STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

GERAWAN FARMING, INC., Employer, and SYLVIA LOPEZ, Petitioner, and UNITED FARM WORKERS OF AMERICA, Certified Bargaining Representative.	)	Case No. 2013-RD-003-VIS 39 ALRB No. 20 (December 19, 2013)

DECISION AND ORDER

On October 25, 2013, Sylvia Lopez (Petitioner) filed a petition to decertify the United Farm Workers of America (UFW) as the bargaining representative of the agricultural employees of Gerawan Farming, Inc. (Employer). The election was held on November 5, 2013, and the ballots were impounded so there is no tally of ballots at this time.

The UFW, Employer and the Petitioner all filed election objections. All parties allege that misconduct occurred that affected the results of the election. The UFW filed thirty-two (32) separate objections, most of which allege Employer misconduct. The Employer filed seven objections some of which allege misconduct by UFW observers, and some of which allege the Agricultural Labor Relations Board (ALRB) Regional Staff mishandled the election. The Petitioner filed thirteen objections which also allege misconduct by

UFW observers and mishandling of the election by the ALRB.[1] In a situation such as this, it is likely that some of the objections will be withdrawn based on the tally of ballots if circumstances later warrant that the impoundment of ballots be lifted.

Election objections are set for hearing when the declarations supporting the objection petition set forth facts which, if uncontroverted or unexplained, would constitute sufficient grounds for the Board to refuse to certify the election. (see Board regulation section 20365(c)(2) and 20365(f).) (*J. R. Norton Co. v. Agricultural Labor Relations Board* (1979) 26 Cal.3d 1.) As explained below, we will set for hearing only those objections that are of the nature that the ballot count is irrelevant, and hold the remaining objections for which a prima facie case is supported by declarations in abeyance pending a ballot count and/or resolution of parallel unfair labor practice charges. [2]

Summary

The following objection is set for hearing:

UFW Objection 1.

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[1] Each party's objections addressed in separate sections below and will be designated as follows: the UFW's objections will be labeled **UFW Objection 1**, etc.; the Employer's will be labeled **ER Objection 1**, etc. and the Decertification Petitioner's will be labeled **DP Objection 1**, etc.

[2] *See Dole Berry North* (2013) 39 ALRB No. 18 in which the Board held an objection alleging an inaccurate eligibility list be held in abeyance pursuant to *Gallo Vineyards, Inc*. (2009) 35 ALRB No. 6 until the ballots have been counted, since it was not possible to know whether the number of defective addresses exceeded the shift in votes needed to change the outcome in the election.

The following objections alleged conduct mirrored in pending Unfair Labor Practice (ULP) charges and will be held in abeyance pending the General Counsel's resolution of those charges:

UFW Objections 2, 4, 5, 21, 22, 23, and 30.

The following objections shall be held in abeyance until the ballots are counted so an evaluation of the outcome of the election can be evaluated:

UFW Objections 9, 10, 11, 12, 17, 18, 19, and 32.
DP Objection 11 (as renumbered by this decision—see footnote 10 below).

The following objections are dismissed:
UFW Objections 3, 6, 7, 8, 13, 14, 15, 16, 20, 24, 25, 26, 27, 28, 29 and 31.
DP Objections 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 12 and 13 (as renumbered).
ER Objections 1-7.

I. UFW's Objections

A. The following objection is set for hearing:

UFW Objection 1 alleges that the Employer unlawfully initiated, assisted in and supported the gathering of signatures for the decertification petition and decertification campaign. This conduct allegedly occurred in 16 crews between July 2013 and the third week of October 2013; and also allegedly occurred during fruit giveaways that began in August 2013, during a work stoppage on September 30, 2013, and during two sexual harassment training sessions in early and late September 2013.

This objection contains allegations that overlap with those in ULP case no. 2013-CE-027-VIS which was filed on July 15, 2013. A first amended complaint was issued in that case on October 25, 2013. The complaint contains allegations of unlawful assistance in five crews, and three of the crews described in the complaint are also described in UFW Objection

1. The complaint also alleges unlawful assistance during the fruit giveaways on August 30 and September 6, 2013.

Where an employer has been found to have initiated or provided significant support for decertification efforts, the Board will dismiss the election petition. (*Gallo Vineyards, Inc.* (2004) 30 ALRB No. 2.)

Pursuant to Board regulation section 20335(c) the Board orders that UFW Objection 1 be consolidated with the hearing in case no. 2013-CE-027-VIS.

B. The following UFW objections allege conduct and facts that mirror unfair labor practice charges and will be held in abeyance pursuant to California Labor Code Section 1149 and *Mann Packing* (1989) 15 ALRB No. 11 pending the General Counsel's resolution of those charges.

UFW Objection 2 alleges the Employer unlawfully assisted the decertification campaign through disparate treatment, namely by giving preferential access to the decertification supporters by allowing them to circulate the decertification petition during work time while prohibiting workers from circulating a pro-UFW petition during work time. This objection contains allegations similar to those in ULP case no. 2013-CE-039-VIS which was filed on September 12, 2013.

The UFW attached multiple declarations in support of this objection alleging that on or about August 27, 2013, foremen in seven crews told workers that they could not circulate a pro-UFW petition during work hours.

Merely permitting the circulation of the petition on company time or allowing employees to discuss, during working hours, decertifying a union has been held

insufficient to support a finding of active employer instigation of, or participation and assistance in, a decertification campaign. However, it is objectionable if the employer discriminates in favor of anti-union activity. (*D'Arrigo Bros. Co. of California* (2013) 39 ALRB No. 4 citing *Nash De Camp Company* (1999) 25 ALRB No. 7, *TNH Farms, Inc.* (1984) 10 ALRB No. 37, *Jack or Marion Radovich* (1983) 9 ALRB No. 45, ALJ dec. pp. 53-57; *Interstate Mechanical Laboratories, Inc.* (1943) 48 NLRB 551, 554; *Curtiss Way Corporation* (1953) 105 NLRB 642.)

UFW Objection 2 is set for hearing conditioned on the outcome of the General Counsel's investigation of the related ULP charge.

UFW Objection 4 alleges that the Employer provided unlawful assistance to the decertification campaign by paying for, supporting or coercing worker participation in anti-UFW protests. The allegations in Objection 4 overlap with allegations in ULP charge no. 2013-CE-041-VIS.

The UFW submits numerous declarations in support of this objection alleging that on September 23, 2013, October 29, 2013, and November 1, 2013, Gerawan supervisors allowed and encouraged workers to leave work early to attend an anti-UFW protest at the ALRB Visalia regional office, and that on September 25, 2013, Gerawan supervisors allowed and encouraged workers to leave work early to attend an anti-UFW protest near Gerawan offices. Other declarations allege that Gerawan supervisors encouraged workers to go on a paid bus trip to Sacramento on October 2, 2013 in order to travel to ALRB offices. Declaration 95 contains allegations that employees were paid for attending these protests.

UFW Objection 4 is set for hearing conditioned on the outcome of the General Counsel's investigation of the related ULP charge. However, because a ballot count is required to determine whether any misconduct found had a tendency to affect free choice in the November 5, 2013 election, a hearing on this objection will be held in abeyance until the ballots have been counted, should a ballot count otherwise be necessary.

UFW Objection 5 alleges that the Employer coerced workers into participating in anti-UFW activities. The UFW incorporates the detailed statement of facts from Objection 4 above. The allegations in Objection 5 overlap with allegations in ULP charge no. 2013-CE-049-VIS.

For the reasons discussed above with respect to Objection 4, UFW Objection 5 is set for hearing conditioned on the outcome of the General Counsel's investigation of the related ULP charge. However, because a ballot count is required to determine whether any misconduct found had a tendency to affect free choice in the November 5, 2013 election, a hearing on this objection will be held in abeyance until the ballots have been counted, should a ballot count otherwise be necessary.

UFW Objection 21 alleges the Employer threatened bankruptcy, closure or discontinuance of operations on various occasions between July 2013 and early November 2013. The allegations in Objection 21 overlap with allegations in ULP charge no. 2013-CE-043-VIS.

In *Vincent B. Zaninovich & Sons* (2008) 34 ALRB No. 3, the Board stated that "when an employer representative states or implies that the employer will shut down its'

operation if employees choose to unionize, the employer violates the ALRA in the absence of providing them with facts showing that this would be an economic necessity." (Citing *Steak-Mate, Inc.* (1983) 9 ALRB No. 11; *Paul M. Bertuccio and Bertuccio Farms* (1979) 5 ALRB No. 5, at ALJD, page 29; *Abatti Farms, Inc. v. ALRB* (1980) 107 Cal.App.3d. 317.)

Similarly an agricultural employer's unexplained threat to change to a less labor-intensive crop if employees decide to unionize violates the ALRA. (*Paul W. Bertuccio, supra*, 5 ALRB No 5 *Arnaudo Bros., Inc*. (1977) 3 ALRB No. 78, at ALJD, page 18; *Jasmine Vineyards* (1977) 3 ALRB No. 74.)

UFW Objection 21 is set for hearing conditioned on the outcome of the General Counsel's investigation of the related ULP charge. However, because a ballot count is required to determine whether any misconduct found had a tendency to affect free choice in the November 5, 2013 election, a hearing on this objection will be held in abeyance until the ballots have been counted, should a ballot count otherwise be necessary.

UFW Objection 22 alleges the Employer unlawfully laid off/discharged union supporters. This allegedly occurred in 13 crews beginning in October 2013. The allegations in Objection 22 overlap with allegations in ULP charge no. 2013-CE-048-VIS.

Firing a worker for union activity before an election "is a display of the employer's economic power that cannot help but chill the desire of a voter to support the union." (*Valley Farms* (1976) 2 ALRB No. 42.) Acceleration for unlawful reasons of a layoff that would have happened eventually is discriminatory. (*Ehrlich Beer, Inc.* (1987) 286 NLRB 671; *Brown & Lambrecht* (1983) 267 NLRB 186.) Where employees are laid off as the result

of additional employees being hired to affect the outcome of a potential election, the layoffs are discriminatory. (*Trend Construction* (1982) 263 NLRB 295.)

UFW Objection 23 alleges the Employer unlawfully hired employees for the purpose of supporting decertification efforts and voting in the decertification election. The allegations in Objection 23 overlap with allegations in ULP charge no. 2013-CE-051-VIS.

As the Board stated in *Gerawan Ranches* (1992) 18 ALRB No. 5, "the NLRB has long held that it is unlawful to bring in additional employees to influence the outcome of an election, as well as to postpone normal layoffs, even where no employee loses income because of a layoff or discharge." (Citing *Humana of West Virginia dba Greenbrier Valley Hospital* (1982) 265 NLRB 1056 ; *Suburban Ford* (1979) 248 NLRB 364, enf. denied on other grounds, 646 F.2d 1244.) Where employees are laid off as the result of additional employees being hired to affect the outcome of a potential election, the layoffs are discriminatory. (*Trend Construction, supra*, 263 NLRB 295.)

UFW Objections 22 and 23 shall be held in abeyance conditioned on the outcome of the General Counsel's investigation of the related ULP charges.[3] However, because a ballot count is required to determine whether any misconduct found had a tendency to affect free choice in the November 5, 2013 election, a hearing on these

[3] The Board requests that the General Counsel expedite her investigation of charge nos. 2013-CE-048-VIS and 2013-CE-051-VIS. (See Board regulation 20335(c).) The majority of challenged ballots filed in this matter allege that individual voters were hired for the purpose of voting. The resolution of case nos. 2013-CE-048-VIS and 2013-CE-051-VIS in particular would result in significant progress toward the resolution of case no. 2013-RD-003-VIS in general.

objections will be held in abeyance until the ballots have been counted, should a ballot count otherwise be necessary.

UFW Objection 30 alleges that Decertification Petitioner, Sylvia Lopez is not a Gerawan Employee and was hired for the purpose of organizing the decertification campaign. Objection 30 is essentially contained in Objection 23. As discussed above, the allegations in Objection 23 overlap with allegations in ULP charge no. 2013-CE-051-VIS.

C. The following UFW Objections shall be held in abeyance pursuant to *Gallo Vineyards* (2009) 35 ALRB No. 6 and *Dole Berry North* (2013) 39 ALRB No. 18 until the ballots have been counted, should a ballot count otherwise be necessary, because these objections are of the nature that a ballot count is required in order for a hearing examiner to conduct a complete evaluation of whether the alleged misconduct affectedthe outcome of the election.

UFW Objection 9 alleges the Employer engaged in bad faith bargaining through a unilateral wage increase to farm labor contractor (FLC) employees in June 2013, and, **UFW Objection 10 alleges** the Employer unlawfully granted a benefit to FLC employees for the purposed of eroding union support.

In support of UFW Objections 9 and 10, the UFW submitted Declaration 96 by Armando Elenes (National Vice-President of the UFW) that indicates he became aware that Employer had given farm labor contractor employees a raise from $8 to $9 per hour in June 2013.

It is well-settled that an employer's bestowal of benefits at a time closely preceding the election, when made with the intention of inducing employees to vote against the election, "is a coercive exercise of the employer's economic leverage." (*Anderson Farms*

(1977) 3 ALRB No. 67 at pp. 17-18.) The test is whether the benefits promised or conferred are intended and do interfere with worker's organizational rights, in particular, where a benefit was made to induce employees to vote in one particular way. (*Harry Carian Sales v. ALRB* (1980) 39 Cal.3d 209.)

UFW Objections 9 and 10 are of the nature that a ballot count is required in order for a hearing examiner to conduct a complete evaluation of whether the alleged misconduct had an outcome-determinative effect on the election. UFW objections 9 and 10 are therefore held in abeyance pending a tally of ballots, should a ballot count otherwise be necessary.

UFW Objection 11 alleges that the Employer engaged in bad faith bargaining through a unilateral wage increase ($.25 per box) to field packing employees on October 25, 2013, and **UFW Objection 12** alleges the Employer unlawfully granted a benefit though the unilateral wage increase to field packing employees. (UFW Objection 12 incorporates the detailed statement of facts in support of UFW Objection 11).

In support of Objections 11 and 12, the UFW submits ample declaratory support. Declaration 69, by a grape packer, states that on October 25, 2013, he was in the field working when he heard workers inside the packing shed yell "We're going to court to get the Union out!" He and his crew members were encouraged to go to Fresno and protest. He continued working, but about 25 workers from the packing area left for Fresno. When they returned two hours later, a worker told him that since packing employees went to the Fresno protest that day, they would be paid extra. His paystub indicated that he was paid $1.50/box on October 25, but was paid $1.25/box for the rest of the pay period.

Declaration 71, by a grape packing worker, states that on October 25, 2013, after lunch break, she heard workers talk about leaving to protest. She chose to keep working, but about 50 of her fellow crew members did leave to join the protest. After the workers returned from the protest, she noticed that the day's price per box had been raised twenty-five cents to $1.50.

Declaration 86, by a grape packer, states that she joined the anti-union protest in Fresno in the last week in October 2013. When she returned to work she saw that a checker passed by and "put a sticker" that raised the price per box from $1.25 to $1.50.

Declaration 94, also by a grape packer, states that around noon on October 25, 2013, she noticed that the majority of her fellow crew members left saying that they were going to the court in Fresno to support the company. She chose to stay. When she received her pay check the following week, she noticed that she had been paid $1.50 per box instead of $1.25 per box on October 25, 2013.

For the reasons set forth above with respect to UFW Objections 9 and 10, UFW Objections 11 and 12 also are of the nature that a ballot count is required in order to evaluate whether the alleged misconduct had an outcome-determinative effect on the election. UFW objections 11 and 12 are, therefore, held in abeyance pending a tally of ballots, should a ballot count otherwise be necessary.

UFW Objection 17 alleges that the Employer engaged in direct dealing and solicitation of grievances.

Exhibit 8, which is attached to declaration 96, contains an undated flyer indicating "as always, our door is open," and which states that "Jose Erevia (director of worker

services for Employer) helps with any questions or problems." Dan Gerawan's number is also on the flyer. There is also a copy of Jose Erevia's business card which states that supervisors cannot answer questions about union issues, and to please contact him for assistance. Also submitted was an undated flyer that encourages workers to be respectful of each other when they talk to each other about different issues during non-work time. That flyer encourages workers to call Jose Erevia with any problem or question. The union is not mentioned on this flyer. Another attached flyer bearing the date July 15, 2013 handwritten at the top and entitled "Declaration of rights of workers" (in Spanish) indicates that if workers want to file unfair labor practice charges or appeal an adverse employment decision, they should contact Jose Erevia. Finally, there is a flyer that says "thanks to our open door policy, you don't need an intermediary." The UFW states that this last flyer was attached to workers' September 21, 2013 paystub, but the flyer is undated.

It also is alleged that Employer also gave a DVD to workers shortly before the election in which Gerawan representatives told workers that "there are many ways for you to let us know about issues without having to wait for the union to come around and hope they will listen."

The UFW is correct that "the solicitation of employee grievances within a few days of a scheduled election coupled with promises, express or implied, to remedy such complaints impinges upon the free exercise of employee rights and is violative of the Act." (*Tom Bengard Ranch, Inc.* (1978) 4 ALRB No. 33, citing *Montgomery Ward & Co., Inc.,* (1976) 225 NLRB No. 15.)

UFW Objection 17 is objection is of the nature that a ballot count is required to evaluate whether the alleged misconduct had an outcome-determinative effect on the election. Therefore, UFW Objection 17 is held in abeyance pending a tally of ballots, should a ballot count otherwise be necessary.

UFW Objection 18 alleges that the Employer interrogated four workers on various dates (October 2013 through November 1, 2013).

In support of this objection, the UFW submits Declaration 13 which states that on November 1, 2013, Supervisor Lucio asked a worker whether she was going to support anti-UFW protests and when she replied "no," the Supervisor asked the worker whether she wanted the UFW to take away 3 percent of her wages. Declaration 23 states that in the first week of October, Foreman Martin Elizondo asked a worker if he was a UFW supporter. Declaration 61 states that in the first week of October, Foreman Esteban Cruz asked a worker to disclose for whom the worker was going to vote. Declaration 90 states that in the second week of October Foreman Francisco Mendoza asked a worker whether he was with the company or with the union, and said the reason he was asking was that he believed his crew was being given less work because the company thought his crew had union supporters.

Whether a particular interrogation tends to interfere with rights is a decision within the Board's particular expertise. (*Karahadian Ranches, Inc*. (1985) 38 Cal.3d 1.) Even though a conversation, viewed in isolation, may appear innocuous, examined against a backdrop of unfair labor practices and antiunion animus, its coercive potential may emerge. (*Karahadian Ranches, Inc., supra*, 38 Cal.3d 1, citing *NLRB. v. Ajax Tool Works, Inc*. (7th Cir. 1983) 713 F.2d 1307.)

UFW Objection 18 is of the nature that a ballot count is required in order to evaluate whether the alleged misconduct had an outcome-determinative effect on the election. Therefore, UFW Objection 18 is held in abeyance pending a tally of ballots, should a ballot count otherwise be necessary.

UFW Objection 19 alleges that the Employer unlawfully granted benefits by unilaterally implementing a new "employee discount" program in which Employer partnered with various merchants to give Gerawan employees "exclusive discounts on day to day life products and services (this was announced on October 19 and 26, 2013 by a flyer attached to employee paychecks), and by a free fruit and drink giveaway beginning in July and August 2013. In support of this objection, the UFW submitted numerous declarations. Various flyers employees received with their paychecks are attached as exhibits to many of the declarations.

UFW Objections 9, 10, 11 and 12 are of the nature that a ballot count is required to evaluate whether the alleged misconduct had an outcome-determinative effect on the election. Therefore, UFW Objection 19 is held in abeyance pending a tally of ballots, should a ballot count otherwise be necessary.

UFW Objection 32 alleges violence and threats of violence directed at UFW supporters. There were two incidents described in declarations submitted in support of this objection: one on September 30, 2013 and one on November 1, 2013. On September 30, a Gerawan employee allegedly threw a rock at a UFW supporter's car bearing a UFW flag (declaration no. 55). On November 1, some anti-UFW workers on their way to an anti-UFW protest allegedly entered Employer's fields to gather sticks that they said they would

use to beat UFW supporters. These comments were made in the presence of a foreman who did nothing to intervene (declaration no. 56).

In evaluating the impact of violence or threats thereof on the election process, the Board examines whether the misconduct creates an atmosphere of fear or coercion rendering employee free choice of representatives impossible. (*T. Ito & Sons Farms* (1985) 11 ALRB No. 36.) The Board has also held that actual violence, as opposed to threats of violence, readily establishes atmosphere of fear and coercion or reprisal sufficient to render employee free choice impossible. (*Ace Tomato Company, Inc.* (1989) 15 ALRB No. 7.)

There are no allegations indicating that the two alleged incidents were more than just isolated incidents. Even though the alleged misconduct, if true, by itself may not be enough to set aside the election, its effect on free choice may be considered along with other misconduct to assess the cumulative effect on the outcome of the election. The cumulative effect cannot be assessed except in tandem with the adjudication of other objections held in abeyance. Therefore, UFW Objection 32 also shall be held in abeyance pending the outcome of the General Counsel's resolution of the ULP matters described above and/or a tally of ballots, should a ballot count otherwise be necessary.

D. The following UFW Objections are dismissed for failure to state a prima facie case.

UFW Objection 3 alleges that the Employer provided unlawful assistance to the Petitioner through the provision of an attorney, Anthony Raimondo.

The statement of facts in support of this objection does not allege that Employer actually hired and paid for the services of Mr. Raimondo. Rather, the objection alleges that

Mr. Raimondo also represents several farm labor contractors that provide labor for Employer, and those farm labor contractors (who have a direct interest in the outcome of the election) are providing the services of Mr. Raimondo to the Petitioner and other employees who support decertification of the UFW. The UFW argues that Employer is liable for the farm labor contractor's misconduct.

While there may be a conflict of interest on the part of Mr. Raimondo, this objection must still be evaluated to determine whether the declarations supporting the objection set forth facts which, if uncontroverted or unexplained, would constitute sufficient grounds for the Board to refuse to certify the election. The UFW submitted no declaratory support for Objection 3 that would indicate any effect on the election.[4] Therefore, Objection 3 is dismissed because the facts alleged do not constitute sufficient grounds for the Board to refuse to certify the election.

UFW Objection 6 alleges that the Employer engaged in bad faith bargaining through a proposal to exclude farm labor contractor employees from collective bargaining agreement (on or about January 18, 2013 and continuing). Employer also allegedly insisted on this exclusion during the Mandatory Mediation and Conciliation process. The UFW argues

[4] The allegations in UFW Objection 3 overlap with allegations in ULP case no. 2013-CE-027-VIS which has gone to complaint; however, as the Board explained in *Mann Packing Co., Inc., supra*, 15 ALRB No. 11 it is well established that conduct sufficient to warrant the setting aside of an election does not necessarily constitute an unfair labor practice, and not all unfair labor practices necessarily constitute conduct sufficient to set aside an election. (See, e.g., *ADIA Personnel Services* (1997) 322 NLRB 994, fn. 2.) Therefore, the Board will not consolidate objections which do not set forth a prima facie case with ULP charges that have gone to complaint. This also applies to UFW Objections 6, 15 and 16.

that the Employer's bad faith bargaining conduct had a serious detrimental effect on employee free choice.

ULP Case No. 2013-CE-010-VIS, which went to complaint on May 17, 2013, alleges identical facts to those in Objection 6; however, as explained above in footnote 3, not all unfair labor practices necessarily constitute conduct sufficient to set aside an election. The conduct complained above in UFW Objection 6 occurred months before the election. The UFW did not include any declaratory information to support its allegation that the conduct tended to interfere with the employees' free choice to an extent that the outcome of the election could have been affected.

Section 20365 (c)(2) of the Board's regulations requires that a party objecting to an election on the grounds that it was not conducted properly must attach to the objection petition, declarations setting forth facts, which if uncontroverted or unexplained, would constitute sufficient grounds for the Board to refuse to certify the election. Section 20365(c)(2)(B) requires that the facts stated in each attached declaration be within the personal knowledge of the declarant, and that the details of each occurrence and the way the occurrence could have affected the outcome of the election be outlined with particularity.

UFW Objection 6 is dismissed for failure to provide sufficient declaratory support.

UFW Objection 7 alleges that the Employer engaged in bad faith bargaining by refusing to provide the UFW with correct employee contact information beginning in October 12, 2012 and continuing to the present, and this prevented the UFW from communicating with a substantial number of employees.

Only one declaration is relied upon (no. 96) in support of this objection. In this declaration, Armando Elenes (National Vice-President of the UFW) states in paragraph 10 that on or about September 12, 2012, he requested bargaining with Employer and requested employee contact information. He states that organizers under his supervision determined that there were 2,000 bad addresses on the list. He further states that between January 2013 and May 2013, he asked that Employer provide correct information, but that they never did. However, Employer apparently did produce an updated list prior to the election because Armando Elenes also states that UFW organizers made home visits to employees.

While the failure to provide the Employee contact information may violate the ALRA (see *Bud Antle, Inc.* (2013) 39 ALRB No. 12), the UFW has failed to provide sufficient declaratory support showing that this conduct so remote from the election tended to interfere with the employees' free choice to an extent that the outcome of the election could have been affected. (*Gallo Vineyards, Inc*., supra, 35 ALRB No. 6; *Silva Harvesting, Inc*. (1985) 11 ALRB No. 12.) Therefore UFW Objection 7 is dismissed.

Objection 8 alleges that the Employer provided an inaccurate eligibility list which prevented the UFW from communicating with a substantial number of voters in the days leading up to the election. The UFW acknowledges that the ballots have been impounded, making it impossible to determine whether the defective list had an outcome-determinative effect on the election, but argues the defective list would impact a margin of approximately 1,266 votes.

During home visits to employees, UFW organizers allegedly documented approximately 633 incorrect addresses on the eligibility list.

Only one declaration is relied upon (no. 96) in support of this objection. In this declaration, Armando Elenes (National Vice-President of the UFW) states in paragraph 10 that on or about September 12, 2012, he requested bargaining with Employer and requested employee contact information. He states that organizers under his supervision determined that there were 2000 bad addresses on the list. He further states that between January 2013 and May 2013, he asked that Employer provide correct information, but that they never did. He refers to attached Exhibit 5 as a copy of the bad address list compiled by UFW organizers under his supervision. This list is undated. Elenes makes no reference to the actual eligibility list for the November 5, 2013 election, nor does he reference to incorrect addresses allegedly discovered in the days leading up to the election. In addition, there is no information as to the number of employees on the actual eligibility list generated in preparation for the election.

In cases involving defective eligibility lists, the Board has applied an outcome-determinative standard under which an election will be set aside only if the eligibility list was so deficient that its utility was impaired and it tended to interfere with the employees' free choice to an extent that the outcome of the election could have been affected. (*Gallo Vineyards, Inc*., supra, 35 ALRB No. 6; *Silva Harvesting, Inc*., supra, 11 ALRB No. 12.) Here, the UFW has failed to provide declaratory support for its allegation that the voter eligibility list was defective. Therefore, Objection 8 is dismissed for failure to provide sufficient declaratory support.

UFW Objection 13 alleges the Employer engaged in bad faith bargaining by refusing to provide the UFW with documents signed by employees after captive audience meetings held in December 2012, and **UFW Objection 14** alleges the Employer engaged in

bad faith bargaining by refusing to provide financial information (approximately September 2013). Only one declaration is relied upon (no. 96) in support of these objections.

While the failure to provide the requested information may violate the ALRA (see *Bud Antle, Inc.,* supra, 39 ALRB No. 12), the UFW has failed to provide declaratory support showing that the failure to provide the requested information would have interfered with the employees' free choice to an extent that the outcome of the election could have been affected. (*Gallo Vineyards, Inc*., supra, 35 ALRB No. 6; *Silva Harvesting, Inc*., supra, 11 ALRB No. 12.) Therefore UFW Objections 13 and 14 are dismissed.

UFW Objection 15 alleges that the Employer engaged in bad faith bargaining by disparaging and undermining the UFW, beginning November 2012 and continuing through October 2, 2013; and **UFW Objection 16 alleges** the Employer encouraged or initiated decertification efforts through a disparagement campaign.

The UFW argues that the Employer implanted the idea of decertification into the minds of employees who later filed the decertification petition (Objection 16 incorporates the detailed statement of facts from Objection 15).

The UFW includes in its detailed statement of facts a list of flyers provided to employees from November 2012 through October 2, 2013. The flyers appear to be connected to the UFW's 2012 request for bargaining and the subsequent mandatory mediation process. Some flyers say that the UFW wants to force employees to pay the UFW 3 percent of their wages. Some indicate that the Mandatory Mediation and Conciliation (MMC) contract is wrong and that Gerawan is challenging it in court. The UFW also submits four declarations by Gerawan workers that have copies of some, but not all of the flyers described by the UFW

attached as exhibits to those declarations. One declarant states that he thinks some of the questions printed on selected flyers were not actually asked by employees, but were made up by the company to make workers think negatively about the UFW. The other declarations affirm receipt of the flyers. None of the declarations set forth facts describing the way the flyers could have affected the outcome of the election, and none of the declarants make statements indicating how the decertification petition was inspired by the Employer's flyers.

The ALRB consistently has applied an objective standard, in which the inquiry is whether statements would tend to interfere with employee free choice. (*Giumarra Vineyards Corp.* (2006) 32 ALRB No. 5. (See also e.g., *Karahadian Ranches, Inc. v. ALRB*, supra, 38 Cal.3d 1; *J.R. Norton v. ALRB* (1987) 192 Cal.App.3d 874, 891; *S. & F. Growers* (1978) 4 ALRB No. 58.) Employees are entitled to receive information relevant to their decision to vote regardless of whether the information comes from the union, the employer or third parties so long as it is not coercive or otherwise unlawful, so long as they can make an informed as well as a free choice. Employer speech in a decertification campaign is prohibited only when it is coercive or tends to interfere with the free choice of employees. (*Jack or Marion Radovich,* supra, 9 ALRB No. 45.) Except for any flyers that appear to directly solicit grievances (discussed in UFW Objection 17 which is discussed below), none of the statements are unlawful on their face. The supporting declarations do not include any information to support the allegation that the conduct implanted the idea of decertification into employees' minds or that the flyers tended to interfere with the employees' free choice to an extent that the outcome of the election could have been affected. Therefore, UFW Objections 15 and 16 are dismissed.

UFW Objection 20 alleges that the Employer unlawfully granted a benefit through a unilateral change in medical provider network for employees injured on the job through a flyer distributed on November 2, 2013 (flyer is dated February 2, 2013, but UFW maintains it was not distributed until November 2, 2013).

Only one declaration is relied upon (no. 96) in support of this objection. In this declaration, Armando Elenes states that on November 2, 2013, he became aware that Employer had distributed a flyer announcing the Employer had made a change or selection of a medical provider network (MPN) to provide care for work-related injuries. Elenes further states that the Employer did this with no notice to the UFW. Exhibit 8, attached to declaration 96 is a notice to employees dated February 2, 2013, indicating that Employer had selected WellComp MPN as the provider and that the MPN was effective February 2, 2013.

There is no indication that this information was distributed on November 2, 2013 except for Armando Elenes' statement that he became aware of the flyer on November 2, 2013. Moreover, there is no indication that this was a "new benefit" as Employer was required by law to carry workers' compensation insurance.

The UFW has failed to support its contention that Employer granted a new benefit on November 2, 2013, and UFW Objection 20 is dismissed.

UFW Objection 24 alleges that packing shed employees were improperly excluded from the election list, and none voted in the election.

In support of this Objection, the UFW submits declaration number 96. Armando Elenes states that during MMC proceedings between the UFW and Gerawan, the Gerawan Human Resources Supervisor testified that Gerawan packing house employees pack only

Gerawan fruit. The declaration itself is hearsay, but it cites to the transcript from the MMC case which is attached to declaration no. 96 as exhibit 9. The testimony of Jose Erevia indicates that the grape pickers take their bins and tubs of grapes to the “packing area” where there are employees whose only job is to pack the grapes. Erevia testified that these employees pack only Gerawan grapes.

There was no testimony in the section of transcript provided about the packing of stone fruit or any other produce grown by Employer although the packing of other produce besides grapes was at issue in *Gerawan Ranches, et al*. (1995) 21 ALRB No. 6. [5] The UFW’s objection states that there are 2,000 “packing house” employees. [6] The UFW did not allege that these packing house employees pack only Gerawan produce, nor did they provide any declaratory support to that effect.

The UFW has failed to support its contention that all 2,000 of its packing house workers only pack Gerawan produce, and UFW Objection 24 is dismissed.

UFW Objection 25 alleges that the peak requirement was not met.

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[5] On March 9, 1993, the NLRB Regional Director issued a decision, in which he determined that the Gerawan's packing shed workers were commercial rather than agricultural. This result was based on his findings that Gerawan packed produce other than its own and, thus, under *Camsco Produce Co., Inc*. (1990) 297 NLRB 905, the work in the packing shed did not fall within the definition of secondary agriculture. The Board concluded that under existing precedent, it was preempted from proceeding to adjudicate the merits of pending unfair labor practice allegations. (*Gerawan Ranches, et al*., *supra*, 21 ALRB No. 6.

[6] The Decertification Petitioner submitted an eligibility list provided by Employer that includes grape packers. Also, the Employer submitted declarations from 10 grape packers who voted challenged ballots, so apparently the UFW is referring to other employees engaged in packing besides the grape packers.

Only one declaration is relied upon (no. 96) in support of this objection. In this declaration, Armando Elenes states that, based on employee lists provided as part of negotiations, in 2012 Gerawan hired a total of 11,535 employees (including from FLCs), and that an analysis of that information shows that peak employment in September of 2012 was about 5,500 and in October about 5,000. In the objection itself, the UFW asserts that the decertification petition lists the number of employees working at the time it was filed as 2,300. There is no information as to the number of employees on the actual eligibility list generated in preparation for the election. There are no supporting documents provided to verify any of the proffered numbers. Even if they are taken as true, however, they do not establish a prima facie case that the peak requirement was not met.

First of all, as described by the UFW the 11,535 figure is a cumulative one over the course of the year. That number is irrelevant, as it is the number of employees (more specifically, job slots) during the peak employment period that is the proper measure.

Second, this is a past-peak case, so the proper measure was peak employment that already had occurred in this calendar year. The proper methodology is to compare the employee count for the pre-petition payroll period first to the employee count during the peak payroll period. If peak is not met by that comparison, then averaging of the peak period is done to ascertain the approximate workforce size during that period. That average is then compared to the pre-petition count figure to determine if peak has been met. (*Gallo Vineyards, Inc.* (1995) 21 ALRB No. 3; *Nurserymen's Exchange, Inc.* (2012) 38 ALRB No. 1.) While the Board has left open the possibility of also considering unusual circumstances affecting the peak figure, nothing of that sort is asserted here. Here, the UFW has failed to provide any

information concerning the peak payroll period in 2013, which is the relevant inquiry. So even if the pre-petition payroll count was 2,300, we have no relevant information regarding the peak employment period with which to compare that number.

The UFW has failed to support its contention that the peak requirement was not met, and UFW Objection 25 is dismissed.

UFW Objection 26 alleges that there is no statutory right to seek decertification at this time because the decertification petition was not filed during the year preceding the expiration of the expiration of a collective bargaining agreement. The UFW cites to California Labor Code section 1156.7(a) which provides in part that a decertification petition "shall not be deemed timely unless it is filed during the year preceding the expiration of a collective bargaining agreement which was otherwise bar the holding of an election…" The UFW argues that since it has never signed a collective bargaining agreement with Gerawan, there is no expiring agreement, and therefore the decertification petition is not timely.

The Board addressed this issue long ago in *Cattle Valley Farms* (1982) 8 ALRB No. 24 in which the Board stated: "In accordance with the interpretation of our statute by the court in *Montebello Rose Co*. (1981) 119 Cal.App.3d 1, we hereby authorize the Regional Director, in any case where there is a valid question concerning representation, to conduct a decertification election on the basis of a representation petition filed pursuant to section 1156.3 when there is no collective bargaining agreement in existence between the parties. This will help obviate the difficulties which the contract and peak requirements of section 1156.7 pose for the traditional means of decertification. Such obstacles to decertification do not exist under the NLRA." The UFW argues that the Board improperly altered the statute in the *Cattle Valley*

decision; however, at the present time, *Cattle Valley* is still good law and the Board declines to revisit its holdings.

UFW Objection 26 is dismissed.

UFW Objection 27 alleges that the Board exceeded its authority in ordering that the election take place because there was no finding that a *bona fide* question of representation existed. The UFW points to the October 31, 2013, blocking letter issued by the Visalia Regional director which stated that unremedied ULP charges "prevent the Regional Director from finding that there is a *bona fide* question of representation." The UFW also argues that in Administrative Order 2013-46 the Board did not find that a *bona fide* question of representation existed.

The Board clearly stated in its Order vacating the Regional Director's dismissal of the decertification petition (Administrative Order 2013-46 issued on November 1, 2013) that "under the unique circumstances presented in this case, there are enough questions regarding the degree to which any taint has been remedied, as well as questions as to the appropriateness of relying on the late-filed complaint to block the election, to justify holding the election, impounding the ballots, and resolving these issues through election objections and litigation of the complaints." Implicit in this statement is that the Board, unlike the Regional Director, found it reasonable to believe that *a bona fide* question concerning representation existed that justified holding the election.

UFW Objection 27 is without merit and it is dismissed.

UFW Objection 28 alleges that the Board ordered the election without following the proper statutory procedure for seeking review of a Regional Director's decision to block the election.

The Board already addressed this argument in Administrative Order 2013-49, which was issued in response to the "Motion for Board to Vacate Its Decision, or in the Alternative, for Reconsideration" filed by the UFW on November 4, 2013. The UFW argued in its motion that the Board was without authority to vacate the Regional Director's blocking decision because the Board did not await the filing of a request for review. The UFW resurrects the same argument in Objection 28.

The Board has already stated in Administrative Order 2013-49 that "Contrary to the UFW's argument, Labor Code section 1142 subdivision (b) does not preclude the Board from acting *sua sponte* to review a regional director's decision blocking an election. (See *Sam & Carmen Knevelbaard dba Bayou Vista Dairy* (2006) 32 ALRB No. 6 (Board reviewed dismissal of decertification petition *sua sponte*).) Had the Legislature intended to deny the Board this power, it could have expressly done so, but did not."

As the Board has already addressed and rejected this argument, UFW Objection 28 is dismissed.

UFW Objection 29 alleges there were improper ex parte communications or the appearance of ex parte communications between Gerawan/Decertification Petitioners and the ALRB or its agents. The UFW argues that on October 31, 2013, prior to the Visalia Regional Director's blocking letter, Employer's owner, Dan Gerawan visited a number of work crews and told employees that the ALRB had finally listened and the workers were going to have an

election. The UFW submitted a number of declarations in support of this allegation. The UFW argues that Dan Gerawan's statements created the appearance that the ALRB itself or that Board agents in Sacramento were having ex parte communications with Employer.

The UFW also argues that on October 31, 2013, Counsel for the Decertification Petitioner was issuing press releases indicating that the ALRB had ordered that an election would be taking place, and further that the UFW was informed that ALRB agents in Sacramento were already planning an election before the Regional Director issued his blocking letter. In support of these last two allegations, the UFW submits declaration no. 96 in which Armando Elenes states that he became aware of the press releases on October 31, 2013, and on the same date was informed that the ALRB was already planning an election. Elenes does not say how or by whom he was informed about the actions of the ALRB, and there are no press releases attached to this declaration.

The first part of UFW Objection 29 is more appropriately analyzed under misrepresentations made prior to an election. The National Labor Relations Board (NLRB) has gone back and forth many times over the years in its willingness to examine and regulate the truth of campaign propaganda. Presently, the rule is that reflected in *Midland National Life Insurance Co*. (1982) 263 NLRB 127. In that case, 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.[7] This Board has never found it necessary to determine if *Midland* is applicable precedent. Rather, the circumstances thus far have allowed the Board to conclude that the facts offered in support of the alleged misconduct did not meet either standard. (See *Giumarra Vineyards Corp.* (2005) 31 ALRB No. 6.)

In this instance, the supporting declarations do not meet even the less strict *Hollywood Ceramics* standard, therefore by definition they do not meet the *Midland* standard. Here, the declarations support the allegation that Gerawan's statements were made consistently and systematically to numerous crews; however, it cannot be said that Gerawan's statements were a substantial departure from the truth because the decertification petition had been filed on October 25, 2013, and it was reasonable to expect that an election would take place within 7 days.

As for the second part of UFW Objection 29, the UFW is correct that "if actual bias or even the appearance of bias creates an atmosphere which renders improbable a free choice by voters, the election must be set aside." (*Agri-Sun Nursery* (1987) 13 ALRB No. 19.) However, the decertification petition had been filed on October 25, 2013, and as of October 31, 2013, before the Regional Director issued his blocking letter, it was reasonable for the decertification petitioner to expect that the election would be held within the seven-day period. It was also reasonable for ALRB agents to begin planning ahead for a very large election

[7] The ALRB has slightly modified this rule by requiring that the misrepresentations affect the integrity of the election. (*Sakata Ranches* (1979) 5 ALRB No. 56; *Giumarra, supra*, 31 ALRB No. 6, pp. 3-5.)

pending the Regional Director's evaluation of the petition. Therefore, these circumstances would not create the appearance of bias. And, as noted above, the UFW offered no support for the assertion that there were improper contacts between the ALRB and either Gerawan or the Decertification Petitioner.

UFW Objection 29 is dismissed as the facts alleged do not constitute sufficient grounds for the Board to refuse to certify the election.

UFW Objection 31 alleges that misleading or altered ballots were distributed the day before the election indicating that workers should vote "No Union."

In support of this objection, the UFW has attached a number of declarations that state that on the day before the election, a "sample ballot" was distributed along with the ALRB's official notice of election. The declarants state that they do not know who distributed the "ballot," with the exception of declaration 89 in which the declarant states that on Monday, November 4, 2013, two women came to speak to his crew about the election and they said they worked with the ALRB. The women handed out two flyers which the declarant understood to be from the State of California. According to the declarant, the documents that were handed out to the crew were ALRB's official notice of election and the "sample ballot."

The "sample ballot" is attached as an exhibit to declaration 89. It is actually not a stand-alone document, rather, it appears in the middle of a flyer that urges workers in Spanish to vote "No Union." There are many Spanish phrases on the flyer. In the middle of the flyer there is a reproduction of a bilingual ALRB ballot with the word "sample" printed diagonally in English. The no union box is marked with an "X" and printed to the side of the no union box are the words "no union" in English with an arrow pointing to the no union box. The

Spanish phrases urging a no union vote appear above and below the "sample ballot." In all capital letters at the bottom of the flyer is a phrase in Spanish which translates as "We ask that all employees of Gerawan vote!! Vote no!!" The flyer does not identify who prepared the document.

The UFW argues that the flyer with the sample ballot printed on it would reasonably mislead employees into thinking that the ALRB favored the "No Union" choice because it was distributed at the same time as the official notice of election, the fact that the word "sample" was printed in English not Spanish, and because at least on one occasion, the people distributing the flyers said they worked with the ALRB.

In *SDC Investment* (1985) 274 NLRB 556, the NLRB explained that the critical inquiry in these cases is whether the altered ballot at issue is likely to have given voters the misleading impression that the Board favored one of the parties to the election.[8]

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[8] In *Ryder Memorial Hospital* (2007) 351 NLRB 214 the NLRB revised the Board's official election ballot to include the following language, taken from the disclaimer language on the NLRB Notice of Election, which specifically asserts the Board's neutrality in the election process and disavows any Board involvement in the defacement or alteration of any sample ballots:

"The National Labor Relations Board does not endorse any choice in this election. Any markings that you may see on any sample ballot have not been put there by the National Labor Relations Board."

The NLRB reasoned that by adding the above language to the ballot, employees will not reasonably be misled into believing that the Board supports a particular party, whether or not the reproduced ballot contains additional markings or promotes that party's cause.

At the time *Ryder Memorial Hospital* was decided, the employees in that case did not have the benefit of the revised Board documents, and the altered sample ballot in Ryder did not include the new disclaimer language. Therefore, the NLRB stated that its resolution of the Ryder case itself, as well as any other arising before the new sample

(Footnote continued….)

Under *SDC Investment* the NLRB first examines whether the altered ballot on its face clearly identifies the party responsible for its preparation; if it does, the NLRB will find that the ballot is not objectionable, as the employees would know that the document emanated from a party and, consequently, they would not be led to believe that the party had been endorsed by the Board. If, however, the altered ballot does not on its face clearly identify its source, the Board further evaluates the nature and contents of the document to determine whether it would have a tendency to mislead employees into believing that the Board favors one party over another. If so, the NLRB will set aside the election. The NLRB further stated that the second part of this standard would require a case-by-case analysis of the altered sample ballots.[9]

We find that the UFW has failed to present a prima facie case under either *SDC Investment* or *Hollywood Ceramics.* While the flyer does not clearly identify the party responsible for its preparation, the nature and contents of the document would not prevent workers from determining whether the document is propaganda. The "sample ballot" is part of flyer that includes multiple Spanish phrases in all capital letters in a bold font urging a no

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(Footnote continued)
ballot and Notice of Election are in use, requires application of the standard articulated in *SDC Investment,* supra, 274 NLRB 556.

[9] The NLRB's determination in *SDC Investment* was premised on its decisions in *Midland National Life Insurance Co.*, *supra*, 263 NLRB 127, and *Riveredge Hospital*, 264 NLRB 1094 (1982), in which the Board held that it would no longer set aside elections on the basis of a party's misleading statements, or a party's misrepresentations of Board actions, respectively, made during election campaigns. As discussed above with respect to Objection 29, the ALRB has never found it necessary to decide whether it deems *Midland National Life Insurance Co.* to be applicable precedent.

union vote, including the phrase "We ask that all employees of Gerawan vote!! Vote no!! Given this context, employees were not likely to view the "sample ballot" as anything other than propaganda in favor of decertification. (See *Rosewood Mfg. Co., Inc*. (1986) 278 NLRB 722 (following SDC Investment and holding that a sample ballot marked "vote no" was not objectionable where the materials added to the ballot were "sufficiently distinct from the printed notice and sample ballot so as to preclude the suggestion that the [NLRB] was endorsing the employer.") Therefore, the objection must be dismissed under either the *SDC Investment* or *Hollywood Ceramics* standard.

UFW Objection 31 is dismissed as the facts alleged do not constitute sufficient grounds for the Board to refuse to certify the election.

II. Decertification Petitioner's Objections

We note at the outset that many of the arguments presented in support of the Petitioner's objections cite to portions of the *NLRB Case Handling Manual Part 2: Representation Proceedings*. First, this document is not binding on the ALRB, and second this Board has declined to apply the "laboratory conditions" standard under which NLRB representation elections are scrutinized for objectionable conduct because it determined that conditions peculiar to agriculture make adherence to this doctrine unrealistic and that "some deviation from the ideal does occur in representation cases." (*S & J Ranch* (1986) 12 ALRB No. 32, citing *D'Arrigo Bros, of California* (1977) 3 ALRB No. 37.) Therefore, the Petitioner's arguments that ALRB agents did not follow NLRB election procedures are unavailing.

A. <u>The following DP Objections are dismissed for failure to state a prima facie case.</u>

DP Objection 1: alleges that the General Counsel (GC), not the Regional Director, improperly controlled the election. The Petitioner alleges that GC Sylvia Torres-Guillén made all substantive decisions about how the election would be conducted and was present at polling sites where she made decisions.

In support of this objection the Petitioner submits declaration 1 in which an agricultural employee stated that she observed the GC commandeering the entire election process, and also declaration 11 by Anthony Raimondo, attorney for the Petitioner who was present at the election and observed the GC's conduct.

This type of allegation involving the GC is very likely the first of its kind under the ALRA. Petitioner cites to Board regulation 20350 which states that "all elections shall be conducted under the supervision of the appropriate regional director," and also to two NLRB cases in which the NLRB stated that "we observe that, wherever practicable, the Board's Regional Offices should, and normally do, keep the conduct of elections completely separate from the investigation or trial of contemporaneous unfair labor practice charges involving the same parties." (*Kimco Auto Products* (1970) 184 NLRB 599, citing *Amax Aluminum Extrusion Products, Inc.,* (1968) 172 NLRB 1401.) These two NLRB cases address the involvement in elections by Regional office staff who were also investigating ULP cases rather than a General Counsel's involvement. We agree that the General Counsel's involvement in the election was not appropriate as the Board, not the General Counsel has authority over election matters pursuant to Labor Code section 1142, subdivision (b). However, we must

evaluate whether the evidence submitted in support of this objection could have reasonably affected the outcome of the election. Indeed, Petitioner did not allege that Ms. Torres-Guillén's involvement significantly impaired the election process.

DP Objection 1 is dismissed.

DP Objection 2 alleges that the Regional Director improperly used an eligibility list that was not approved by the parties at the pre-election conference. Even though a list was approved by the parties at the pre-election conference, at 11:45 p.m. on the day before the election, Regional Director Silas Shawver allegedly switched to a new list purportedly to deal with the logistical issues presented by a split crew.

The Petitioner provides no declaratory support for this objection. Rather, the Petitioner cites to portions of the *NLRB Case Handling Manual Part 2: Representation Proceedings*. Petitioner also refers to Exhibit 1 which in part consists of the eligibility list provided by the employer. Exhibit 3 which is not referred to in the objection appears to be an eligibility list organized by job classification. These exhibits are insufficient to reflect that a new list was improperly utilized.

Therefore, DP Objection 2 is dismissed for failure to provide declaratory support indicating voter disenfranchisement due to the improper use of a new eligibility list.

DP Objection 3 alleges that the polls improperly opened after the time scheduled and closed after the time scheduled.

The Board has held that there must be proof of voter disenfranchisement before actions such as the late opening of the polls can provide a basis for setting aside the election.

(*H.H. Maulhardt Packing Co.* (1980) 6 ALRB No. 42, IHE Dec. at p. 7; *D'Arrigo Bros. of California*, supra, 3 ALRB No. 37 at p. 12.)

Declaration 11 by Anthony Raimondo states that only one of the three polling sites opened on time; however, he does not state how late the polls opened, and there is no declaratory support for the contention that voters were disenfranchised. As for the contention that the polls stayed open after the time they were scheduled to close, there is no evidence that the late closure disenfranchised voters. Indeed, in Exhibit 1 provided by the Petitioner, there is a copy of an email from Employer's attorney, Ron Barsamian, who asked Regional Director Silas Shawver to keep the polls open at all polling sites so the employees who were working would have an opportunity to vote.

DP Objection 3 is dismissed for failure to provide sufficient declaratory support indicating voter disenfranchisement.

DP Objection 4 alleges that the Regional Director improperly used procedures that allowed for duplicative voting. The Petitioner alleges that "it is probable" that the system set up for multi-location resulted in duplicative voting.

The Petitioner provides no declaratory support for this objection. Rather, the Petitioner cites to portions of the *NLRB Case Handling Manual* which sets forth a detailed procedure for situations where there are multiple polls opened at the same time.

As discussed above, the *NLRB Case Handling Manual Part 2: Representation Proceedings* is not binding on the ALRB. Most significant, however, is the fact that the Petitioner's allegations are merely speculative and Petitioner failed to support its contention

that the multi-location system affected the outcome of the election; therefore, DP Objection 4 is dismissed.

DP Objection 5 alleges that a UFW observer wore union insignia during the decertification election.

In *Lonoak Farms* (1991) 17 ALRB No. 19, the Board stated that Board has consistently followed the NLRB in holding that the wearing of campaign insignia by election observers is not grounds for overturning an election. (Citing *Chula Vista Farms* (1975) 1 ALRB No. 23.) The Board held that if a union observer was wearing "campaign material" which Board agents did not require her to remove, this would not provide a basis for setting aside the election.

DP objection 5 is dismissed.

DP Objection 6 alleges that UFW observers improperly used their telephones during the election.

In *Oceanview Produce Co*., (1994) 20 ALRB No. 16 the Board stated that "Disputes … about the fundamental exercise of Board agent discretion to manage the election… require something more than just one party's preference that a different procedure had been implemented. The test is not whether optimum practices were followed, but whether on all the facts the manner in which the election was held raises a reasonable doubt as to its validity." (Citing *NLRB v. ARA Services. Inc*. (3d Cir. 1983) 717 F.2d 57; see, also *Nightingale Oil Co. v. NLRB* (1st Cir. 1990) 905 F.2d 528, holding that an election will be set aside only where there is a defect which significantly impaired the election process.)

The two declarations submitted in support of this Objection state that at two polling sites, two UFW observers were seen talking on their cell phones. At one polling site, the ALRB agent told the UFW observer to stop using his phone.

There is nothing in either declaration to suggest this conduct interfered with employee free-choice; therefore, DP Objection 6 is dismissed.

DP Objection 7 alleges that UFW observers engaged in prohibited conversation with voters during the election.

The NLRB has held that any discussion by a party with employees waiting to vote will invalidate the election regardless of its content. (*Milchem, Inc.* (1968) 170 NLRB 362) However, the ALRB long ago rejected the *Milchem* rule and will not set aside an election unless it can determine that the content of discussion among waiting employees was such that it would tend to affect the results of the election. (*Coastal Berry Company, LLC* (2000) 26 ALRB No. 1.)

The Petitioner submitted two declarations in support of DP Objection 7. Declaration 3 states that a UFW observer shook the hands of several voters as they left the polling area. Declaration 4 states that a different UFW observer was observed speaking to workers and shaking their hands.

There is nothing in either declaration to suggest interference with employee free-choice; therefore, DP Objection 7 is dismissed.

DP Objection 8[10] alleges that the UFW observers improperly created new employee lists during the decertification election.

In support of this objection, Petitioner submits two declarations. One declarant states that she saw a UFW observer scribbling things on a piece of paper, and that she saw the UFW observer take notes when the challenged crews came in to vote. The other declarant states that at a different polling site, she saw another UFW observer writing down voters' names even though an ALRB agent told him not to write anything.

As with Objection 7 above, there is nothing in either declaration to suggest interference with employee free-choice; therefore DP Objection 8 is dismissed.

DP Objection 9 alleges that the ALRB General Counsel and ALRB agents did not properly instruct voters how to mark election ballots.

In support of this objection, the Petitioner submitted one declaration by an election observer who stated that he "felt that the individuals voting did not understand how to mark the ballots." The declarant explained that this was because in Mexico, voters mark and "X" to indicate which candidate that they don't want to win, while in America an "X" is placed next to the candidate being voted for. In addition, the declarant said that General Counsel Torres-Guillén showed him a sample ballot with the word "Example" written diagonally across the ballot in such a way that the "No Union" image on the ballot was covered up.

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[10] There were actually two DP Objections labeled number 8 and two labeled number 10. Because it is clear that this was most likely due to a typographical error, we have renumbered the objections.

There is nothing in this declaration to suggest interference with employee free-choice; therefore, DP Objection 9 is dismissed.

DP Objection 10 alleges that ALRB agents allowed voters and observers to make fun of voters who did not support the union. In addition, a drunk voter came to the polling area at the park and insulted voters.

Board agents should not only be free of bias but should refrain from any conduct that would give rise to an impression of bias. However, Board agent misconduct requires the setting aside of an election only if the conduct is sufficiently substantial in nature to create an atmosphere which renders improbable a free choice by the voters. (*Agri-Sun Nursery,* supra, 13 ALRB No. 19.) See also *Coastal Berry Company, LLC*, supra, 26 ALRB No. 1.)

In addition, where there was no evidence that entry of [a] drunk [man] and his remarks in the voting area in any way interfered with the election, there was no reason for the ALRB to withhold certification of the election. (*Adamek & Dessert, Inc. v. ALRB* (1986) 178 Cal.App.3d 970.)

There is one declaration submitted in support of the objection which states that one UFW observer at one voting location made fun of voters who he believed did not support the union and also that this UFW observer made fun of Decertification Petitioner Lopez when she came to vote and made lewd gestures behind her back. This declaration does not describe how this conduct interfered with free choice or tended to undermine the integrity of the election process, and therefore DP Objection 10 is dismissed.

DP Objection 12 alleges that UFW observers caused problems that delayed the decertification election.

The Petitioner submitted one declaration in support of this objection which states that a UFW observer at one polling site insisted on voters providing identification when the parties had agreed that a pay stub was adequate, and because of his conduct voting was delayed. The same declaration also indicates that the UFW observer stopped asking for IDs once another UFW observer explained the agreed on rules to him.

This declaration does not describe how this conduct interfered with free choice or tended to undermine the integrity of the election process, and therefore DP Objection 12 is dismissed.

DP Objection 13 alleges that Petitioner Sylvia Lopez's vote was improperly challenged resulting in the interrogation of Petitioner outside the presence of counsel.

As the Board stated in *Henry Garcia Dairy*, (2007), 33 ALRB No. 4, "Voting by challenged ballot does not result in disenfranchisement, as challenged voters indeed are allowed to vote." Sylvia Lopez did not state in her declaration in that she was not allowed to vote after making a challenged ballot declaration. Therefore, DP Objection 13 is dismissed.

B. The following DP Objection shall be held in abeyance pursuant to *Gallo Vineyards* (2009) 35 ALRB No. 6 and *Dole Berry North* (2013) 39 ALRB No. 18 until the ballots have been counted, should a ballot count otherwise be necessary, because this objection is of the nature that a ballot count is required in order to evaluate whether the alleged misconduct had an outcome-determinative effect on the election.

DP Objection 11 alleges that the Regional Director's decision to allow blanket challenges to voter eligibility intimidated voters and discouraged many from voting.

As discussed above with respect to DP Objection 6, in *Oceanview Produce Co*., *supra*, 20 ALRB No. 16, the Board stated that "Disputes…about the fundamental exercise of Board agent discretion to manage the election…require something more than just one party's preference that a different procedure had been implemented. The test is not whether optimum practices were followed, but whether on all the facts the manner in which the election was held raises a reasonable doubt as to its validity."

The Board has stated that allegations of objectionable misconduct cannot be tested by the subjective individual reactions of employees, rather the test is whether the conduct measured by an objective standard was such that it would reasonably tend to interfere with employee free choice. (*L.E. Cooke* (2009) 35 ALRB No. 1, citing *Oceanview Produce, supra*, at p. 6, citing *Picoma Industries, Inc*. (1989) 296 NLRB 498; *Triple E Produce Co. v. ALRB* (1983) 35 Cal.3d 42. See also *Coastal Berry Company, LLC*, supra, 26 ALRB No. 1, citing *Emerson Electric Co*. (1980) 247 NLRB 1365; see, also, *NLRB v. Gissel Packing Co*. (1969) 395 U.S. 575.)

However, unlike *George Amaral Ranches, Inc*. (2012) 38 ALRB No. 5, in which the Board held that employees' declarations that did not show that they did not vote or were prevented from voting, and were therefore insufficient on their face, the Petitioner here has submitted declarations 6, 7, 8 and 9 from workers who stated that they decided not to vote when they heard that challenged voters were being asked personal questions.

DP Objection 11 shall be held in abeyance pending a tally of ballots, should a ballot count otherwise be necessary. [11]

III. Employer's Objections

The following ER Objections are dismissed for failure to state a prima facie case:

ER Objection 1 alleges the Regional Director accepted an improper and unsubstantiated challenge to nine crews totaling approximately 800 workers made by the UFW, and this disenfranchised workers because they were intimidated by the challenged ballot process, and also caused the appearance of bias by the ALRB.

According to the Employer, the UFW did not show good cause for the challenges because no evidence was submitted in support of the challenge as required by Board regulation section 20355, subsection (a). While section 20355, subsection (a) requires that challenges must be asserted prior to the time the prospective voter receives a ballot, this section actually states that that evidence in support of challenges shall be submitted subsequent to the closing of the polls.

Employer argues that the challenge to the nine crews caused delays, as well as instilling fear and apprehension in voters when they found out they would be questioned by

[11] We note that Employer's Objection 1 discussed below contains similar allegations as DP Objection 11; however, also as discussed below, the Employer did not provide sufficient declaratory support for its contention that the challenge to the eligibility of the large number of workers had a significant impact on the outcome of the election.

ALRB agents. The Employer alleges that potential voters were unable to vote or gave up waiting to vote because of the delays.

In support of this objection, Employer submits several declarations by employees who witnessed other workers whose eligibility was being challenged and state that many of the challenged voters looked upset. Some declarations were from workers who were part of the challenged crews, and while they describe feeling frustrated and anxious about the challenged ballot process, they all state they were allowed to vote after making a challenged ballot declaration. Only one declaration by an election observer states that she heard a worker waiting in line say it was taking too long, and saw the worker leave to go back to work. The Declaration of Ron Barsamian, Employer's attorney, states that there were reports of workers leaving voting lines due to delays, but this statement is hearsay.

The primary concern here is whether voters were prevented from voting due to the large number of challenged ballots. As the Board stated in *Henry Garcia Dairy*, *supra*, 33 ALRB No. 4, "Voting by challenged ballot does not result in disenfranchisement, as challenged voters indeed are allowed to vote." The challenged voters who submitted declarations all state they were allowed to vote after making a challenged ballot declaration.

While the Employer did submit declaratory support for its contention that processing the challenged voters did cause delays in the voting process, the Employer only submitted one declaration indicating that a voter was actually observed leaving the voting line because she had waited too long.

Section 20365(c)(2)(b) of the Board's regulations require that declarations set forth with particularity the details of each occurrence and the manner in which it is alleged to

have affected or could have affected the outcome of the election. In *George Amaral Ranches, Inc*. (2012) 38 ALRB No. 5, the Board held that employees' declarations that did not show that they did not vote or were prevented from voting, were insufficient on their face.

ER Objection 1 is dismissed for failing to support its contention that the challenge to the eligibility of 800 workers had a significant impact on the outcome of the election. However, it should be noted that DP Objection 11, which was supported by declarations and is held in abeyance pending a ballot count is based upon the same alleged misconduct.

ER Objection 2 alleges that the Regional Director failed to adequately prepare staff and train personnel under his direction in order to conduct the election, and this caused delays which in turn disenfranchised an unknown number of employees who were unable to vote due to the delays.

ER Objection 2 is dismissed similar reasons discussed above with respect to ER Objection 1. The Employer failed to support its contention that delays in the voting process affected free choice in the election.

ER Objection 3 alleges that ALRB personnel repeatedly threatened to stop or shut down the election when Petitioner's and Employer's election observers brought reasonable concerns to ALRB agents' attention during the election.

The Employer submitted Declarations 5 and 6 in support of ER Objection 3. Both are by agricultural employees who served as election observers. Declarant 5, who served as an election observer, describes two incidents when an ALRB agent (the same person in each incident) told the declarant that "she would invalidate the entire process." The first was when

the declarant was standing close enough to hear the ALRB agent questioning a group of 15 men who told the ALRB agent that they had been laid off for supporting the union. The ALRB agent told the declarant to move away out of earshot or she would invalidate the entire process, so the declarant moved away. The other incident happened about 15 minutes later when the declarant told the ALRB agent that it was 7:00 p.m., the time when it had been agreed that voting was supposed to stop. The ALRB agent told the declarant to allow people to continue voting or she would invalidate the entire process.

There is no indication that any ALRB agents other than the one in charge of the polling area at the park made similar comments. Also the comments were directed only at the declarant. There were no other declarations submitted that indicated that other election observers at other polling sites were told anything similar by ALRB agents.

ER Objection 3 is dismissed because the Employer failed to support its contention that these two incidents had any effect on free choice in the election.

ER Objection 4 alleges that UFW election observers at all voting sites used their cell phones while employees were voting or waiting to vote.

ER Objection 5 alleges that ALRB staff allowed UFW election observers to hold papers that had the names of crew bosses written on them in full view of voters in the voting area. This, combined with the unusually large number of challenges to the eligibility of workers from several crews further intimidated workers who were already distrustful of the ALRB's ability to provide a secret ballot election.

ER Objection 6 alleges that UFW election observers had pens and paper and were observed writing in full view of voters. In some cases ALRB staff did not stop this conduct.

ER Objections 4, 5 and 6 all involve allegations concerning ALRB agent control of the voting area, and imply that ALRB agents allowed UFW observers to “get away” with misconduct due to bias toward the UFW. The Board has stated that Board agents should not only be free of bias but should refrain from any conduct that would give rise to an impression of bias. Board agent misconduct requires the setting aside of an election only if the conduct is sufficiently substantial in nature to create an atmosphere which renders improbable a free choice by the voters. (*Agri-Sun Nursery*, supra,13 ALRB No. 19.)

The declarations submitted in support of these declarations do not support the contention that the alleged misconduct affected free choice in the election; therefore ER Objections 4, 5, and 6 are dismissed.

ER Objection 7 states that the conduct described in ER Objections 1-6, taken together and as a whole constitute a degree of improper conduct which warrants setting the election aside.

Because the Employer’s other objections have been dismissed, there is no need to evaluate the cumulative effect of the conduct alleged.

ORDER

PLEASE TAKE NOTICE that, pursuant to section 1156.3(e)(2) of the Agricultural Labor Relations Act (ALRA), an investigative hearing on the following objections filed by the United Farm Workers (UFW) in the above-captioned matter shall

be conducted on a date and place to be determined. The investigation shall be conducted in accordance with the provisions of Board regulation section 20370, an investigative hearing in the above-titled matter shall be held and the Investigative Hearing Examiner (IHE) shall take evidence on the following issues:

1. Did the Employer unlawfully initiate, assist in and support the gathering of signatures for the decertification petition and decertification campaign? Pursuant to Board regulation section 20335(c) the Board further orders that this objection (UFW Objection 1) be consolidated with the hearing in case no. 2013-CE-027-VIS should a complaint issue.)

2. Did the Employer give preferential access to decertification supporters by allowing them to circulate the decertification petition during work time while prohibiting UFW supporters from circulating a pro-UFW petition during work time, and if so did this conduct have a tendency to affect free choice in the November 5, 2013 election to the extent that setting aside the election is warranted? (UFW Objection 2 to be consolidated with case no. 2013-CE-039-VIS should a complaint issue.)

PLEASE TAKE FURTHER NOTICE that the objections immediately below will be held in abeyance until a tally of ballots, should a ballot count otherwise be necessary.

1. Whether the Employer unlawfully granted a benefit to Farm Labor Contractor Employees by giving them a raise from $8.00 to $9.00 per hour in June of 2013, and, if so, did this conduct have a tendency to affect free choice in the November 5, 2013 election to the extent that setting aside the election is warranted? (UFW Objections 9 and 10)

2. Whether the Employer unlawfully granted a benefit through a twenty-five cent per box wage increase for field packing employees on or about October 25, 2013, and, if so, did this conduct have a tendency to affect free choice in the November 5, 2013 election to the extent that setting aside the election is warranted? (UFW Objections 11 and 12)

3. Whether Employer engaged in direct dealing and solicitation of grievances and

if so, did this conduct have a tendency to affect free choice in the November 5, 2013 election to the extent that setting aside the election is warranted? (UFW Objection 17)

4. Whether Employer unlawfully interrogated workers on various dates between October 2013 and November 2013, grievances, and, if so, did this conduct have a tendency to affect free choice in the November 5, 2013 election to the extent that setting aside the election is warranted? (UFW Objection 18)

5. Whether Employer unlawfully granted benefits by implementing a new employee discount program which was announced by flyers on October 19 and 26, 2013, and by starting a free fruit and drink giveaway in July and August 2013, and, if so, did this conduct have a tendency to affect free choice in the November 5, 2013 election to the extent that setting aside the election is warranted? (UFW Objection 19)

6. Whether there was violence and/or the threat of violence directed at UFW supporters between September 2013 and November 2013 which was condoned by the Employer or its agents and if so did this conduct have a tendency to affect free choice in the November 5, 2013 election to the extent that setting aside the election is warranted? (UFW Objection 32)

7. Whether the decision by the ALRB Regional Director to allow mass challenges to the eligibility of workers in certain crews intimidated or disenfranchised potential voters to the extent that employee free choice in the election was not possible? (DP Objection 11)

PLEASE TAKE FURTHER NOTICE that the following UFW Objections that are mirrored in unfair labor practice charges (ULP) pending before the General Counsel are held in abeyance pending the determination of whether a complaint should issue. Under the rule set forth in *Mann Packing Co, Inc*., *supra*, 15 ALRB No. 11, where the evaluation of the merits 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.

As these objections are of the nature that a ballot count is required to determine whether any misconduct found had a tendency to affect free choice in the November 5, 2013 election, any of these objections that otherwise would be set for hearing based on the issuance of a complaint by the General Counsel also shall be held in abeyance until the ballots have been counted, should a ballot count otherwise be necessary.

1. UFW Objection 4: Did Employer provide unlawful assistance by paying for or coercing workers into participation in anti-UFW protests, and, if so, did this conduct have a tendency to affect free choice in the November 5, 2013 election to the extent that setting aside the election is warranted? (See case no. 2013-CE-41-VIS)

2. UFW Objection 5: Did the Employer coerce workers into participating in anti-UFW activities, and, if so, did this conduct have a tendency to affect free choice in the November 5, 2013 election to the extent that setting aside the election is warranted? (See case no. 2013-CE-049-VIS)

3. UFW Objection 21: Did the Employer threaten bankruptcy, closure or discontinuance of operations on various occasions between July 2013 and early November 2013, and, if so, did this conduct have a tendency to affect free choice in the November 5, 2013 election to the extent that setting aside the election is warranted? (See case no. 2013-CE-043-VIS)

4. UFW Objection 22: Did the Employer unlawfully lay off/discharge union supporters in 13 crews beginning in October 2013, and, if so, did this conduct have a tendency to affect free choice in the November 5, 2013 election to the extent that setting aside the election is warranted? (See case no. 2013-CE-048-VIS)

5. UFW Objection 23: Did the Employer unlawfully hire employees for the purpose of supporting decertification efforts and voting in the decertification election, and, if so, did this conduct have a tendency to affect free choice in the November 5, 2013 election to the extent that setting aside the election is warranted? (See case no. 2013-CE-051-VIS)

6. UFW Objection 30: Was Decertification Petitioner, Sylvia Lopez hired for the purpose of organizing the decertification campaign, and, if so, did this conduct have

a tendency to affect free choice in the November 5, 2013 election to the extent that setting aside the election is warranted? (See case no. 2013-CE-051-VIS)

Given that the resolution of the objections directly above depends on the resolution of unfair labor practice charges, the Board requests the Regional Director to expedite her investigation and resolution of overlapping charges. [12]

The following objections are hereby DISMISSED:

UFW Objections 3, 6, 7, 8, 13, 14, 15, 16, 20, 24, 25, 26, 27, 28, 29, and 31.

DP Objections 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 12 and 13 (as renumbered).

ER Objections 1-7.

DATED: December 19, 2013

Genevieve A. Shiroma, Chair

Cathryn Rivera-Hernandez, Member

Herbert O. Mason, Member

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[12] In particular, the Board requests that the General Counsel expedite her investigation of charge nos. 2013-CE-048-VIS and 2013-CE-051-VIS. (See Board regulation 20335(c).) The majority of challenged ballots filed in this matter allege that individual voters were hired for the purpose of voting. The resolution of case nos. 2013-CE-048-VIS and 2013-CE-051-VIS in particular would result in significant progress toward the resolution of case no. 2013-RD-003-VIS in general.

CASE SUMMARY

GERAWAN FARMING, INC.
Sylvia Lopez
(Petitioner)
United Farm Workers of America
(Certified Bargaining Representative)

Case No. 2013-RD-003-VIS
39 ALRB No. 20

On October 25, 2013, Sylvia Lopez (Petitioner) filed a petition to decertify the United Farm Workers of America (UFW) as the bargaining representative of the agricultural employees of Gerawan Farming, Inc. (Employer). An election was held on November 5, 2013, and the ballots were impounded. The UFW, Employer and the Petitioner all filed election objections. All parties alleged that misconduct occurred that affected the results of the election.

Board Decision and Order

The Board set the following objection for hearing: UFW Objection 1, which alleges that the Employer unlawfully initiated, assisted in and supported the gathering of signatures for the decertification petition and decertification campaign.

The Board determined that the following objections alleged conduct mirrored in pending Unfair Labor Practice (ULP) charges and ordered that they be held in abeyance pending the General Counsel's resolution of those charges: UFW Objections 2, 4, 5, 21, 22, 23, and 30.

The Board found that some objections are of the nature that a ballot count is required in order to conduct a complete evaluation of whether the alleged misconduct affected the outcome of the election. Therefore, the Board ordered that the following objections be held in abeyance pending a tally of ballots, should a ballot count otherwise be necessary.: UFW Objections 9, 10, 11, 12, 17, 18, 19, and 32; and Petitioner's Objection 11.

The Board dismissed the following objections for failure to state a prima facie case : UFW Objections 3, 6, 7, 8, 13, 14, 15, 16, 20, 24, 25, 26, 27, 28, 29, and 31; Petitioner's Objections 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 12 and 13; and Employer's Objections 1-7.

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