Tracy, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

ARNAUDO BROTHERS, LP, and ARNAUDO BROTHERS, INC.,	)	Case No. 2012-CE-030-VIS
Respondent,	)	
and	)	40 ALRB No. 3
UNITED FARM WORKERS OF AMERICA,	)	(April 4, 2014)
Charging Party.	)	

DECISION AND ORDER

This matter is based on a charge filed by the United Farm Workers of America (UFW or Union) on September 10, 2012, which was the basis of a first amended complaint issued on June 21, 2013. The complaint alleged that Arnaudo Brothers, LP (Arnaudo or Respondent) violated sections 1153(a) and (e) of the Agricultural Labor Relations Act (ALRA or Act) by refusing to furnish information requested by the UFW, and by refusing to bargain with the UFW. The UFW sent information and bargaining requests to Respondent in early August 2012. Respondent did not respond to any of the information requests until mid-November 2012, and at that point only responded to a portion of one of the items. Further responses were not forthcoming for another two months. Respondent never agreed to any of the numerous dates offered by the UFW for negotiations. Eventually, the UFW filed for mandatory mediation and conciliation, which was granted by the Board.

Administrative Law Judge Decision

On September 26, 2013, the Administrative Law Judge (ALJ) issued his recommended decision and order. The ALJ found Respondent violated sections 1153(a) and 1153(e) of the ALRA, rejecting Respondent's various defenses. The ALJ held that Respondent, without justification, failed to timely respond to the information requests, and in some cases, did not respond at all. The ALJ also found that Respondent, without justification, failed to meet with the UFW in negotiations. The ALJ issued a cease and desist order, ordered Respondent to furnish the remainder of the information and bargain, and to comply with notice posting and additional dissemination requirements.

A. ALJ's Findings of Fact

The ALJ found that the UFW was certified as the collective bargaining representative of Respondent's agricultural employees on January 14, 1977. After five years of negotiations that did not result in a contract, the UFW did not contact the Respondent again until the events in the instant case.

The UFW sent letters on August 7 and 8, 2012, requesting bargaining, suggesting September 5, 6, and 7, 2012 as dates to meet, and requesting information about Respondent's agricultural employees and agricultural operations.

On August 27, 2012, the UFW sent a second letter to the Respondent repeating the information request, proposing four additional dates in September for negotiations, and informing the Respondent that if no response was received within five days, the UFW would file an Unfair Labor Practice (ULP) charge. When Respondent

again failed to respond, the UFW filed Charge No. 2012-CE-030-VIS on September 10, 2012.

On September 24, 2012, UFW bargaining coordinator, Guadalupe Larios (Larios) emailed Respondent's counsel, Robert K. Carrol (Carrol), suggesting four dates in October for bargaining. On September 27, 2012, Carrol responded by email to Larios, and, rather than responding to the information request or addressing any of the proposed bargaining dates, he told her that he would call her on October 9, to discuss preliminary matters:

> [l]ike: (i) what happened at the bargaining table between 1977 and 1982 when the Union walked away from the table; (ii) if the bargaining unit has changed dramatically (like the Company's operations) in the past 30 years; whom exactly the Union believes it is still representing; and (iv) if the Union has some comparable contracts of Arnaudo Brothers' current operations to send us for review.
> (General Counsel's Exhibit 17.)

Larios sent Carrol an email on October 2, 2012, letting him know she was available the week of October 29 for bargaining, asking him to propose some dates, and letting him know that she would work on preparing a response to his preliminary questions, but in order to do so she needed the information that had been requested by the UFW on August 7 and August 27, 2012.

Carrol called Larios on October 8, but she was not able to take the call due to her schedule. She emailed Carrol on October 11, proposing November 5 and 6 as bargaining dates and asking for the employee list by October 15. The ALJ found that Larios made additional requests for the list after this date.

On November 2, 2012, Carrol left a voicemail message for Larios, telling her that the employee list was not available in electronic format, but that the Respondent was working on putting the list together. Finally, on November 13, 2012, the Respondent provided an employee list for 2012 (containing approximately 200 names) with employee addresses, hours and the last date worked. The Respondent did not provide an employee list for 2011 or any of the other information requested by the UFW. The ALJ determined that the list turned out to be highly inaccurate, with about half of the addresses being non-existent.

On December 4, 2012, Larios emailed Carrol and proposed three negotiation dates in December. She attached the original August 2012 information request to the email, and told Carrol that while the UFW did not need all of the information on the list in order to proceed with negotiations, three items of information were needed by December 14, 2012.

Carrol responded by email on December 6, 2012, indicating he would be visiting his mother during the second half of December, and requested that Larios propose dates to meet in January 2013. Carrol also asked that the UFW withdraw the ULP charge.

On January 10, 2013, Larios emailed Carrol reminding him that the Respondent had yet to provide several items the UFW had requested, proposing five additional negotiation dates, and informing him that over 100 of the addresses on the employee list provided in November 2012 were inaccurate. The Respondent never provided a corrected list.

On January 16, 2013, the Respondent provided the ALRB Visalia Regional office (which was investigating the ULP charge) and the UFW with some of the information responsive to the UFW's information request. On January 22, 2013, Carrol emailed Larios letting her know he would supply the additional information and proposing that they discuss meeting dates after employees returned to work in a few more weeks. Carrol also submitted an information request to the UFW on January 22, 2013.

On January 25, 2013, the Respondent provided the UFW with its Injury and Illness Prevention Policy. On February 1, 2013, the UFW filed a request for mandatory mediation and conciliation (MMC) with the Board.

B. The ALJ's Analysis and Conclusions of Law

The ALJ found that in spite of the many requests for bargaining by the UFW, the Respondent failed to agree to a meeting date for a five-month period, and that Respondent's refusal to agree to meet within a reasonable period of the UFW's request violated section 1153(a) and (e) of the Act. The ALJ noted that Respondent's primary explanation for the delay was that it questioned whether the UFW was still the collective bargaining representative because the UFW had allegedly been inactive for over 30 years. The ALJ found that Respondent had failed to show that the UFW's inactivity impeded it from responding to the requests for bargaining and information.[1] The ALJ stated during

[1] The Respondent's attorney attempted several times during the hearing to explain to the ALJ that one of his arguments would be that the issues in the case needed to be viewed "in light of the entire bargaining history since the Company was certified back in January of 1977," but the ALJ did not allow him to explore this argument with witnesses at the hearing. The ALJ noted that Respondent's counsel had already argued this factual

(Footnote continued….)

the hearing that "the law is very well established that the union is not required to maintain constant contact with employees to maintain certification rights" (TR: I, 221); however, the ALJ did not include a discussion of relevant legal precedent in his written decision.

The ALJ found Respondent's other asserted reasons for not agreeing or proposing bargaining dates, namely, Respondent's contention that the UFW's representative was unavailable, and Respondent's claim that the UFW could not meet because it did not have a bargaining committee, were without merit. The ALJ went on to state that had the Respondent responded in a timely manner to the UFW's information request, the alleged problem of the UFW having difficulty putting together a negotiating committee would not have existed, and Respondent could not claim a defense based on a circumstance created by its unlawful conduct.

With respect to the UFW's information request, the ALJ found that the request on its face was presumptively relevant (Respondent did not question the relevancy of the requested information). The ALJ found that Respondent violated sections 1153(a) and (e) of the Act by not providing any of the information requested until more than three months after the initial request by the UFW. Additional information responsive to the request was not produced for another two months.

(Footnote continued)
background extensively in Respondent's Motion for Summary Judgment (filed on July 22, 2013 and dismissed without comment by the ALJ on July 23, 2013), and that he (the ALJ) was aware of what Respondent's position was. (TR: I, 88-89).

The ALJ was unimpressed with Respondent's argument that its lack of technical knowledge was the reason for the delay in providing the employee list because Respondent did not mention this to the UFW until shortly before it provided the list. Moreover, the ALJ concluded, Respondent was legally obligated to maintain employee records. The ALJ flatly rejected the contention made by Respondent in its post-hearing brief that upon receiving the information request it began diligently attempting to provide the requested information, as the ALJ found that there was "not one scintilla of evidence that this was the case." Rather, the ALJ found that Respondent ignored the request as evidenced by Carrol's "defiant" email on September 27, 2012.

The ALJ found that the cases cited by Respondent in support of its position that its delay in providing the information was justified (*Union Carbide Corporation, Nuclear Division* (1985) 275 NLRB 197, and *Dallas & Mavis Forwarding Company* (1988) 91 NLRB 980) were inapposite to the present case. The ALJ also rejected Respondent's argument that the UFW waived its right to receive some of the information by Larios' December 4, 2012 email to Carrol in which she stated the UFW did not need all of the information on the list in order to begin negotiations. The ALJ reasoned that the UFW filed Charge No. 2012-CE-030-VIS, and continued to request the information. Furthermore, Larios' offer was made after Respondent had already violated the Act by its unreasonable delay. (*As-H-Ne Farms, Inc*. (1978) 6 ALRB No. 9.)

The ALJ issued a cease and desist order, ordered Respondent to furnish the remainder of the information and bargain, and to comply with notice posting and additional dissemination requirements. The ALJ stated that in fashioning the affirmative

relief set forth in his order, he took into account the entire record, the character of the violations, the nature of Respondent's operations, and the conditions among farm workers and the agricultural industry at large, as set forth in *Tex-Cal Land Management, Inc*. (1977) 3 ALRB No. 14.

Respondent's Exceptions and Discussion

The Respondent filed numerous exceptions to the ALJ's decision and order on October 21, 2013. The Respondent's exceptions are listed below as items A through H. Following each exception, the Board's analysis and conclusion appears. Exception A requires a lengthy discussion which is subdivided into two parts.

A. The ALJ erred in finding that Respondent failed to produce evidence showing how the UFW's 30-year absence impeded Respondent's ability to respond to the August 2012 bargaining and information requests. It was prejudicial error for the ALJ to prevent the Respondent from presenting evidence regarding the UFW's alleged disclaimer of interest and waiver of rights due to its 30-year absence.

The Respondent argues that the only reason it did not produce such evidence was that during the hearing, the ALJ prevented Respondent from pursuing lines of questioning that would have elicited evidence on the UFW's alleged disclaimer of interest and waiver of rights due to its 30-year absence. The Respondent argues that this was prejudicial error which undermines the entire ALJ decision.

Respondent argues at great length that the ALRB's "certified until decertified" principle should not and cannot apply in this case, as it is inconsistent with fundamental fairness and due process.

1. The Respondent argues that the UFW abandoned the unit

To the extent that the Respondent argues that the UFW abandoned the unit, it is well-established that the Union's absence alone does not constitute a waiver of rights.

In *Nish Noroian Farms* (1982) 8 ALRB No. 25, the Board first articulated the rule that, under the ALRA, labor organizations are 'certified until decertified.' The Board noted that, in contrast to the National Labor Relations Act (NLRA), which permits voluntary recognition, it is unlawful under the ALRA for an employer to recognize a labor organization or for a labor organization to attempt to force recognition through any means other than the election process. Employers under the ALRA may not petition for an election, which they may do under the NLRA. The Board concluded that the intent of the Legislature was that "agricultural employers are to exercise no discretion" concerning whether to recognize a labor organization or over whether recognition should be withdrawn or terminated.

This Board has recognized only two exceptions to the 'certified until decertified' rule. In *Lu-Ette Farms* (1982) 8 ALRB No. 91, the Board stated that "Once a union has been certified, it remains the exclusive collective bargaining representative of the employees in the unit until it is decertified or a rival union is certified, or until the union becomes defunct or disclaims interest in continuing to represent the unit employees." (*Lu-Ette Farms, supra,* 8 ALRB No. 91, p. 5, emphasis added.)

In *Bruce Church, Inc.* (1991) 17 ALRB No. 1, the employer accused the union of engaging in dilatory and evasive bargaining tactics and of abandoning

negotiations. The parties met in June 1986, after which the union canceled several negotiating sessions and did not respond to a notification that the employer planned to make a change to its operations. (*Bruce Church, Inc., supra*, 17 ALRB No. 1 at pp. 3-4.) In December 1986, the employer wrote to the union requesting that further negotiations be scheduled but the union did not respond. In January 1987, the employer unilaterally implemented certain changes, to which the union objected. One negotiating session was held in March 1987. In April 1987, the employer unilaterally implemented two other changes. The parties continued to bargain, but the union alleged that the employer had unlawfully implemented the January and April changes without bargaining. The employer countered that the union had engaged in dilatory and evasive bargaining tactics and had abandoned negotiations.

The Board noted that it had defined abandonment as "a showing that the union was unwilling or unable to represent the bargaining unit." (*Bruce Church, Inc., supra*, 17 ALRB No. 1 at p. 10.) The Board concluded that, while there was evidence that the union engaged in evasive bargaining conduct, there was "nothing that indicates that the Union disclaimed interest in, or was unwilling or unable to represent, the bargaining unit."[2] The Board noted that there was no evidence of a lack of contact with unit employees, or that the union had ceased representing employees in grievance or other bargaining matters.

[2] We note that it is clear from Board decisions issued since *Bruce Church, Inc.* that "unwilling or unable" means disclaimer or defunctness. There is no broader application of the phrase "unwilling or unable."

In *Dole Fresh Fruit Co., Inc*. (1996) 22 ALRB No. 4, the Board confirmed that, to the extent that there may be said to be an "abandonment" defense under the ALRA, "the proper question before the Board is whether [the Employer] has carried its burden of establishing that its duty to bargain has become extinguished by the Union's inability or unwillingness to represent the [bargaining unit] employees." The Board also held that "stalled negotiations or even a hiatus in negotiations cannot alone be the basis for refusing to bargain on the grounds that the union is unable or unwilling to represent the unit employees." (*Dole Fresh Fruit Co., Inc*., *supra,* 22 ALRB No. 4 at p. 11.)

The Board further stated that it "could not recognize the concept of 'abandonment' beyond that already present in Board case law, i.e., where certified labor organizations become inactive by becoming defunct or by disclaiming interest in continuing to represent the bargaining unit. In all other circumstances, certified bargaining representatives remain certified until decertified by the employees themselves in either a decertification or rival union election." (*Dole Fresh Fruit Co., Inc*., *supra*, 22 ALRB No. 4 at p. 15.)

Cases decided since *Dole Fresh Fruit* have adhered to its holding that defunctness and disclaimer are the only exceptions to the "certified until decertified" rule. In *Pictsweet Mushroom Farms* (2003) 29 ALRB No. 3 p. 6, the Board stated that "[o]nly two events aside from decertification in a Board election have been recognized as effective to terminate a certification: (1) a disclaimer by the certified union of its status as collective bargaining representative or (2) the certified union's 'defunctness,' i.e., its institutional death and inability to represent the employees." In *San Joaquin Tomato*

Growers, Inc. (2011) 37 ALRB No. 5 at p. 3, the Board confirmed that "under the ALRA the concept of abandonment has no significance beyond a union disclaimer of interest or union defunctness." The *San Joaquin Tomato Growers* decision also confirmed two other aspects of Board law on abandonment. First, the Board, in considering an alleged 13-year lapse in bargaining confirmed that "a period of dormancy of bargaining, even a prolonged period, [does] not establish union 'abandonment' of a certification." [3]

In the instant case, Respondent's argument that it was not required to produce information responsive to the UFW's information request because the UFW was inactive for a long period of time fails for the reasons discussed above.

2. The Respondent argues that the UFW disclaimed interest in representing the unit in 1982

In the instant case, the Respondent's argument that the UFW waived its statutory rights is not based solely on allegations of abandonment. Rather, the Respondent has attempted to raise a disclaimer of interest argument as an affirmative defense. In Respondent's Answer to the General Counsel's First Amended Complaint, Respondent alleged that "Respondent engaged in good faith negotiations with the UFW for a period of five years following the UFW's certification … through May 1982 when

[3] See also *Ventura County Fruit Growers* (1984) 10 ALRB No. 45, in which the Board made it clear that:

> "Notwithstanding the relative inactivity of the union...[once] a union becomes active by virtue of its... requests to commence negotiations...it thereby affirmatively notified [the employer] of its desire and intent to actively represent the employees in the conduct of negotiations. At the critical time that Respondent [refused to bargain], its abandonment theory was a factual impossibility." (Emphasis added.)

the UFW's lead negotiator informed Respondent that 'the UFW wants nothing to do with you and your Company.'"

As noted above, the Respondent filed a Motion for Summary Judgment on July 22, 2013, also claiming the UFW had disclaimed interest in representing Respondent's employees. Attached to the motion was a declaration by Steve Arnaudo in which he stated that in May 1982, UFW negotiator, Mac Lyons, told him that the Union "no longer wanted anything to do with the Company, or words to that effect." The ALJ dismissed the Motion for Summary Judgment without comment.

Other than Steve Arnaudo's declaration, there is nothing in the current record before the Board that allows the Board to evaluate Respondent's affirmative defense. Each time Respondent's counsel attempted to raise the issue of the bargaining history of the parties in general, the ALJ refused to allow it. Thus, Respondent's counsel did not explore the disclaimer of interest argument during the hearing. Instead, the ALJ essentially lumped the abandonment and disclaimer defenses together and both were dismissed under the same legal principle—that a period of dormancy of bargaining does not establish union "abandonment" under the ALRA.

Although the Board has identified disclaimer of interest as one of the ways that a union may forfeit its certification absent an election, it has never defined what constitutes a disclaimer of interest under the ALRA, nor has the Board formally adopted the National Labor Relations Board's (NLRB) analysis of disclaimer of interest. However, the issue of whether the UFW s disclaimed interest in representing a unit of agricultural employees was raised by Respondent and is now before the Board. The

NLRA has long held that to be effective, "a disclaimer by a union 'must be unequivocal and must have been made in good faith.'" (*Vaughn & Sons, Inc.* (1986) 281 NLRB 1082, 1084 (Union's statement that "we are pulling out" was not a clear and unequivocal statement of disclaimer in light of the surrounding circumstances); *Food, Drug, Beverage Warehousemen and Clerical Employees Local 595 (Sweetener Products Company)* (1984) 268 NLRB 1106 (disclaimer ineffective where made in bad faith); *Retail Associates, Inc.* (1958) 120 NLRB 388, 391.) Additionally, under NLRB precedent, in order for a disclaimer to be effective, the union's conduct must not be inconsistent with its alleged disclaimer." (*Retail Associates, Inc.*, *supra*, 120 NLRB 388, 391-392.) "A union's 'bare statement' of disclaimer is not sufficient to establish that it has abandoned its claim to representation if the surrounding circumstances justify an inference to the contrary." (*Ibid.*; *Samaritan Health Center, Deaconess Hospital Unit, Sisters of Mercy Health Corp.* (1985) 277 NLRB 1353 (disclaimer given effect where union did not engage in any action inconsistent with its statement of disclaimer for two months.) The NLRB has also stated that the party asserting disclaimer of interest bears the burden of proving the disclaimer occurred. (*Kindred Health Care, Inc.* (2006) 346 NLRB 281 at p. 282.) The Board finds that this precedent is applicable under the ALRA. (Lab. Code § 1148.)

At this point, the Board has insufficient evidence to determine whether a disclaimer should be found under the standard described above because the record was not fully developed on this issue. Therefore, this matter is remanded and the ALJ is

ordered to take evidence on the sole issue of whether a disclaimer of interest occurred. As discussed above, the burden is on the Respondent to prove this.

If following remand, the Respondent fails to meet its burden of proving that the UFW made an unequivocal and good faith disclaimer of interest, and fails to also prove that the union engaged in conduct consistent with the purported disclaimer, the remaining exceptions filed by the Respondent shall be dismissed consistent with the discussion below, and the ALJ's recommended order will be upheld in full (with the exception of the ALJ's recommended affirmative remedy that the parties agree to meet and bargain. See page 18 below.).

Respondent's Remaining Exceptions

B. The Respondent argues that the ALJ erred in finding that the Respondent caused the UFW's difficulty in creating a negotiating committee, rather it was the UFW's 30-year absence that caused the difficulty.

Respondent argues that the Respondent's workforce has changed dramatically since the UFW was certified, and if the UFW had maintained any contact with workers, it may have been able to form a committee before February 13, 2013.

This exception is without merit as Respondent is merely trying to manufacture an excuse that stems from its own unlawful conduct. Because the UFW was seeking to begin negotiations after its absence, it needed the employee list it requested in early August to develop its committee. The Respondent did not provide the list until November 13, 2012, and as the ALJ correctly stated, had Respondent provided the list in a timely manner, the UFW would have likely been able to contact potential committee

members sooner. Moreover, half of the addresses provided on the employee list did not physically exist. (TR: II, 18-19; 53.)

This exception is dismissed.

C. The Respondent argues that the ALJ improperly found that the Respondent provided no proof that the UFW could not negotiate without a bargaining committee.

The Respondent maintains that it was the General Counsel's and UFW's burden to affirmatively prove that the UFW could have proceeded without a committee in place. The Respondent reasons that it would be impossible for the UFW to meet its duty of fair representation without getting input from a workers' negotiating committee.

This exception is also without merit and is dismissed. First, there was no finding that the UFW was unable to put together a bargaining committee before February 13, 2013. Larios did admit that as of October 11, 2012, there was no negotiating team in place (TR: I , 152); however, she further testified that the negotiating team was in place in December 2012, but that she did not inform Respondent of this because they had been unable to agree on any bargaining dates. Again, Respondent is relying on an excuse that stems from its own unlawful conduct.

D. The Respondent argues that the UFW waived its right to receive information when Larios stated in early December 2012 that she did not need all of the information that had been requested in order to commence negotiations.

This exception is also without merit and is dismissed. In Larios' December 4, 2012 email to Carrol (General Counsel's Exhibit 14), she re-attached the original information request which made it clear that the UFW was still seeking all of the

information; however, in the interest of moving negotiations along, Larios was prepared to proceed with partial information.

Respondent attempts to distinguish the case cited by the ALJ in reaching his conclusion that Larios' offer to proceed with partial information was made after Respondent had already violated the Act by its unreasonable delay (*As-H-Ne Farms*, *Inc*. (1978) 6 ALRB No. 9). Respondent claims that the delay at issue in *As-H-Ne Farms*, was over 10 months in duration. However, the delay in *As-H-Ne Farms* actually ranged from three months to a year.

E. The Respondent argues that the ALJ erred in finding that the employee list provided was "highly inaccurate" and that Respondent never provided a corrected list.

Respondent maintains that the difficulty the organizers had in contacting workers was not due to the inaccurate addresses on the list, but was instead due to the fact that in November 2012, when UFW organizers went out to speak with workers, the workers had already moved on to other locations for the season.

Once again, we find this exception to be without merit. UFW Organizer Gutierrez credibly testified that when she tried to contact workers at the addresses on the list provided, "a majority of those addresses" were incorrect and half of the addresses provided physically did not exist. (TR: II, 18-19; 53.) Moreover, the ALJ did not rely on the inaccuracy of the employee list in finding that Respondent violated the Act. As discussed above with respect to exception D, by the time Respondent provided the inaccurate list, an unreasonable amount of time had passed, and Respondent had already violated the Act.

F. The Respondent argues that the ALJ erred in finding that evidence of the UFW representative's unavailability to meet and bargain was minimal.

This exception is also dismissed. The record shows that between August 7, 2012 and January 31, 2013, the UFW proposed, in writing, at least 26 meeting dates. Although Larios was busy during this time, she testified that she would have accepted any date proposed by Carrol. (TR: I, 134, 160, 164.) Larios repeatedly asked Carrol to propose dates when he would be available; however, except for one alleged proposal via telephone made by Carrol on a date he could not recall, there was no evidence that Respondent ever proposed any dates of its own in response to Larios' requests.

G. The Respondent takes issue with the ALJ's characterization of the Respondent's September 27, 2012 email to Larios as "defiant." The Respondent further contends that the ALJ's statement shows that the ALJ is biased against Respondent.

This exception is also dismissed as it is without merit. Respondent's September 27, 2012 email supports the ALJ's conclusion that Respondent consciously ignored the UFW's information request until November 2012. Rather than responding to the information request or addressing any of the proposed bargaining dates, Respondent immediately challenged the UFW's continued status as the collective bargaining representative, and the ALJ appropriately characterized the tone of the response as "defiant." The record does not support Respondent's claim that the ALJ was biased against the Respondent.

H. The Respondent argues that the remedy ordered by the ALJ contains the following errors:

1. The Respondent argues that it was wrong for the ALJ to order the Respondent to agree on bargaining dates because the parties have already been referred to mandatory mediation and conciliation (sec. 2 (b) of the ALJ's proposed order).

The Board agrees with the Respondent. Although this is a standard affirmative remedy for the type of violation found in this case, the order to agree on bargaining dates is now moot because the parties have gone through the mandatory mediation and conciliation process. Given the unique circumstances of this case, this portion of the order is deleted.

2. The Respondent argues that the notice and reading remedy is overbroad because it gives the Regional Director too much discretion to determine the frequency, number and length of readings and question and answer periods, and further, the Respondent argues that no Board agent should be permitted to answer questions concerning the Notice. Respondent argues that these remedies should be eliminated from the order.

Underlying Respondent's concern with this remedy is Respondent's view that the current Regional Director and General Counsel have shown that they cannot be impartial. However, the Board agent conducting the reading, merely reads from a prepared "Notice to Agricultural Employees" which is attached as the last two pages of the ALJ's decision. This exception is dismissed.

The Board is well within its authority to order standard reading notices. As the court stated in *Jasmine Vineyards, Inc. v. ALRB* (1980) 113 Cal.App.3d 968, "the Agricultural Labor Relations Board (Board) in its presumed expertise must be given relatively free reign in determining which remedy will best effectuate the policies of the

Agricultural Labor Relations Act. It is only when the remedies ordered by the Board are patently outside the Board's authority that a reviewing court can interfere. Because the relation of remedy to policy is peculiarly a matter of administrative competence, courts must not enter the allowable area of the Board's discretion…." In addition, the court responded to Jasmine's argument that the reading of the notice by a Board representative followed by a question and answer period on company time was economically burdensome, unfair and punitive in nature by stating that "the actual reading of the notice will take but a few minutes and we should presume that the Board representatives will be impartial in their explanation of employee rights and will not utilize any more company time than is reasonably necessary to answer employee questions. We should not question the integrity of the administrative agency or its representatives in effectuating the policies of the act -- other forums exist for this purpose."

3. Finally, the Respondent argues that it should not have to provide the Notice to all employees hired in the twelve-month period following the issuance of a final Board order in this matter because this remedy is excessive under the circumstances.

This exception is also without merit as it is a standard remedy for the type of violation found in this case.

In *N.A. Pricola Produce* (1981) 7 ALRB No. 49, cited by Respondent in support of its position, the Board found that because Respondent exhibited no bad faith and committed only one *per se* violation of sections 1153(e) and (a), and because the UFW was primarily responsible for delays in bargaining, it was appropriate to omit the provision for 12 months' notification to new employees as excessive under the

circumstances. In contrast to the Respondent in *N.A. Pricola Produce*, the record supports the conclusion that the Respondent in the instant case was unwilling to sit down and bargain within a reasonable period after the UFW's request.

In *Oasis Ranch Management, Inc*. (1992) 18 ALRB No. 11, a case where there were several violations involving anti-union animus the Board stated that the normal practice is to provide for a mailing period of one year and a posting period of 60 days. Further, the Board stated that the provision of notices to all employees hired for 12 months after the posting and the extension of the remedy to all of Respondent's employees reflect the Board's normal practice.

Other than accepting Respondent's argument to reject the ALJ's order for the parties to agree to bargaining dates, we uphold the ALJ's remedy in full subject to the ALJ's supplemental decision on remand.

ORDER

The Agricultural Labor Relations Board (Board) hereby remands this matter to the Administrative Law Judge (ALJ) for the issuance of a supplemental recommended decision in accordance with this Decision on the narrow issue of whether a disclaimer of interest occurred. Pursuant to California Code of Regulations, title 8, section 20282, the parties shall have the opportunity to file exceptions to the ALJ's supplemental decision, which also shall be filed with the Board in accordance with Regulation 20164. Any arguments in the exceptions shall be limited to the question concerning disclaimer of interest. Thereafter, the Board shall issue a final order in this

matter that will be subject to review pursuant to Agricultural Labor Relations Act section 1160.8.

DATED: April 4, 2014

William B. Gould IV, Chairman

Genevieve A. Shiroma, Member

Cathryn Rivera-Hernandez, Member

CASE SUMMARY

ARNAUDO BROTHERS, LP, and
ARNAUDO BROTHERS, INC.
(United Farm Workers of America)

Case No. 2012-CE-030-VIS
40 ALRB No. 3

This matter is based on allegations that Arnaudo Brothers (Employer) violated sections 1153(a) and (e) of the Agricultural Labor Relations Act (ALRA) by refusing to furnish information to the United Farm Workers of America (UFW) and by refusing to bargain with the UFW.

ALJ Decision

On September 26, 2013, the Administrative Law Judge (ALJ) issued his recommended decision and order. The ALJ found Respondent violated sections 1153(a) and 1153(e) of the ALRA, rejecting Respondent's various defenses. The ALJ held that Respondent, without justification, failed to timely respond to the information requests, and in some cases, did not respond at all. The ALJ also found that Respondent, without justification, failed to meet with the UFW in negotiations.

Board Decision and Order

The Employer argued in its exceptions that during the hearing, the ALJ prevented Employer from pursuing lines of questioning that would have elicited evidence on the UFW's alleged disclaimer of interest and waiver of rights due to its 30 year absence. The Board rejected the Employer's abandonment defense, stating that it was well-established that the union's absence alone did not constitute a waiver of rights, rather "[o]nly two events aside from decertification in a Board election have been recognized as effective to terminate a certification: (1) a disclaimer by the certified union of its status as collective bargaining representative or (2) the certified union's 'defunctness,' i.e., its institutional death and inability to represent the employees." (*Pictsweet Mushroom Farms* (2003) 29 ALRB No. 3, p. 6.) The Board found that it had insufficient evidence to determine whether a disclaimer of interest had occurred because the record was not fully developed on that issue. Therefore, the Board remanded the matter to the ALJ to take evidence on the sole issue of whether a disclaimer of interest occurred.

The Board dismissed the Employer's remaining exceptions and upheld the remainder of the ALJ's decision.

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STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of:	)	Case No. 2012-CE-030-VIS
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ARNAUDO BROTHERS, LP, and ARNAUDO BROTHERS, INC.,	)	
	)	
Respondents,	)	
	)	
and	)	
	)	
UNITED FARM WORKERS OF AMERICA,	)	
	)	
Charging Party.	)	

Appearances:

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Aida L. Sotelo
United Farm Workers of America Legal Department
Bakersfield, California
For the Charging Party

Vivian Velasco Paz and Abdel Nassar
Visalia ALRB Regional Office
For General Counsel

DECISION OF THE ADMINISTRATIVE LAW JUDGE

DOUGLAS GALLOP: I heard this unfair labor practice case on July 25 and 26, 2013 at Tracy, California. It is based on a charge filed by United Farm Workers of America (hereinafter Union), alleging that Arnaudo Brothers, Inc. violated section 1153(a) and (e) of the Agricultural Labor Relations Act (Act), by refusing to furnish it with information relevant to its functions as the collective bargaining representative of Arnaudo's agricultural employees. The General Counsel of the Agricultural Labor Relations Board (ALRB or Board) issued a Complaint alleging this violation, naming Arnaudo Brothers, LP as the correct respondent, and further alleging that Arnaudo Brothers LP, violated section 1153(a) and (e) by refusing to bargain with the Union.[1] The First Amended Complaint (hereinafter complaint) alleges that Arnaudo Brothers, LP and Arnaudo Brothers, Inc. (hereinafter Respondents) are jointly and severally liable for the alleged violations. At the hearing, Respondents stipulated that if any violations are found herein, they are jointly liable.

The Union has intervened in these proceedings. Respondents filed answers denying the commission of unfair labor practices, and asserting affirmative defenses. After the hearing, the parties filed briefs, which have been carefully considered. Upon the entire record in this case, including the testimony, documentary evidence, briefs and oral arguments made by counsel, the undersigned makes the following findings of fact and conclusions of law.

[1] Although the better practice would have been to solicit an amended charge from the Union, specifically alleging this additional violation, the undersigned believes the two allegations are sufficiently related, from a legal and factual standpoint, to consider the refusal to bargain allegation. This additional alleged violation was fully litigated at the hearing.

FINDINGS OF FACT

The charge was filed and served in a timely manner. Respondents produce vegetables, and jointly constitute an agricultural employer within the meaning of section 1140.4(c) of the Act. It is undisputed that Respondents' attorney, Robert K. Carrol, acted as their agent during the course of the events discussed herein. The Union is a statutory labor organization as defined by section 1140.4(f).

The Union was certified as the collective bargaining representative of Respondents' agricultural employees on January 14, 1977.[2] Five years of contract negotiations failed to result in an agreement. From that point, the Union did not contact Respondents again, until the events described herein.

By letters dated August 7 and 8, 2012,[3] the Union requested contract negotiations, suggesting September 5, 6 and 7 as dates to meet. The Union further requested the following information:

1. Employee lists in digital non-pdf format such as Excel for all employees employed during the 2011 season and a separate list for all employees employed during the 2012 season, including all direct hire employees and farm labor contractor employees that work or worked on the company [sic] agricultural properties, including classification, foreperson name, department and/or crew, hire date, date laid off or date terminated, physical and mailing addresses and employee number.
2. Maps of the company properties owned, leased or rented in California.
3. Number of acres involved in the operation by area[.]
4. Names and titles of company representatives[.]
5. Names, addresses and license numbers of any farm labor contractors the company uses.
6. When each season begins and ends, i.e. harvesting, weeding, etc. for each product.
7. The number of hours worked daily and total hours worked yearly by workers.
8. Types of the company's agricultural products.

[2] The certification names "Arnaudo Brothers" as the employer.

[3] All dates hereinafter refer to 2012, unless otherwise indicated.

9. Detailed summary of any benefits, vacation pay, bonuses, holidays, piece rates and wages provided to employees for 2010, 2011 and 2012.
10. Copies of any current employee manuals, policies, etc.

By letter dated August 27, the Union informed Respondents that, because they had not responded to the August 7 and 8 letters, it would file charges with the Board, alleging refusals to bargain and furnish information, if no response was receive within five days. The Union proposed four additional dates in September for contract negotiations. The letter also repeated the information request. When Respondents failed to respond to this request, the Union filed and served the charge herein, on September 10.

The Union assigned Guadalupe Larios to conduct the negotiations. On September 24, she e-mailed Robert K. Carrol, providing four dates in October to commence bargaining. Carrol responded on September 27. Rather than accepting any of the dates proposed by Larios, or suggesting others, Carrol stated he would contact Larios to discuss some "preliminary matters:"

> Like: (i) what happened at the bargaining table between 1977 and 1982 when the Union walked away from the table; (ii) if the bargaining unit has changed dramatically (like the Company's operations) in the past 30 years; (iii) whom exactly the Union believes it is still representing; and (iv) if the Union has some comparable contracts of Arnaudo Brothers' current operations to send to us for review.

Larios sent Carrol an e-mail on October 2, proposing the week of October 29 for negotiations. She further reiterated the request for information, and agreed to provide Carrol with information he had requested.

After receiving a message that Carrol had called on October 8, Larios, on October 11, sent him an e-mail, proposing that the parties meet for negotiations on November 5

and 6. Larios requested that Respondents produce the employee list by October 15. She made additional requests for the employee list thereafter. On November 2, Carrol left a voicemail for Larios, stating that the employee list was not available in electronic format, but Respondents were working on it.

On November 13, Respondents produced an employee list for 2012, containing about 200 names, along with employee addresses, hours and last date worked. Respondents did not provide an employee list for 2011, or any of the other requested information.[4] According to the list, there were over 50 workers employed as of October 31, the last payroll period it covered. An employee witness testified he knew of about 20 who were still employed in mid-November. Many more were employed as of when the Union submitted the information request. The list proved to be highly inaccurate, with about half of the addresses being non-existent.

On December 4, Larios e-mailed Carrol, stating that Respondents had not provided all of the information requested. Larios stated that the Union would not need all of the information to commence negotiations, but set forth those items it needed prior thereto. Larios proposed three additional dates in December to commence negotiations, and requested that the additional information be provided by a date prior thereto. On December 6, Carrol responded, stating he would be visiting his mother during the second half of that month. Carrol requested that the Union propose dates to meet in January 2013, and that it withdraw the charge herein. In response, Larios, on that date,

[4] Respondents contend they do not engage labor contractors for agricultural work. The record is unclear as to when the Union was informed of this.

e-mailed Carrol, proposing four dates in early January 2013,[5] for negotiations.

Carrol left a telephone message for Larios on January 3, after he returned from his trip. Larios returned his call the following day, and they discussed the issues herein on that date and again, on January 8. On January 10, Larios e-mailed Carrol, stating that Respondents had yet to provide several items the Union had requested, and proposing five additional dates for negotiations.[6] Larios also stated that over 100 of the addresses provided were inaccurate. Respondents never provided a corrected list.

By now, the Visalia Regional office, as part of its investigation of this charge, had served an investigative subpoena on Respondents, requesting some of the items sought by the Union in its information request. On January 16, Respondents furnished the regional office and the Union with maps of its operations.[7] On that date, Respondents informed the Union of the type of crops they were cultivating, but not the acreage. On January 22, Carrol e-mailed Larios, stating he would supply additional information, and suggested that they discuss bargaining dates commencing after Respondents' employees returned to work, "in a few more weeks." In the same communication, Carrol submitted an information request to the Union. On January 25, Respondents provided the Union and Visalia office with copies of their Injury and Illness Prevention Program.

[5] All dates hereinafter refer to 2013, unless otherwise indicated.

[6] Larios also verbally reiterated the information and bargaining requests to Carrol on two or three occasions.

[7] There is no evidence that these maps had not previously been available.

Shortly thereafter, the Union filed for mandatory mediation and conciliation, pursuant to Section 1164 of the Act. The Board ordered the parties to mediation in February, and those proceedings are still in progress.

ANALYSIS AND CONCLUSIONS OF LAW

On request, an employer is obligated to meet and negotiate with a certified collective bargaining representative for the purposes of reaching agreement. A refusal to agree to meet within a reasonable period after the request violates section 1153 (a) and (e) of the Act. *Masaji Eto,* et al., (1980) 6 ALRB No. 20; *Robert H. Hickham* (1978) 4 ALRB No. 73.

The evidence shows that, in spite of many requests by the Union for contract negotiations, Respondents never agreed to any meeting, for a period of more than five months, at which point, the Union filed for mandatory mediation and conciliation. Beyond questioning the Union's continued status as the collective bargaining representative of its agricultural employees, Respondents gave no other explanation for their refusal to accept, or propose alternative meeting dates, beyond the unavailability of its counsel, for two trips, which both took place well after a reasonable period of time to meet had passed.[8] Respondents' contention that the Union's representative was also unavailable to meet is without merit, because the evidence shows that her unavailability was minimal. Finally, Respondents' assertion that the Union could not meet, because

[8] In their brief, Respondents also cite the Union's inactivity for over 30 years as a reason for the delay. Respondents failed to produce any evidence showing how the Union's absence impeded them from responding to the bargaining or information requests.

there were no employees available to serve on its bargaining team fails, because it employed many employees when the bargaining request was made, it employs some workers year-round, and there is no proof that the Union was obligated to forego negotiations without an employee bargaining committee.[9] Accordingly, it is concluded that Respondents violated the Act by this conduct.

An employer has the statutory obligation to provide, on request, relevant information that a union needs for the proper performance of its duties as collective bargaining representative. Information concerning the wages, hours and working conditions of agricultural employees is presumptively relevant to the discharge of these duties. A failure to timely produce such information violates section 1153(a) and (e) of the Act. *Bud Antle, Inc.* (2013) 39 ALRB No. 12; *Richard A. Glass Company, Inc., et al.,* (1988) 14 ALRB No. 11, at pages 18-27; *Mario Saikhon, Inc.* (1987) 13 ALRB No. 8.

Respondents have not questioned the relevance of the information requested by the Union, and said requests, on their face, are presumptively relevant. Despite repeated requests for the information, and the filing of the unfair labor practice charge herein, Respondents did not furnish any of it until more than three months after the initial request. The information provided on November 13, 2012 only responded to a portion of

[9] At the hearing, Respondents were invited to submit evidence, such as the Union's constitution or by-laws, showing its representative(s) were required to be accompanied by an employee negotiating committee to engage in collective bargaining. No such documentation was forthcoming. In any event, had Respondents timely responded to the information and bargaining requests, this alleged problem would not have existed. Respondents cannot claim a defense based on a circumstance created by their unlawful conduct.

one of the requests, and it appears that further responses were not forthcoming for another two months.

Respondents cite their lack of personnel and technology for the delay in providing the employee addresses. They did not, however, cite this as a reason for the delay until shortly before they provided the list, and the undersigned is unimpressed with this justifying such a lengthy delay, particularly since Respondents are legally obligated to maintain such records.[10] Respondents' argument, that the Union waived its right to receive some of the information, by stating it could proceed with negotiations without all of the information being produced, is rejected, since the Union filed this charge and continued requesting the information thereafter. Furthermore, Larios' offer to commence negotiations without all of the information was made after Respondents' delay was already in violation of the Act. See *As-H-Ne Farms, Inc.* (1978) 6 ALRB No. 9. In any event, Respondents did not agree to any negotiating dates. It is also apparent that some of the additional requests could have easily been responded to, such as the use of

[10] In their brief, Respondents further contend they diligently began attempting to provide the requested information, upon receipt of the request. There is not one scintilla of evidence that this was the case. Rather, the evidence shows that Respondents consciously ignored the information request, as demonstrated by Carrol's defiant communication of September 27, 2012, until November. Respondents cite *Union Carbide Corporation, Nuclear Division* (1985) 275 NLRB 197 [119 LRRM 1077] as supporting their position. In that case, an administrative law judge dismissed an allegation that the employer unlawfully delayed furnishing information, by not providing it for over ten months. Neither the NLRB's general counsel nor the union appealed that conclusion, so it does not constitute NLRB precedent. In any event, the respondent in that case promptly replied to the information request, and established that, due to its complexity, it furnished the information as soon as it could. In *Dallas& Mavis Forwarding Company* (1988) 91 NLRB 980 [131 LRRM 1272], also cited by Respondents, the employer's delay in furnishing the information was held justified by its claim of confidentiality.

contractors (none), the types of commodities produced, and providing copies of policy manuals applied to workers. Based on the foregoing, it is also concluded that Respondents violated section 1153(a) and (e) by failing to produce the information in a timely manner, and in some respects, at all.

THE REMEDY

Having found that Respondents violated section 1153(a) and (e) of the Act, I shall recommend that they cease and desist therefrom and take affirmative action designed to effectuate the purposes of the Act. In fashioning the affirmative relief delineated in the following Order, I have taken into account the entire record of these proceedings, the character of the violations found, the nature of Respondents' operations, and the conditions among farm workers and in the agricultural industry at large, as set forth in *Tex-Cal Land Management, Inc.* (1977) 3 ALRB No. 14.

On the basis of the entire record, the findings of fact and conclusions of law, and pursuant to section 1160.3 of the Act, I hereby issue the following recommended:

ORDER

Pursuant to Labor Code section 1160.3, Respondents Arnaudo Brothers, LP and Arnaudo Brothers, Inc., their officers, agents, labor contractors, successors and assigns shall:

1. Cease and desist from:

(a) Failing and refusing to timely provide United Farm Workers of America (Union) with information relevant to the performance of its duties as the collective bargaining representative of their agricultural employees.

(b) Failing or refusing to bargain collectively with the Union, for the purposes of negotiating a collective bargaining agreement.

(c) In any like or related manner interfering with, restraining or coercing any agricultural employee in the exercise of the rights guaranteed in section 1152 of the Act.

2. Take the following affirmative actions which are deemed necessary to effectuate the purposes of the Act:

(a) Upon request, promptly make available to the Union the information it requested on August 7, 2012 and January 10, 2013, to the extent they have not already done so.

(b) Upon request, promptly agree to meet in collective bargaining negotiations.

(c) Sign the Notice to Agricultural Employees attached hereto, and after its translation by a Board agent into appropriate languages, reproduce sufficient copies in each language for the purposes set forth hereinafter.

(d) Post copies of the Notice in all appropriate languages at conspicuous places on Respondents' property, including places where notices to employees are usually posted, for sixty (60) days, the times and places of posting to be determined by the Regional Director. Respondents shall exercise due care to replace any copies of the Notice which may be altered, defaced, covered or removed.

(e) Arrange for a Board agent or representative of Respondents to distribute and read the attached Notice, in all appropriate languages, to its employees then employed in the bargaining unit on company time and property, at the times and places to be

determined by the Regional Director. Following the reading, a Board agent shall be given the opportunity, outside the presence of supervisors and management, to answer any questions the employees may have concerning the Notice or employee rights under the Act. The Regional Director shall determine a reasonable rate of compensation to be paid by Respondents to all non-hourly employees to compensate them for lost work time during the reading and the question-and-answer period.

(f) Mail copies of the Notice in all appropriate languages, within 30 days after this Order becomes final, to all agricultural employees employed by Respondents at any time during the period September 1, 2012 to August 31, 2013, at their last known addresses.

(g) Provide a copy of the Notice to each agricultural employee hired to work for Respondents during the twelve-month period following the issuance of a final order in this matter.

(h) Notify the Regional Director in writing, within thirty days after this Order becomes final, of the steps Respondents have taken to comply with its terms. Upon request of the Regional Director, Respondents shall notify the Regional Director periodically in writing of further actions taken to comply with the terms of the final order in this matter.

Dated: September 26, 2013

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Douglas Gallop
Administrative Law Judge, ALRB

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating a charge that was filed by United Farm Workers of America (Union), in the Visalia Office of the Agricultural Labor Relations Board (ALRB), the General Counsel of the ALRB issued a complaint alleging that we had violated the law. After a hearing at which all parties had an opportunity to present evidence, the ALRB found that we had violated the Agricultural Labor Relations Act (Act) by failing and refusing to timely furnish the Union with information to which it was entitled under the Act, and by failing and refusing to meet in collective bargaining negotiations.

The ALRB has told us to post and publish this Notice.

The Agricultural Labor Relations Act is a law that gives you and all other farm workers in California these rights:

1. To organize yourselves;
2. To form, join or help a labor organization or bargaining representative;
3. To vote in a secret ballot election to decide whether you want a union to represent you;
4. To bargain with your employer about your wages and working conditions through a union chosen by a majority of the employees and certified by the Board;
5. To act together with other workers to help and protect one another; and
6. To decide not to do any of these things.

Because you have these rights, we promise that:

WE WILL NOT fail or refuse to timely provide the Union with information necessary for it to fulfill its duties as the collective bargaining representative of our agricultural employees.

WE WILL NOT fail or refuse to meet in collective bargaining negotiations with the Union.

WE WILL NOT in any like or related manner, interfere with, restrain or coerce employees from exercising their rights under the Act

DATED:

ARNAUDO BROTHERS, LLP and
ARNAUDO BROTHERS, INC.

By _____
(Representative) (Title)

If you have any questions about your rights as farm workers or about this Notice, you may contact any office of the Agricultural Labor Relations Board. One office is located at 1642 W. Walnut Ave., Visalia, California. Telephone: (559) 627-0995.

This is an official notice of the Agricultural Labor Relations Board, an agency of the State of California.

DO NOT REMOVE OR MUTILATE