effect on the time in which to file a decertification petition and, as such, the decertification petition was untimely and contained incorrect factual allegations as to the existence of a statutory contract bar. The Executive Secretary also dismissed Objection Two, in which the UFW argued that Gallo's failure to comply with all the requirements of the remedial Board Order in 30 ALRB No. 2 in advance of the election rendered the election *per se* improper, as well as Objections Four and Five, in which the UFW argued that the Executive Secretary erred in relying on *Mann Packing, Inc.* (1989) 15 ALRB No 11 and *Richard's Grove and Saralee's Vineyard, Inc.* (2007) 33 ALRB No. 7, in dismissing these objections because the Regional Director had

dismissed unfair labor practice charges based on the same facts. The Executive Director also dismissed Objection Eight, in which the UFW alleged that it did not have sufficient time to respond to representations made by Petitioner in a flyer.

Board Decision

The Board affirmed the dismissals of Objections One, Two, Three, Four, Five and Eight by the Executive Secretary. The Board held that the Executive Secretary properly found that there was no statutory contract bar to the decertification petition as alleged in Objection One and that the premature extension doctrine did apply. As a result, there were no erroneous factual allegations in the decertification petition as to the lack of a statutory contract bar as alleged in Objection Three. The Board held that the Executive Secretary's dismissal of Objection Two was proper. The decision of a Regional Director to direct, instead of block, an election is only reviewable as an election objection, and the showing of alleged non-compliance by Gallo with the remedial Board Order issued in 30 ALRB No. 2 by two declarations, although disconcerting, was insufficient to have affected the outcome of the election. The Board also held that the Executive Secretary properly dismissed Objections Four and Five, which were based on the same facts as dismissed unfair labor practice charges. The Board found that the Executive Secretary's dismissal of those charges was not *pro forma* as argued by the UFW, but instead was required under *Mann Packing, Inc.* and *Richard's Grove and Saralee's Vineyards* because the election objections and dismissed unfair labor practice charges were coextensive in their legal merits, i.e., it would have been impossible to adjudicate the election objections without reaching legal conclusions as to the merits of the dismissed unfair labor practice charges. The Board also held that the Executive Secretary properly dismissed Objection Eight because the UFW had sufficient time to respond to a flyer circulated by the Petitioner.

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

<table>
<tr><td>In the Matter of:

GALLO VINEYARDS, INC.,

Employer,

and

ROBERTO PARRA,

Petitioner,

and

UNITED FARM WORKERS OF AMERICA,

Certified Bargaining Representative.</td><td>Case No. 07-RD-1-SAL

ORDER SETTING ELECTION OBJECTION FOR HEARING; ORDER DISMISSING ELECTION OBJECTIONS; NOTICE OF OPPORTUNITY TO FILE REQUEST FOR REVIEW</td></tr>
</table>

On June 25, 2007, a decertification election was held in the above-entitled case. The tally of ballots showed 125 votes for No Union, 95 votes for the United Farm Workers of America (UFW), and 12 unresolved challenged ballots. On July 2, 2007, the UFW timely filed objections to the election.

PLEASE TAKE NOTICE that, pursuant to section 1156.3(c) of the Agricultural Labor Relations Act (ALRA)[1], an investigative hearing on an objection filed by the UFW in the above-captioned matter shall be conducted

[1] The ALRA is codified at California Labor Code section 1140, et seq.

on August 26, 2008 and consecutive days thereafter until completed at the Salinas ALRB Regional Office, 342 Pajaro Street, Salinas, CA.

The investigative hearing shall be conducted in accordance with the provisions of Regulation 20370.[2] The Investigative Hearing Examiner shall take evidence on the following issue:

> Objection 6: Whether the Employer provided an eligibility list with numerous incorrect addresses and, if so, whether the provision of the defective list affected the outcome of the election? (*Leminor, Inc., et al.* (1996) 22 ALRB No. 3.)[3]

PLEASE TAKE NOTICE that pursuant to section 1156.3(c) of the Agricultural Labor Relations Act, the UFW's remaining objections, Objections Nos. 1, 2, 3, 4, 5, 7 and 8, are hereby dismissed for the following reasons.

Objections 1 and 3

Objections 1 and 3 raise substantially the same issue, i.e., whether the contract extension agreed to by the UFW and Gallo Vineyards, Inc. (Gallo) was effective to bar the decertification petition filed in this case.[4] The parties signed a collective bargaining agreement on September 23, 2005, with an

[2] The Agricultural Labor Relations Board's (ALRB) regulations are codified at Title 8, California Code of Regulations, section 20100, et seq.

[3] The alleged failure to provide an accurate address list was the basis of an unfair labor practice charge filed by the UFW in Case No. 07-CE-24-SAL. This charge was the subject of a unilateral settlement agreement that contained no admission of liability. Because the charge was resolved without any determination of its merits, there is no potential for interference with the General Counsel's exclusive authority to determine whether charges warrant the issuance of a complaint. Accordingly, the Board may make an independent evaluation of the merits of the objection. (See *Bayou Vista Dairy* (2006) 32 ALRB No. 6.)

[4] Prior to the election, the UFW filed a motion with the Salinas Regional Director (RD) seeking the dismissal of the decertification petition for the reasons underlying what are now Objections 1, 2, and 3. That motion was denied. The UFW then filed with the Board a request for review of the RD's ruling. On June 22, 2007, the Board denied the request for review, holding that the decision to go forward with an election is not reviewable, and that the UFW's contentions instead appropriately could be the subject of election objections. In so holding, the Board did not address the merits of these contentions.

expiration date of March 23, 2008. On May 3, 2007, Gallo and the Union signed an amendment to the contract that, inter alia, extended its expiration date to March 23, 2011. On June 18, 2007, Petitioner Roberto Parra filed a decertification petition with the Salinas Regional Office, seeking to oust the UFW as the exclusive collective bargaining representative.

Pursuant to section 1156.7, subdivision (c), of the ALRA, the window period for filing a decertification petition is the year preceding the expiration of a collective bargaining agreement that would otherwise bar the holding of an election. Using the original term of the contract as the benchmark, the window period was the year preceding March 23, 2008, thus making the decertification petition timely filed. However, if the expiration date of the extended contract is utilized, as urged by the UFW, the petition was untimely.

In *Phelan & Taylor Produce Co.* (1981) 7 ALRB No. 8, the Board adopted the NLRB's premature extension doctrine as applicable precedent under the ALRA. Under that doctrine, a collective bargaining agreement whose expiration date has been extended during the terms of the original agreement does not bar a decertification or rival union petition if the petition is filed within the window period created by the original agreement. The purpose of this doctrine, the Board explained, is to give certainty regarding the proper time for filing petitions to rival unions and to employees wishing to change or decertify collective bargaining representatives. Further, the doctrine prevents an employer and incumbent union from manipulating the

window period so as to frustrate rival unions and employees seeking a change in representatives.

The UFW asserts in its objections that the Board erred in adopting the premature extension doctrine in *Phelan & Taylor Produce Co.* The merits of that argument are not at issue here, as *Phelan & Taylor Produce Co.* remains good law and the Executive Secretary is bound to follow it. Any claim that the doctrine is inapplicable under the ALRA must be addressed to the Board. Under the doctrine, the decertification petition was timely filed. Accordingly, Objections 1 and 3 are hereby DISMISSED.

Objection 2

Objection 2 alleges that the unfair labor practices found in Gallo Vineyards, Inc. (2004) 30 ALRB No. 2, in which two Gallo supervisors were found to have impermissibly involved themselves in the gathering of signatures on an earlier decertification petition filed by Petitioner, had not been fully remedied by the date of the election at issue here. That Board order required the Employer (1) to cease and desist from assisting, supporting, or encouraging any agricultural employee(s) in an effort to decertify their certified bargaining representative, (2) sign the Notice to Agricultural Employees, (3) mail copies of the notice to all agricultural employees employed by the Company during the period February 1, 2003 - January 31, 2004, (4) post copies of the notice for 60 days, (5) provide a copy of the notice to each agricultural employee hired by the Company during the

12-month period following the date when the order became final, (6) upon request, provide the Regional Director with the dates of the next peak season, and (7) arrange for a reading of the notice and for a question and answer period.

The UFW contends that the Employer has not complied with all the requirements of the Board order in 30 ALRB No. 2 because new hires after May 15, 2006 did not receive a copy of the required Board notice during the 12 month period following the Board order becoming final. There is no claim that the Employer did not comply with any other provision of the Board's order. The Board's decision in 30 ALRB No. 2 became final on January 25, 2006, when the California Supreme Court denied the Employer's petition for review.

In support of Objection 2, the UFW provided the declarations of two employees hired in January of 2007, but prior to the cut-off date of January 25, who state that they were never given copies of the notice. The declarants also state that they had not heard of the notice from other employees or from anyone else. The declarations provide no basis for determining how many, if any, other employees hired during the relevant period did not receive a copy of the notice. Assuming for the sake of argument that the failure to provide the notice to new hires would affect free choice in the election, in this instance the declarations establish only that two prospective voters failed to

receive the notice. As that number is insufficient to have affected the outcome of the election, the objection is DISMISSED.

<u>Objections 4 and 5</u>

In Objections 4 and 5, the UFW alleges that Petitioner Roberto Parra was an agent of Gallo and/or was allowed to use company time and property to facilitate the gathering of signatures on the decertification petition. The objection also includes several other instances of alleged unlawful assistance in the gathering of signatures and in the election campaign. Objections 4 and 5 raise the same facts and allegations as those contained in two unfair labor practive charges, 07-CE-23 and 07-CE-26-SAL. The Salinas Regional Director dismissed these charges and, on November 16, 2007, the General Counsel sustained the dismissals.

Where the evaluation of the merit of election objections is dependent on the resolution of issues in a pending unfair labor practice charge, the Board must defer to the exclusive authority of the General Counsel regarding the investigation of charges and the issuance of complaints. (*Mann Packing Co., Inc.* (1989) 15 ALRB No. 11; *Richard's Grove & Saralee's Vineyard, Inc.* (2007) 33 ALRB No. 7.) It is more than the mere existence of identical issues that triggers this rule. As the Board explained in *Richard's Grove & Saralee's Vineyard, Inc.*, it is only where the issues in the two proceedings are coextensive in terms of their legal merit that the Board is bound by the General Counsel's determination. In other words, it is only where the

preclusion of relitigation of the issue is fatal to the election objection that the Board must in turn dismiss the objection without further inquiry.

The conduct alleged in Objections 4 and 5, unlawful assistance by agents of Gallo in the gathering of signatures and in the decertification election campaign, is of the nature that it cannot be objectionable election conduct if it did not also constitute an unfair labor practice. The Regional Director concluded that there was insufficient evidence to conclude that Petitioner was an agent of Gallo or that other Gallo agents provided any unlawful assistance. There is no independent basis upon which the alleged conduct, even if lawful, could nonetheless constitute election misconduct. Therefore, under *Mann Packing Co., Inc.*, the Board is bound by the dismissal of the charges and must dismiss the objections. Accordingly, Objections 4 and 5 are hereby DISMISSED.

<u>Objection 7</u>

In Objection 7, the UFW alleges that Gallo engaged in a pattern of misconduct designed to undermine the UFW's support among employees. The objection incorporates by reference Objections 2-6. To the extent that it incorporates Objections 2-5, it is DISMISSED for the reasons stated above. To the extent it incorporates Objection 6, this issue has been set for hearing. In addition, the objection parallels the same general subject matter as the allegations in 07-CE-25-SAL which, as discussed above, was a charge that has been dismissed, making the parallel election objection subject to dismissal in accordance with *Mann Packing Co., Inc.*

However, Objection 7 contains an allegation that is not specifically referenced in the charge or in the Regional Director's dismissal. The allegation is that, three days before the petition was filed, supervisor Rigoberto Castillo referred employees who had questions about the effect of the changes in pay rates and classifications effected by the recent contract extension to Petitioner, stating Petitioner could help them with their questions. Assuming arguendo that this allegation was not encompassed within the investigation of 07-CE-25-SAL, it nevertheless fails to reflect objectionable conduct.

The supporting declaration indicates that Mr. Castillo, in response to a question about classifications under the amended contract, responded that he did not know because he had just returned from Mexico and that he would investigate. After then questioning why the employees did not know the answer themselves, he said that they should talk to Petitioner. He then went to his truck to look for Petitioner's phone number, could not find it and told the employees he would give it to them later. It is not clear why Mr. Castillo would suggest that the employees talk to Petitioner. While the UFW asserts that this reflects a message that the employees should decertify the UFW, in fact on its face the conduct is benign. Without more, it is difficult to see how this conduct would have sent any message other than that Mr. Castillo did not know the answer but Petitioner might. Therefore, assuming that this allegation is not subsumed within 07-CE-25-SAL and dismissed on that

basis, it is DISMISSED for failure to provide declaratory support setting forth facts which, if true, would constitute objectionable conduct.

Objection 8

In Objection 8, the UFW alleges that Petitioner distributed a flyer which falsely accused the UFW of having made various misrepresentations to employees in order to induce them not to support decertification.[5] The flyer, which was provided as an exhibit to the relevant declarations, contains assertions that the UFW had claimed that if the employees decertified the UFW, 1) they would lose a $500 bonus (applicable to labor contractor employees), 2) Gallo would eliminate a $5.00 harvest wage increase, 3) they would lose their seniority, 4) Gallo would pay only minimum wage, and 5) Gallo would resume mistreatment of employees. The UFW asserts that all these statements are false, that they would have affected employee free choice in the election, and that the flyer was distributed too close to the election to allow any opportunity to respond and correct the misrepresentations.

The National Labor Relations Board (NLRB) has gone back and forth several times in its history regarding its willingness to examine and regulate the truth of campaign propaganda. The current approach is reflected in *Midland National Life Insurance Co.* (1982) 263 NLRB 127. In that case,

[5] This allegation is not contained in any unfair labor practice charges, except to the extent that it suggests that Petitioner was acting as an agent of Gallo in the decertification election campaign. That allegation was contained in 07-CE-23-SAL, 07-CE-25-SAL, and 07-CE-26-SAL, and was dismissed for insufficient evidence. As a result, that finding is binding on the Board. Therefore, Objection 8 must be evaluated on the assumption that Mr. Parra was acting not as an agent of Gallo, but merely as the petitioner and as an employee supporting decertification.

the NLRB announced that it would no longer probe into the truth or falsity of the parties' campaign statements, absent the use of forged documents or altered NLRB documents. Previously, the NLRB had utilized the rule reflected in *Hollywood Ceramics* (1962) 140 NLRB 221. Under that approach, elections would be set aside based on misrepresentations if they involved a substantial departure from the truth, they occurred at a time that prevented other parties from making an effective reply, and where the misrepresentation could reasonably be expected to have a significant impact on the election. As this test is stated in the conjunctive, all three elements must be present to warrant setting aside an election based on misrepresentations.

The ALRB has not found it necessary to decide whether *Midland National Life Insurance Co.* is applicable precedent that it must follow pursuant to ALRA section 1148. In *Oceanview Produce Co.* (1998) 24 ALRB No. 6 and *Giumarra Vineyards Corporation* (2005) 31 ALRB No. 6, the Board held that even under the *Hollywood Ceramics* rule the objections must be dismissed because the union in both cases had the opportunity to make an effective reply.[6] In *Giumarra Vineyards Corporation*, the Board found that the union became aware of the alleged misrepresentations six days prior to the election and that this was ample time to refute them.

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[6] In a previous decision, the Board modified its application of the *Hollywood Ceramics* rule to require that the misrepresentations affect the integrity of the election, thus remaining consistent with the Board's application of an outcome determinative test to the evaluation of election misconduct. (See *Sakata Ranches* (1979) 5 ALRB No. 56.)

In this case, the declarations submitted by the UFW indicate that two UFW representatives saw the flyer in question four days prior to the election. If the Board considers six days to be "ample" time to refute alleged misrepresentations, then four days is sufficient time to make an effective reply. In so finding, I note that while applying the *Hollywood Ceramics* rule, the NLRB found that two days was sufficient time to refute alleged misrepresentations. (See *General Electric Co.* (1967) 162 NLRB 912.) Accordingly, Objection 8 is hereby DISMISSED.

PLEASE TAKE FURTHER NOTICE that, pursuant to Regulation 20393(a), the UFW may file with the Board a request for review of the partial dismissal of its election objections within five (5) days of the issuance of this Order. The five-day filing period is calculated in accordance with Regulation 20170. Accordingly, the request for review is due on June 16, 2008.

Dated: June 6, 2008

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J. ANTONIO BARBOSA
Executive Secretary, ALRB