Bakersfield, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

TRI-FANUCCHI FARMS,	)	Case Nos. 2013-CE-008-VIS
	)	2013-CE-014-VIS
Respondent,	)	
	)	
and	)	
	)	
UNITED FARM WORKERS OF AMERICA,	)	40 ALRB No. 4
	)	
Charging Party.	)	(April 23, 2014)

DECISION AND ORDER

On November 5, 2013, Administrative Law Judge Thomas Sobel (the "ALJ") issued the attached decision in the above-captioned matter. Thereafter, Respondent Tri-Fanucchi Farms (the "Employer") timely filed exceptions to the ALJ's decision along with a brief in support of its exceptions. Charging Party United Farm Workers of America (the "UFW") and the General Counsel timely filed reply briefs responding to the Employer's exceptions.

The Agricultural Labor Relations Board (the "ALRB" or the "Board") has considered the record and the ALJ's decision in light of the Employer's exceptions and the parties' briefs and has decided to adopt the ALJ's rulings, findings, and conclusions except as modified herein. We find, in agreement with the ALJ, that the Employer refused to bargain with the UFW and refused to provide information relevant to bargaining in violation of Labor Code section 1153(a) and (e). We further agree with the ALJ that, under the circumstances of this case, an award of makewhole is appropriate.

1. Background

The Employer is an agricultural employer within the meaning of the Agricultural Labor Relations Act (the "ALRA" or "Act"). The UFW is a labor organization within the meaning of the ALRA and was certified by the ALRB as the bargaining representative of a bargaining unit of the Employer's agricultural employees in 1977.

Despite the UFW having been certified for over 35 years, the parties have never reached an initial contract. Some bargaining occurred after the UFW was certified. However, in 1981, the Employer refused to bargain with the UFW citing the results of a poll it had conducted among its employees that purportedly showed that the UFW had lost the support of a majority of the bargaining unit. (See *Joe G. Fanucchi & Sons/Tri-Fanucchi Farms* (1986) 12 ALRB No. 8.) The Board found that the Employer's refusal to bargain was unlawful and ordered it to bargain with the UFW and pay bargaining makewhole in 1986. (*Ibid*.)

The Employer claims that in 1988 it "indicated its willingness to bargain with the UFW." [Answer to Corrected Consolidated Complaint ("Answer") p. 2.] The Employer further claims that the UFW told the Employer that it would set a date for bargaining when its negotiator returned from vacation but that the UFW never followed up on this communication and there was no bargaining for the next roughly 24 years. [Answer p. 2.]

On September 28, 2012, the UFW sent a letter to the Employer in which it asserted its status as the collective bargaining representative, proposed dates for

collective bargaining negotiations and requested 10 categories of information from the Employer, including employee contact information. [Answer ¶ 6-7.] On October 19, 2012, the Employer sent a letter to the UFW in which it refused to bargain with the UFW. [Answer ¶ 5.] The Employer has admitted that it has not provided any of the requested information and that it has refused to meet with the UFW. [Answer ¶ 4-6.]

The Employer contends that there were further communications between itself and the UFW after its October 19, 2012 refusal to bargain regarding potential resolution of the dispute, which continued into the spring of 2013. [Answer p. 3.] However, on March 7, 2013, the UFW filed the charge in 2013-CE-008-VIS alleging that the Employer refused to provide information in violation of the Act. On April 16, 2013, the UFW filed the charge in 2013-CE-014-VIS alleging that the Employer refused to bargain in violation of the Act.

On September 5, 2013, a corrected consolidated complaint (the "Complaint") was issued by the General Counsel alleging that the Employer unlawfully refused to bargain and refused to provide information in violation of Labor Code section 1153(e). [Complaint ¶ 15-18.] The Complaint also alleged that the Employer violated Labor Code section 1153(a) by refusing to make itself available for bargaining at reasonable times and by refusing to provide employee contact information. [Complaint ¶ 11-14.] The Complaint prayed for an order directing the Employer to cease and desist from its unlawful conduct, to respond to the information requests and schedule bargaining dates, and for bargaining makewhole.

In its answer to the Complaint (the "Answer"), the Employer substantially admitted the factual allegations against it, including, specifically, that it refused to bargain with the UFW and failed to respond to the UFW's information requests. However, the Employer asserted that, at the time that it engaged in the alleged conduct, the UFW was no longer the bargaining representative because it had abandoned the bargaining unit and also alleged that relief was barred under the doctrines of unclean hands and laches. [Answer p. 5-6 (6th through 8th affirmative defenses).]

On October 16, 2013, the General Counsel filed a motion in limine seeking to exclude evidence relating to the Employer's asserted abandonment defense on the grounds that such a defense is not legally recognized under the ALRA. At the October 21, 2013 hearing, the ALJ heard arguments on the motion in limine and indicated that he intended to grant it. [Tr.18:2-19:3.] The ALJ concluded the unavailability of an abandonment defense eliminated the Employer's equitable defenses of unclean hands and estoppel as well. [Tr. 19:4-7.] Finally, the ALJ concluded that, given that the Employer's defenses had been stricken, he was vested with the inherent power to grant judgment on the pleadings in favor of the General Counsel and the UFW. [Tr. 21:15-22:7.]

No post-hearing briefs were filed. On November 5, 2013, the ALJ issued his decision in the case, to which the ALJ attached his ruling on the General Counsel's motion in limine. In his ruling on the motion in limine, the ALJ stated that he was treating the motion as "akin to a demurrer to the answer or a motion for judgment on the

pleadings."[1] [Ruling on General Counsel's Motion In Limine p. 11-12.] The ALJ concluded that "a defense of abandonment that relies solely on either a prolonged period of union inactivity in bargaining or on a union's long 'absence from the fields', does not establish either defunctness or disclaimer of interest and, therefore, that such inactivity or absence is not a defense to a refusal to bargain charge." [Id. at 14.]

The ALJ also addressed and rejected the Employer's equitable defenses, namely, laches, unclean hands, and equitable estoppel. The ALJ found that each of these defenses required that the Employer demonstrate that it was injured by the UFW's conduct. [Ruling on General Counsel's Motion In Limine p. 22.] The ALJ noted that the Board had previously held that an employer's freedom from the bargaining obligation is not an injury, but rather a benefit. [Id. at 22 (citing *Joe G. Fanucchi & Sons/Tri-Fanucchi Farms, supra*, 12 ALRB No. 8.)] Accordingly, because the Employer did not demonstrate harm, the ALJ rejected the equitable defenses.

In the decision itself, the ALJ found that, with the Employer's abandonment and equitable defenses having been dismissed, what remained were the Employer's admissions that it had refused to respond to the information request and had refused to meet and bargain. Accordingly, the ALJ found that the unfair labor practices alleged in the Complaint were established. [Decision of the Administrative Law Judge

[1] In so doing, the ALJ assumed the facts that the Employer sought to prove to be true and examined whether those facts constituted a viable defense. [Ruling on General Counsel's Motion In Limine p. 11-12.]

("ALJ Dec.") p. 3-4.] Additionally, the ALJ found that the Employer should be made to pay bargaining makewhole. [ALJ Dec. 4-6.]

On November 20, 2013, the Employer filed 15 exceptions to the ALJ's Decision and a brief in support thereof. On December 16, 2013, both the UFW and the General Counsel filed reply briefs opposing the exceptions.

2. Discussion

a. The ALJ's Authority To Consider Dispositive Motions

We must first consider the Employer's contention that the ALJ lacked the authority to treat the General Counsel's motion in limine as a demurrer to the answer or motion for judgment on the pleadings. [Exception Nos. 6 & 7.] The Employer argues that such a motion is not provided for in the Board's regulations and that Board regulation section 20243 required the ALJ to permit the Employer to submit evidence before granting a motion for a decision based on lack of evidence.[2] [Respondent's Brief In Support of Exceptions to the Decision of the Administrative Law Judge ("R. Br.") p. 4.]

Board regulation section 20243 contains the procedure for a "motion for decision for lack of evidence." (Cal. Code Regs., tit. 8, § 20243(a).) While Board regulation section 20243 does describe a motion akin to a motion for directed verdict or motion for judgment as a matter of law (i.e. a dispositive motion made after a party has rested its case), it does not preclude the making of other types of motions. In fact, Board

[2] The Board's regulations are set forth at California Code of Regulations, title 8, section 20100 et seq.

regulation section 20262 empowers ALJs to generally "dispose of procedural requests, motions, or similar matters." (Cal. Code Regs., tit. 8, § 20262(g).) The Board has previously ruled that it "utilizes a procedure similar to civil summary judgment when no factual conflicts must be resolved prior to ruling on the legal rights of the parties." (*Mario Saikhon, Inc*. (1989) 15 ALRB No. 8, p. 6.) (See also *F&P Growers Assoc*. (1983) 9 ALRB No. 22, p. 2-3 (considering general counsel's motion for summary judgment and to strike answer); *Bacchus Farms* (1978) 4 ALRB No. 26, p. 3 (considering motion for judgment on the pleadings).)

The power of the ALJ to consider a demurrer to the answer or motion for judgment on the pleadings is reasonably encompassed within the ALJ's authority to regulate hearings and dispose of motions and is consistent with prior Board decisions that have allowed motions in the nature of summary judgment and judgment on the pleadings. Accordingly, Exception Nos. 6 and 7 are dismissed.

b. <u>The Employer's Abandonment And Equitable Defenses</u>

i. <u>Abandonment</u>

The Employer asserts that, in 1988, it informed the UFW that it was willing to bargain and that the UFW indicated that it would schedule bargaining dates when its negotiator returned from vacation. The Employer contends that the UFW took no further action to schedule bargaining and bargaining remained in hiatus for roughly the next 24 years. [R. Br. p. 2-3.] Based upon this, the Employer argues that the UFW should be held to have forfeited its certification by abandoning the bargaining unit. [R. Br. p. 8-9.]

We, like the ALJ, reject the Employer's abandonment defense. The Board's previous decisions have been very clear that, under the ALRA, the fact that a labor organization has been inactive or absent, even for an extended period of time, does not represent a defense to the employer's duty to bargain. (*Dole Fresh Fruit Co., Inc*. (1996) 22 ALRB No. 4; *Pictsweet Mushroom Farms* (2003) 29 ALRB No. 3; *San Joaquin Tomato Growers, Inc*. (2011) 37 ALRB No. 5.) The Board recently reaffirmed its holdings on abandonment and confirmed that, except in cases where the union disclaims interest in representing the bargaining unit or becomes defunct, the union remains certified until removed or replaced through the ALRA's election procedures, regardless of any bargaining hiatus or union inactivity that may have occurred. (*Arnaudo Brothers, LP* (2014) 40 ALRB No. 3 pp. 9-12.).[3] These principles stem from the legislative intent inherent in the ALRA that the power to select and remove unions as bargaining representatives should reside with agricultural employees and not with their employers. (*F&P Growers Assoc. v. Agricultural Labor Relations Board* (1985) 168 Cal.App.3d 667, 676.) The facts alleged by the Employer fall squarely within this well-established rule.

In cases where a union is failing to adequately carry out its duties as bargaining representative and employees' appeals to the union itself are insufficient to resolve the situation, the remedy for such dereliction is for the members of the bargaining

[3] We concur with the ALJ that, insofar as our decisions have referred to a union's inability or unwillingness to represent a bargaining unit, those concepts are coextensive with defunctness and disclaimer. (See *Arnaudo Brothers, LP, supra,* 40 ALRB No. 3, p. 10 fn. 2.)

unit to seek to decertify the union or replace it with another union through the ALRA's election procedures. Bargaining unit members may also, where appropriate, seek to enforce their union's duty of fair representation. (*Vaca v. Sipes* (1967) 386 U.S. 171.) While these procedures are unavailable to the employer, it need not stand idly by if a certified union refuses to come to the bargaining table but may use the ALRA's unfair labor practice procedures to assert a claim that a union is unlawfully refusing to bargain. (*Dole Fresh Fruit Co., Inc*., *supra*, 22 ALRB No. 4, pp. 17-18.) Additionally, a union that fails to respond to changes to terms and conditions of employment proposed by the employer may be held to have waived its right to bargain over those changes, privileging the employer to implement them without bargaining. (*Ibid*.) However, what the employer may not do is impose its own choice on employees by unilaterally determining that it will no longer bargain with the union.

Accordingly, the Employer's claim that it was not obligated to bargain with the UFW due to an alleged period of inactivity by the UFW does not represent a legally cognizable defense to the duty to bargain under the ALRA. The ALJ did not err in rejecting that defense.

ii. <u>Laches</u>

Exception 15 challenges the ALJ's decision to reject the Employer's laches defense on the grounds that the defense requires proof of injury, which the Employer did not show. Although the Employer filed an exception on this issue, its supporting brief contains no argument or authority on this issue. Therefore, the Employer has waived this issue.

Even if the Employer had preserved this issue, laches is not available as a defense to an unfair labor practice allegation under the ALRA. When the ALRB pursues unfair labor practice allegations, it acts in the public interest to effectuate the policies underlying the ALRA. The benefits that the Board's orders confer on individual employees "are only incidental to the exercise of its power to effectuate the policies of the [ALRA] by remedying conditions created by unfair labor practices." (*Stamoules Produce Co*. (1990) 16 ALRB No. 13, p. 4 (quoting *Colorado Milling and Elevator Co*. (1939) 11 NLRB 66, 68.) (bracketed material supplied).) "It is well settled that the equitable principle of laches is not applicable to the government acting in the public interest." (*Ibid*.) (See also *R. E. Dietz Co*. (1993) 311 NLRB 1259, 1265 (National Labor Relations Board ("NLRB") complaint alleging refusal to bargain "was issued to vindicate a public right, not a private right, so any actions of the Charging Party can in no way constitute laches, since laches does not run against the Government."); *Briggs Manufacturing Co*. (1947) 75 NLRB 569, 573 ("the equitable doctrine of laches is not applicable to the [NLRB] as a Government agency acting in the public interest") (bracketed material supplied).)

Furthermore, even if the defense of laches were available in an unfair labor practice case, we would find, in agreement with the ALJ, that the defense was not established here. Although unreasonable delay is an essential component of the defense of laches, as the ALJ correctly noted, a showing of delay alone is not sufficient. It must also be shown that the delay caused prejudice to the other party. (*Marriage v. Keener* (1994) 26 Cal.App.4th 186, 191; *Gibson v. Mitchell* (1937) 9 Cal. 2d 718, 725-726

("Laches is dependent not only upon delay, but also upon injury occasioned by the delay."); *Wilkerson v. Thomas* (1953) 121 Cal.App.2d 479, 490 ("The doctrine of laches has been defined not merely as a delay in asserting one's rights, but such a delay as redounds to the disadvantage of another.").)

In *Joe G. Fanucchi & Sons/Tri-Fanucchi Farms*, the Board rejected the Employer's argument that the UFW should be equitably estopped from pursuing refusal to bargain charges due to the UFW's delay in requesting bargaining. (*Joe G. Fanucchi & Sons/Tri-Fanucchi Farms, supra,* 12 ALRB No. 8, p. 5-6.) The Board held that,

> [E]stoppel will not lie in this case since Respondent has not shown that any detriment resulted from its reliance on the Union's neglect of its representational responsibilities. To the contrary, Respondent was left free for extended periods to unilaterally determine the wages, hours, and working conditions of its employees without being called to task by the Union, either across the bargaining table or via the Board's processes.
> (*Id*. at 6.)

The Employer does not explain how it was harmed by the UFW's delay in asserting its bargaining rights except to allege that the UFW filed a notice of intent to take access in 1990 and again in 1992. While the Employer claims that these actions caused "great confusion" this would not constitute harm sufficient to invoke the doctrine of laches, even if available, particularly because the events cited by the Employer would have occurred some 20 years prior to the UFW's renewed demand for bargaining.

iii. Unclean Hands

The Employer excepts to the ALJ's rejection of its unclean hands defense. However, like the defense of laches, the equitable defense of unclean hands is not

available as a defense to unfair labor practice allegations under the ALRA. In *United Farm Workers of America* (*California Table Grape Commission*) (1993) 19 ALRB No. 15, the Board noted that the United States Supreme Court had held that "Dubious character, evil or unlawful motives, or bad faith of the informer" does not deprive the NLRB of its jurisdiction to conduct inquiries into unfair labor practice charges and rejected the proposition "that similar misconduct by a litigant before this Board would deprive the Board of its jurisdiction." (*Id.* at p. 7 (citing *National Labor Relations Board v. Indiana & Michigan Electric Co*. (1943) 313 U.S. 9).) This ruling is in accord with NLRB precedent holding that the unclean hands of a charging party is not a defense to an unfair labor practice allegation under the National Labor Relations Act ("NLRA") because unfair labor practice proceedings "are not for the vindication of private rights, but are brought in the public interest and to effectuate the statutory policy." (*Cal. Gas Transport, Inc*. (2006) 347 NLRB 1314, 1326; *International Brotherhood of Teamsters* (*Island Dock Lumber, Inc*.) (1963) 145 NLRB 484, 492 fn. 9.) It is also in accord with California state court precedent holding that the unclean hands defense does not apply where the defense "would result in permitting an act declared by statute to be void or against public policy." (*Kofsky v. Smart & Final Iris Co*. (1955) 131 Cal.App.2d 530, 531-532 (no unclean hands defense to allegation that defendant violated that Unfair Practices Act); *Mendoza v. Ruesga* (2008) 169 Cal.App.4th 270, 279, 279 (unclean hands defense not available to an allegation of violation of the Immigration Consultants Act as it would "undermine the protective purposes of the legislation."); *Pepper v. Superior*

Court (1977) 76 Cal.App.3d 252, 259 ("The bar of unclean hands is limited if policy considerations favor substantive relief.").)

Even if unclean hands constituted a defense to an unfair labor practice allegation under the ALRA, the Employer failed to establish the defense. California courts have required a showing of prejudice in connection with the unclean hands defense. (See *Soon v. Beckman* (1965) 234 Cal.App.2d 33, 36 ("The unconscionable conduct must be of such a nature that it would, if permitted to go unnoticed, result in prejudice to the other party."); *Kendall-Jackson Winery, Ltd. v. Superior Court* (1999) 76 Cal.App.4th 970, 978 ("The misconduct must prejudicially affect the rights of the person against whom the relief is sought.") (internal punctuation omitted); *Brown v. Grimes* (2011) 192 Cal.App.4th 265, 283-284 (unclean hands defense rejected due to lack of prejudice).) As noted above, the Board has held that inactivity by a union that leaves the employer free to unilaterally determine terms and conditions of employment does not constitute a detriment to the employer. (*Joe G. Fanucchi & Sons/Tri-Fanucchi Farms, supra*, 12 ALRB No. 8, p. 5-6.)

iv. Exclusion Of Evidence Concerning Abandonment And Equitable Defenses

The Employer asserts that it should have been permitted to introduce evidence in support of its abandonment, laches, and unclean hands defenses. The ALJ did not admit any of the employer's proffered evidence on these issues. As discussed above, abandonment is not a defense to the duty to bargain with a certified union under the ALRA. Accordingly, any evidence offered in support of such a defense would be

irrelevant and the ALJ properly excluded it. The same conclusion applies with respect to laches and unclean hands, neither of which constitutes a defense to unfair labor practice allegations under the ALRA. Furthermore, as discussed above, even if they applied, both of these defenses require a showing of harm. Other than claiming that it was confused when the UFW filed notices of intent to take access, the Employer did not identify any evidence, or even a theory, as to how it was harmed by the alleged absence of the UFW. As noted previously, the Board has held a union's inactivity that leaves the employer free to set terms and conditions of employment without bargaining does not constitute harm to the employer. (*Joe G. Fanucchi & Sons/Tri-Fanucchi Farms, supra*, 12 ALRB No. 8, p. 6.) Accordingly, even if the defenses of laches and unclean hands were available, the ALJ did not err by not admitting the Employer's evidence.

For the foregoing reasons, the ALJ properly rejected the Employer's abandonment, laches, and unclean hands defenses and properly declined to take evidence on those issues. Accordingly, Exceptions 3-5, 9 & 12-15 are dismissed.

c. <u>Disclaimer Of Interest</u>

The Employer takes exception to the ALJ's failure to find that "by its 24 years of failing to fulfill its statutory duty that the [UFW] did not exhibit a 'disclaimer of interest.'" [Exception No. 11 (bracketed material supplied).] Respondent, however, did not allege in the Answer that the UFW disclaimed interest in representing the bargaining unit, nor did it urge such a theory during the hearing. The issue, therefore, was not preserved. Furthermore, even if the Board were to consider the Employer's exception, we would dismiss it. In order to be effective, "a disclaimer by a union must be

unequivocal and must have been made in good faith." (*Arnaudo Bros., LP*, *supra*, 40 ALRB No. 3, p. 14 (internal punctuation omitted).) In order for a disclaimer to be effective, the union's conduct "must not be inconsistent with its alleged disclaimer." (*Ibid*.) The party asserting disclaimer of interest bears the burden of proving the disclaimer occurred. (*Ibid*.)

The Employer devotes almost no attention in its brief to its disclaimer argument. It does not cite to any statement by the UFW that it claims constituted an unequivocal disclaimer of interest in representing the bargaining unit. The Employer claims that the UFW filed a notice of intent to take access in 1990 and again in 1992 and argues that this shows that the UFW did not believe itself to be the certified bargaining representative. [R. Br. p. 11.] However, the filing of the notices was not an unequivocal statement that the UFW no longer wished to represent the unit. In fact, as the ALJ pointed out, the Board in *Dole Fresh Fruit* treated the filing of access notices by a certified union as evidence that the union had continued interest in representing the employees. (*Dole Fresh Fruit Company*, *supra*, 22 ALRB No. 4, p. 13.) (See also *Oil Capitol Electric* (1992) 308 NLRB 1149, 1149 (representation petition filed by union when it was already certified was due to a mistake of fact and did not provide a basis for employer to withdraw recognition); *Sierra Development Company* (1977) 231 NLRB 22, 23 (although union was attempting to organize employees it was certified to represent, employer did not have a good faith basis to question union's continued majority support).)

The Employer contends that it should have been permitted to introduce evidence on the issue of disclaimer. As noted, however, the Employer did not contend at the hearing that the UFW disclaimed interest. Furthermore, the Employer does not claim that, apart from the alleged bargaining hiatus and filing of notices of intent to take access by the UFW, there was any evidence of a disclaimer of interest. None of the documentary evidence the Employer sought to introduce related to a statement of a disclaimer, nor did the Employer contend that any of its witnesses would testify to such a statement.

The Employer's case for disclaimer appears to be grounded almost exclusively on its allegation that the UFW did not engage in bargaining for over 20 years. However, as discussed above, the Board has been clear that an extended bargaining hiatus does not result in the forfeiture of a union's certification. It follows that such conduct, standing alone, also does not constitute a disclaimer of interest.

Accordingly Exception No. 11 is dismissed.

d. Bargaining Makewhole

The Employer excepts to the ALJ's decision to award bargaining makewhole. [Exception No. 8.] The Employer also specifically excepts to the ALJ's decision not to take into account that the Employer's efforts to expedite the processing of the case, which efforts, the Employer argues, were allegedly stymied by the General Counsel and the UFW resulting in substantial delay. [Exception No. 10; R. Br. p. 13.] Finally, the Employer argues that it should have been permitted to introduce evidence establishing that its refusal to bargain represented a good faith "technical refusal to

bargain" to test the UFW's certification.[4] [Exception No. 2; R. Br. p. 12.] In this regard, the Employer argues that the case is governed by *J.R. Norton Co. v. Agricultural Labor Relations Board* (1979) 26 Cal.3d 1.

Bargaining makewhole is authorized by Labor Code section 1160.3 which states that the Board may enter orders in unfair labor practice cases "making employees whole, when the board deems such relief appropriate, for the loss of pay resulting from the employer's refusal to bargain." (Lab. Code § 1160.3.) In *J.R. Norton*, the California Supreme Court held that the Board may not automatically award makewhole in cases where an employer refuses to bargain in order to challenge the validity of an election. The court held that the Board must "determine from the totality of the employer's conduct whether it went through the motions of contesting the election results as an elaborate pretense to avoid bargaining or whether it litigated in a reasonable good faith belief that the union would not have been freely selected by the employees as their bargaining representative had the election been properly conducted." (*J.R. Norton Co. v. Agricultural Labor Relations Bd., supra*, 26 Cal.3d 1, 39.)

In *F&P Growers Assoc., supra*, 9 ALRB No. 22, the Board clarified that the *J.R. Norton* "reasonableness and good faith" analysis does not apply outside of the context of an employer's refusal to bargain for the purpose of seeking court review of a

[4] Specifically, the Employer argues that had it been able to present witnesses, "it would have been able to further demonstrate its good faith in engaging in the technical refusal to bargain and its efforts to expedite the matter and the dilatory tactics of the UFW and General Counsel that were designed to thwart [the Employer's] efforts to expedite the matter." [R. Br. pp. 13-14 (bracketed material supplied).]

certification election. When an employer refuses to bargain "but neither the conduct of the election nor the agency's decision to certify the union is at issue, the 'reasonableness' of the employer's litigation posture and the employer's 'good faith' do not control our decision as to whether to impose makewhole." (*F&P Growers Assoc., supra,* 9 ALRB No. 22, p. 7; affirmed at *F&P Growers Ass'n v. Agricultural Labor Relations Bd., supra,* 168 Cal.App.3d 667.) Instead, the Board is to "consider on a case-by-case basis the extent to which the public interest in the employer's position weighs against the harm done to the employees by its refusal to bargain." (*Id.* at 7-8.) Except in cases where the employer's position furthers the policies and purposes of the ALRA, "the employer, not the employees, should ultimately bear the financial risk of its choice to litigate rather than bargain." (*Id.* at 8.)

Here, because the Employer is not seeking review of a certification election, *F&P Growers* applies, rather than *J.R. Norton*. The issue, therefore, is whether the public interest in the Employer's position outweighs the harm done to employees by its refusal to bargain. The position taken by the Employer is based principally on its contention the UFW forfeited its certification by abandoning the bargaining unit. As discussed above, this position is contrary to over 30 years of Board precedent holding that abandonment is not a defense to the duty to bargain. Accordingly, the Employer's position cannot be said to further the policies and purposes of the ALRA. (See *Joe G. Fanucchi & Sons/Tri-Fanucchi Farms, supra*, 12 ALRB No. 8, p. 9-10 (ordering makewhole where Employer raised defenses that had already been rejected under existing case law).)

The Employer asserts that the ALJ failed to consider the Employer's efforts to expedite the processing of the case, complaining that neither the UFW nor the General Counsel would agree to submit the case on stipulated facts. [R. Br. p. 13.] While parties are given the option under the Board's regulations to file stipulated facts with the Board where there is no conflict in the evidence, the use of this procedure is not mandatory.[5] (Cal. Code Regs., tit. 8, § 20260.) The Employer further argues that the UFW delayed filing a charge after the Employer refused to bargain. The charge was, however, filed within the applicable, and relatively short, six-month statutory limitations period and the UFW was not required to adhere to the Employer's timetable in filing its charge. (Lab. Code § 1160.2) The Employer argues that, "for unexplained reasons," the General Counsel delayed issuing a complaint for approximately five months after the UFW filed its charge. [R. Br. p. 13.] While the Employer claims in its brief that this conduct constituted "dilatory tactics" the Employer did not assert that there was any evidence of such other than the bare fact of the "delay" itself. It is well-established that agency delay does not toll, much less negate, an employer's makewhole liability.[6] (*San Joaquin Tomato Growers, Inc*. (2012) 38 ALRB No. 4, p. 20-21; *Harding Glass Co., Inc*. (2002)

[5] Furthermore, given that the Employer's case revolved around an abandonment theory, and the General Counsel correctly regarded the alleged facts relating to that theory as irrelevant, it appears that there would have been a reasonable basis for the General Counsel and the UFW to decline to stipulate to such facts.

[6] This is not to say that evidence of delay and/or dilatory tactics would never be sufficient to negate or reduce a makewhole award. We have previously held that delays in processing a case may become sufficiently extreme to justify modifying the amount of makewhole that would otherwise be owed. (*San Joaquin Tomato Growers, Inc*. (2012) 38 ALRB No. 4.)

337 NLRB 1116, 1118 (two-year delay by NLRB in issuing amended back-pay specification did not toll employer's back-pay liability); *National Labor Relations Bd. v. J.H. Rutter-Rex Mfg. Co*. (1969) 396 U.S. 258, 265 ("the [NLRB] is not required to place the consequences of its own delay, even if inordinate, upon wronged employees to the benefit of wrongdoing employers.") (bracketed material supplied).)

Based upon our review of the facts and circumstances and the equities of this case, we conclude, in agreement with the ALJ, that an award of makewhole is appropriate and that, under the circumstances presented in this case, "the employer, not the employees, should ultimately bear the financial risk of [the Employer's] choice to litigate rather than bargain." (*F&P Growers Assoc*., *supra*, 9 ALRB No. 22, p. 8 (bracketed material supplied).)

Accordingly, Exception Nos. 2, 8, and 10 are dismissed.[7]

i. Calculation of Interest on Makewhole Award

In paragraph 2(c) of the ALJ's recommended order, the ALJ stated that makewhole was to be awarded with interest to be calculated in accordance with the Board's decision and order in *E.W. Merritt Farms* (1988) 14 ALRB No. 8. The Board has held that it now follows the more recent NLRB precedent set forth in *Kentucky River Medical Center* (2010) 356 NLRB No. 8 as clarified in *Rome Electrical Services, Inc*. (2010) 356 NLRB No. 38 calling for interest to be calculated on a compounded daily

[7] Inasmuch as we have found that each of the Employer's defenses were either not preserved, not legally cognizable, or, even taking the Employer's allegations as true, were insufficient, we also dismiss Exception No. 1.

basis rather than the simple interest method formerly used by the NLRB and the ALRB. (*H&R Gunland Ranches, Inc*. (2013) 39 ALRB No. 21, p. 6 fn. 4.) The ALJ's recommended order shall be modified accordingly.

ORDER

The Employer's exceptions are DISMISSED. The decision and order of the Administrative Law Judge is AFFIRMED except as noted above.

DATED: April 23, 2014

Genevieve A. Shiroma, Member

Cathryn Rivera-Hernandez, Member

CHAIRMAN GOULD, concurring:

The problem of agency delay is a concern I have had for decades. In recent years, it has posed problems both vexatious and perilous to effective labor law administration. In my view, the problem of agency delay is as pernicious as dilatory conduct by private parties which appear before administrative agencies. The federal judiciary, in denying statutory relief has had occasion to characterize some NLRB delays as "inexplicable." (*NLRB v. Thill, Inc*. (7th Cir. 1992) 980 F.2d 1137, 1141 (Judge Richard Posner speaking of an eight year delay by the NLRB); see generally William B. Gould IV, *Labored Relations: Law, Politics, and the NLRB* (2000) and William B. Gould IV, *A Primer on American Labor Relations* (5th ed. 2013).) That must never happen here at the ALRB.

Although there is no time limitation for agency action in a ULP matter under the NLRA, and similarly no time limitation under the ALRA, as the U.S. Supreme Court noted "inordinate delay in any case is regrettable." (*NLRB v. Katz* (1961) 369 U.S. 736, 748 fn. 16.) I concur that the facts of this particular case do not show that there was a delay that would warrant denying the remedy ordered by the Board. I write separately to emphasize that the need for prompt and expeditious agency action applies not only to the General Counsel of the ALRB—who was alleged in this case not to have met the

above-noted standard — but also to the Board itself, and that under other facts showing delay, the Board risks giving up important remedies. (*Emhart Industries, Hartford Division v. NLRB* (2nd Cir. 1990) 907 F2d 372, 378; *NLRB v. Ancor Concepts* (2nd Cir. 1999) 160 LORM 2304, 2308; *Local Joint Executive Bd. of Las Vegas v. NLRB* (9th Cir. 2011) 657 F.3d 865, 867; *NLRB v. Int'l Bhd. Of Teamsters Local 251* (1st Cir. 2012) 691 F.3d 49, 61; *NLRB v. Mountain Country Food Store* (8th Cir. 1991) 931 F.2d 21*; NLRB v. Hanna Boys Ctr.* (9th Cir. 1991) 940 F.2d 1295, 1299.) The public deserves a vigilant Board, and I intend to meet that standard myself and facilitate its implementation while I serve here in Sacramento.

DATED: April 23, 2014

William B. Gould IV, Chairman

CASE SUMMARY

TRI-FANUCCHI FARMS
(United Farm Workers of America)

40 ALRB No. 4
Case Nos. 2013-CE-008-VIS et al.

Background

On November 5, 2013, Administrative Law Judge Thomas Sobel (the "ALJ") issued a decision finding that the Respondent, Tri-Fanucchi Farms (the "Employer"), unlawfully refused to bargain with Charging Party United Farm Workers of America (the "UFW") and unlawfully refused to respond to a UFW information request. The Employer admitted that it refused to bargain with the UFW and refused to respond to its information request but contended that the UFW lost its certification by abandoning the bargaining unit between 1988 and 2012 and that its claims were also barred under the doctrines of unclean hands and laches. The Employer also contended that makewhole would be inappropriate because of its own good faith and dilatory conduct on the part of the UFW and the ALRB's General Counsel. The General Counsel filed a motion in limine to exclude evidence pertaining to the Employer's abandonment defense, which the ALJ treated as a demurrer or motion for judgment on the pleadings. The ALJ granted the General Counsel's motion, rejected the Employer's abandonment and equitable defenses, found that the unfair labor practice allegations had been proven, and ordered the Employer to pay bargaining makewhole. The Employer filed exceptions.

Board Decision

The Board upheld the ALJ's decision as modified. The Board held that the ALJ had the authority to consider a demurrer or motion for judgment on the pleadings. The Board further held that the Employer's abandonment defense fell squarely within a line of Board decisions rejecting that defense as a matter of law. The Board found that the Employer had waived its laches defense and, in any event, laches is not a defense to unfair labor practice proceedings. Additionally, the Board held that, even if the defense were available, the Employer had failed to demonstrate the required element of prejudice. The Board also held that the defense of unclean hands is not available in unfair labor practice proceedings and that, even if it were available, the Employer failed to demonstrate prejudice. The Board held that the Employer failed to preserve its argument that the UFW disclaimed interest in representing the unit and, furthermore, it did not claim that the UFW made an unequivocal good faith statement of disclaimer. The Board agreed with the ALJ that the standard stated in *F&P Growers Assoc*. (1983) 9 ALRB No. 22 applied to the issue of whether makewhole should be awarded and that, under that standard, makewhole was appropriate. The Board modified the ALJ's recommended order concerning interest calculation pursuant to *H&R Gunland Ranches, Inc*. (2013) 39 ALRB No. 21.

Concurring Opinion

Chairman Gould filed a concurring opinion in which he expressed his concern for the problem of agency delay. He stated that, although the facts of this case did not show that there was a delay that would warrant denying the remedy ordered by the Board, he wished to emphasize that the need for prompt and expeditious agency action applies not only to the Board's General Counsel but also to the Board itself and that, under other facts, the Board risks giving up important remedies through delay. Chairman Gould expressed his intent to ensure that the Board acts with vigilance.

***

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of:	)	Case Nos. 2013-CE-008-VIS
	)	2013-CE-014-VIS
TRI-FANUCCHI FARMS,	)	
	)	
Respondent,	)	
	)	
and	)	
	)	
UNITED FARM WORKERS OF AMERICA,	)	
	)	
Charging Party.	)	
_____	)	

Appearances:

General Counsel
Vivian Paz
Abdel Nassar
Agricultural Labor Relations Board
1642 W. Walnut Avenue
Visalia, CA 93277

Charging Party
Edgar Ivan Aguilasocho
Efren Trujillo
United Farm Workers Of America
1227 California Avenue
Bakersfield, CA 93304

Respondent
Howard A. Sagaser
Ian Wieland
7550 N. Palm Avenue, Suite 201
Fresno, CA 93711

DECISION OF THE ADMINISTRATIVE LAW JUDGE

Thomas Sobel, Administrative Law Judge: This case was heard by me on October 21, 2013 in Visalia, California.

JURISDICTION

By a complaint issued on September 5, 2013, General Counsel alleged that Tri-Fanucchi (hereafter Respondent) refused to provide information to, to meet with, and to recognize the United Farmworkers of America, (UFW) AFL-CIO, (hereafter UFW or the Union) as the collective bargaining representative of its employees.

FACTS

By answer dated August 27, 2013,[1] Respondent admitted that it is an agricultural employer, that the UFW is a labor organization under the Act, and that the UFW was certified as the collective bargaining representative of its employees in 1977. Respondent admitted that on or about September 28, 2012, the UFW requested that it provide information; that on or about September 28, 2012, the UFW requested bargaining; and that on or about October 19, 2012, Respondent refused to recognize and bargain with the UFW in order "to seek judicial review of the status of the UFW as the exclusive bargaining representative of Respondent's employees." Respondent's refusal was based upon the grounds that, by the Union's lack of representational activity from 1988 until

[1] As noted in the attached ruling on the Motion in Limine, in speaking of Respondent's Answer, I am also referring to any averments in Respondent's Explanation and Background Information contained within it, as well the Exhibits referred to the Background Information. Board Regulations permit explanations to be included in answers. See, 8 CCR Section 20232.

2012, it must be held to have abandoned the unit and, as a result, Respondent is justified on both statutory and equitable grounds in withdrawing recognition from it.

DECISION

In advance of hearing, General Counsel filed a Motion in Limine to exclude any evidence relating to the conduct of the Union prior to the specific violations alleged in the complaint and admitted in the Answer. I heard the Motion at the opening of hearing and, ruling that the Board does not recognize the defense of abandonment,[2] I indicated I would issue an Order on the Pleadings and state my reasons in a written ruling, which is attached to this decision.

On the basis of Respondent's admissions, which remain after rejection of its defense, I find that the Union was certified as collective bargaining representative of Respondent's employees in 1977, that it made the requests for information and for meetings for the purpose of bargaining as alleged in the complaint, and that Respondent has refused to provide information to, and to recognize and bargain with, the Union. Although Respondent has not contended that the information requested by the Union was not relevant, I find that the information was presumptively relevant to the Union's function as bargaining representative. See, The Developing Labor Law, Fourth Ed. Vol. I, pp. 864-65. I also find that the failure to recognize and to meet with the Union constitute per se refusals to bargain. Labor Code Sections 1153(e), 1155.2.

[2] An effect of my ruling was to moot out any issue of the Union's compliance with Respondent's subpoena. The subpoena sought information concerning the Union's activities on behalf of, and correspondence with unit employees from 1988 until 2012.

Accordingly, I will order Respondent to provide complete and accurate responses to the Union's request for information and to recognize and meet with the Union for the purpose of collective bargaining.

General Counsel also seeks makewhole. Because the availability of the remedy requires the exercise of discretion in its application, I must consider Board precedent on the application of the remedy in cases like this. Respondent argues that since it has refused to bargain in order to obtain judicial review of the (continued) certification of the Union, and that it has sought review with dispatch, the standards applicable to technical refusals to bargain laid out in *J R Norton v Agricultural Labor Relations Board* (1979) 26 Cal 3d 1, should be applied.

The Board has repeatedly held that a challenge to the "continued" certification of a union of the kind made by Respondent here is not to be judged by *Norton*-technical-refusal-to-bargain standards. In *F & P Growers Association* (1983) 9 ALRB No. 22, the Board held:

> Where, as in the instant case, an employer refuses to bargain but neither the conduct of the election nor the agency's decision to certify the union is at issue, the "reasonableness" of the employer's litigation posture and the employer's "good faith" do not control our decision whether to impose makewhole.
>
> Cognizant of our duty under section 1160.3 to exercise discretion in the imposition of the makewhole remedy, we consider on a case-by-case basis the extent to which the public interest in the employer's position weighs against the harm done to the employees by its refusal to bargain. Unless litigation of the employer's position furthers the policies and purposes of the Act, the employer, not the employees, should bear ultimately bear the financial risk of its choice to litigate rather than to bargain. *F & P Growers*, supra, at pp. 7-8

This standard for imposing makewhole was upheld in *F & P Growers v. Agricultural Labor Relations Board* (1985) 168 Cal App 3d 676, 682. The Board applied this standard in *Joe G. Fanucchi Sons/Tri-Fanucchi* (1986) 12 ALRB No. 8, an earlier case in which this Respondent withdrew recognition on the grounds of "good faith doubt" and on some of the same equitable grounds upon which it relies in this case. The Board wrote:

> The standard for awarding makewhole, where section 1153(e) is violated in a "non-technical" bargaining situation, is applied on a case-by-case basis, according to
>
> > the extent to which the public interest in the employer's position weighs against the harm done to the employees by its refusal to bargain. Unless litigation of the employer's position furthers the policies and purposes of the Act, the employer, not the employees, should ultimately bear the financial risk of its choice to litigate rather than to bargain. [Citation omitted.]
>
> As we held in F & P [9 ALRB No. 22] and Ventura County Fruit Growers [10 ALRB No. 45]:
>
> > once the Board had clarified the exclusivity of the decertification process . . . the employer could claim no public interest in refusing to bargain based on good faith doubt of the Union's majority support, especially while its employees had sought no decertification or rival union election....[L]itigation of the claim of loss of majority support could not possibly further the policies and purposes of the ALRA. *Joe G. Fanucchi/Tri-Fanucchi*, supra, at pp. 6-7.

Since the Board construed the contentions in that case as essentially raising the defense of abandonment and rejected both that defense and the equitable defenses that depended on it, and ordered makewhole as the 'price' for raising them, I reject Respondent's contention that makewhole should not be imposed in this case. Paraphrasing the Board in the previous *Tri-Fanucchi* case: Since the Board has made it clear in *Dole Fresh Fruit*

Company (1996) 22 ALRB No.4, that absent proof of union defunctness, disclaimer or a its ouster in an election, a once certified union remains certified, Respondent's efforts to obtain court resolution of an issue the Board regards as settled cannot be said "to further the policies and purposes of the Act."

Makewhole shall be applied from October 19, 2012 when Respondent made known its intention to refuse to recognize the Union.

ORDER

Pursuant to Labor Code section 1160.3, Respondent Tri-Fanucchi Farms, Inc. its officers agents, labor contractors, successors and assigns shall:

1. Cease and desist from:

(a) Failing and refusing to provide the United Farm Workers of America, AFL-CIO, with the information it requested in Paragraph 6 (A-J) of the Complaint, or with any other information relevant to its obligation to provide the Union with such requested information as may be necessary to fostering informed collective bargaining.

(b) Failing or refusing to recognize, meet with and to bargain collectively with the United Farm Workers of America, AFL-CIO (UFW) as the collective bargaining representative of its employees;

(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, furnish to the Union the information it requested in Paragraph 6 (A-J) of the Complaint and all other information relevant to its obligation to provide the Union with such requested information as may be necessary to fostering informed collective bargaining.

(b) Upon request, meet and bargain collectively in good faith with the UFW, as the exclusive representative of its agricultural employees.

(c) Make whole its present and former agricultural employees for all losses of pay and other economic losses they have suffered as a result of Respondent's failure and refusal to bargain in good faith with the UFW, such amounts to be computed in accordance with established Board precedents, plus interest thereon, computed in accordance with our Decision and Order in E.W. Merritt Farms (1988) 14 ALRB No. 8, the period of said obligation to extend from October 19, 2012 and continuing thereafter until such time as Respondent commences good faith bargaining with the UFW which results in a contract or a bona fide impasse in negotiations.

(d) Upon request of the Regional Director, 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.

(e) Mail copies of the Notice in all appropriate languages within 30 days after the issuance of this order to all employees employed by Respondents at any time after September 12, 2012 at their last known correct addresses.

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

(g) Arrange for a representative of Respondent or a Board agent to distribute and read the attached Notice in all appropriate languages to all of its employees on company time and property at times and places to be determined by the Regional Director. Following the reading, the Board agent shall be given the opportunity outside the presence of supervisors and management, top answer any questions the employees may have concerning the Notice or their rights under the Act. The Regional Director shall determine a reasonable rate of compensation to be paid by Respondent to all non-hourly wage employees in order to compensate them for time lost at this reading and during the question and answer period.

(h) Notify the Regional Director in writing, within thirty days after the date of issuance of this Order, of the steps Respondent has taken to comply with its terms. Upon request of the Regional Director, Respondent shall notify the Regional

Director periodically in writing of further actions taken to comply with the terms of this Order.

Dated: November 5, 2013

_____

THOMAS SOBEL
Administrative Law Judge, ALRB

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating charges that were filed by the United Farm Workers of America, in the Visalia Office of the Agricultural Labor Relations Board (ALRB), the General Counsel of the ALRB issued a complaint 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 to supply the Union with information to which it was entitled under the Act

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 refuse to provide the Union with information necessary to foster informed collective bargaining.

WE WILL NOT refuse to meet and to bargain collectively and in good faith with the Union as the representative of our employees for the purpose of collective bargaining.

WE WILL NOT in any like or related manner, refuse to bargain with the Union over wages, hours or conditions of employment, or interfere with, restrain or coerce employees from exercising their right under the Act

DATED:

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.

RULING ON GENERAL COUNSEL'S MOTION IN LIMINE

The grounds for asserting abandonment are contained in Respondent's Answer, which included a statement of "Background Information Concerning Respondent and the UFW's 24 Years of Abandonment", and in a letter by Respondent's attorney, Howard Sagaser, attached as Exhibit C to Respondent's "Background Information."[3] The background information states:

> In 1988, [Respondent] indicated its willingness to bargain with the UFW. In 1988, the UFW responded as soon as their negotiator came back from vacation, a date would be set. Thereafter, the UFW failed to follow through and there were no bargaining sessions. * * * [M] ore than 35 years have passed since the election and more than 24 years have passed from the time [Respondent] indicated a willingness to bargain. The UFW never actually made a request to bargain until September of 2012. This raised questions regarding the Union abandoning a statutory duty to represent [Respondent's] employees and whether the UFW by requesting bargaining 35 years after the election had unclean hands. See Answer, Background Information Concerning [Respondent] and the UFW's 24 Years of Abandonment

The Sagaser letter states that the UFW filed Notices of Intent to Take Access in 1990 and 1992, and argues from the Union's resort to these procedures for taking organizational access that even the Union did not believe it was certified.

Upon receipt of the Motion, I reviewed Board precedent on the issue of abandonment as a defense. Based upon that precedent, I granted the motion on the grounds that the Board has repeatedly held that what Respondent sought to prove was not

[3] Title 8 CCR Section 20232 permits an answer to make an explanation of the circumstances surrounding the facts in the complaint.

a defense to a refusal to bargain under the ALRA. In doing so, I was, in effect, treating the motion as akin to a demurrer to the answer or a motion for judgment on the pleadings, See, e.g., *Edwards v Centex Real Estate Corp*. (1997) 53 Cal App 4th 15, *Miller v McLagen* (1947) 82 Cal App 2d 299; in other words, accepting the facts Respondent sought to prove as true, I concluded they did not establish a defense to its refusal to bargain. I, therefore, told the parties that I did not see what remained to be litigated in view of the admissions contained in Respondent's answer, and that I would issue an Order based upon the pleadings.

My reasons for granting the motion follow.

1. Hiatus in bargaining

a. Abandonment v. Defunctness or Disclaimer

Respondent's primary reason for refusing to provide information to, and to recognize and bargain with, the Union is the lack of any Union request to bargain between 1988, when Respondent made its last offer to bargain, and 2012, when the Union made the requests at issue in this case. According to Respondent, this hiatus means the Union must be held to have abandoned the unit and to justify Respondent's refusal to recognize it. (I will later consider the same contention framed in equitable terms.) In *Pictsweet Mushrooms Farms* (2003) 29 ALRB No. 3, the Board explained that "only 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 union's "defunctness," i.e.,. its institutional death and inability to represent the employees. (*Bruce Church, Inc.* (1991) 17 ALRB No.1)[4]

In *San Joaquin Tomato Growers* (2011) 37 ALRB No. 5, the Board rejected a claim of abandonment based on the union's "absence from the fields" since 1998. It wrote:

> The Board noted that in *Dole Fresh Fruit Company* (1996) 22 ALRB No. 4, it had clarified that under the ALRA, the concept of abandonment has no significance beyond a union disclaimer of interest or union defunctness. This is consistent with the established principle under the ALRA that employers can not withdraw recognition of the union based on a reasonable belief of loss of majority support. Rather, the continued representation status of the union may be tested via a decertification election. Moreover, in *Dole Fresh Fruit Company*, the Board specifically held that a period of dormancy in bargaining, even a prolonged period, did not establish "abandonment" of a certification. Finally, the Board pointed out that the presentation of an abandonment defense has no relevance where, as here, bargaining has resumed after a period of dormancy.[5]

I do not see how I can read these cases as saying other than that a defense of abandonment that relies solely on either a prolonged period of union inactivity in bargaining or on a union's long "absence from the fields", does not establish either

[4] "Defunctness" as a reason for cessation of the bargaining obligation rests on obvious grounds. Under the NLRA, a "disclaimer of interest" is generally deployed by a union to moot the existence of a question concerning representation when an employer seeks an election on the grounds that "one or more individuals or labor organizations have presented a claim for recognition. . . . " 29 USC Sec. 159(c)(1)(B), or where a union contends there is no recognitional or organizational object for its picketing under 29 USC 158(b)(7). See, generally, The Developing Labor Law, Fourth Ed. Vo1., pp 511-513; Volume II, pp. 1575 et seq.

[5] The Board's shorthand for the complex of doctrines elaborated above is that "a union remains certified until decertified."

defunctness or a disclaimer of interest and, therefore, that such inactivity or absence is not a defense to a refusal to bargain charge.

It remains to consider whether Respondent's has alleged facts sufficient to establish that the union was either defunct or had disclaimed of interest.

As indicated above, the Board has defined "defunctness" as "institutional death." I can take notice under Evidence Section 452(g), as a fact of common knowledge within the jurisdiction of the Board, that the Union was not "dead" during the period Respondent seeks to put its activities at issue in this case.

The Board has never defined "disclaimer of interest,"[6] but the NLRB has identified effective disclaimers of interest in various contexts. Generally speaking, they must be "clear and unequivocal." Examples of disclaimers held "clear and unequivocal" are: the one made by the union in *VFL Technology Corp.* (2001) 332 NLRB 1443, in which the union advised the employer that "it renounced any intention to act as the employees'' bargaining representative; that it would cease and desist from acting in any way as the employees' bargaining representative; and that it would not seek to be the employees' bargaining representative"; the one made by the union to the employer in *Miratti's Inc.* (1961) 132 NLRB 699, 700, that it was not "claiming to represent the employees 'in any way, shape or form'"; and the one in *IBEW, AFL-CIO-CLC Local No. 58* (1978) 234 NLRB 633,636, in which the union telegrammed the employer that

[6] But see, *Dave Walsh Company,* (1988) 4 ALRB No, 84, in which the Board recognized one.

"IBEW Local 58 herewith disclaims, fully and unequivocally any and all representative rights with respect to [certain employees.]"

Respondent has not contended that the Union has "clearly and unequivocally" disclaimed interest along the lines of any of these models. Rather, its defense is that the lack of Union activity "raised questions about" the Union's abandonment of the unit. See, Para. 7, Declaration of Howard Sagaser, Exhibit C, attached to the Answer. This is the language of doubt and inference and not of certainty based upon the clear expression of the Union's intentions. Respondent has not, therefore, met either of the standards set by the Board to justify its withdrawal of recognition.

b. Partial v Total Abandonment

At the hearing on the motion, Respondent contended that the *San Joaquin Tomato, Dole Fresh Fruit*, and *Bruce Church* cases are not apposite in that they are cases of 'partial abandonment', in which some representational activity took place, and that this case, by way of contrast, involves abandonment for the 'whole' period. I read those cases as finding that 'abandonment' cannot be proved *as a matter of fact* when a union shows some representational activity. I read the line of cases on abandonment beginning with *Dole Fresh Fruit Company*, and culminating in the most recent ones, as holding that the test of union "inability" to represent employees means only "union defunctness", that the test for union "unwillingness" to represent employees means only "union disclaimer", and, finally, that outside a showing of either of those facts, "abandonment" as a defense

does not exist *as a matter of law.*

Respondent contends that no court has ever explicitly accepted the Board's rejection of any grounds for withdrawal of recognition besides defunctness or a disclaimer of interest or through the election process. However, the only cases Respondent has cited in support of its argument that abandonment is a defense to a refusal to bargain are cases involving union inactivity as one element of an employer's good faith doubt, and the Board's rejection of that defense has, in fact, been upheld in *F & P Growers Association v Agricultural Labor Relations Board* (hereafter *F & P Growers Association*) (1985) 168 Cal App 3d 677. Accordingly, to the extent abandonment is to be treated as springing full blown and independent from its role as an element of 'good faith doubt', Respondent's argument essentially reduces to the proposition that, even though a court has rejected the whole of the defense, it did not reject a part of it. The Board has not accepted this argument.

2. Filing Notices of Intent to Take Access

In refusing to treat evidence that the Union filed Notices of Intent to Take Access in 1990 and 1992 as proof of abandonment, I am relying on the Board's decision in *Dole Fresh Fruit Company*, supra. In that case, the UFW filed approximately six Notices of Intent to Take Access at various fields, including those farmed by Dole, where the Union was certified. While the Board acknowledged that the Union's seeking to take access under the Board's Organizational Access Regulation created confusion, the Board not only rejected the use of Organizational Access as proof of abandonment, but treated it as "demonstrating … continued interest in representing those same employees." *Dole Fresh*

Fruit Company, supra, at p. 13; *San Joaquin Tomato Growers*, supra, (Defense of abandonment has no relevance *once* a union seeks to resume bargaining.); see also, *Oil Capitol Electric* (1992) 308 NLRB 1149 (Even if a union mistakenly seeks to have an election at a unit for which it is certified, such a mistake proves its representational interest.)

3. The effect of Labor Code Section 1156.3(f)

Respondent made one other argument at the Pre-Hearing Conference that I have not been able to discover the Board has directly addressed and which, therefore, I must, namely, that the addition of Labor Code Section 1156.3(f) [Added by Stats. 2011, SB 126] undercuts the Board's rationale for its "certified until decertified rule." Under section 1156.3(f), the Board may now certify a union in cases where it finds both that employer misconduct 1) has affected the results of an election and 2) that such misconduct would "render slight" the chances of a new, fair election.

The legislative history behind section 1156.3(f) reveals that it was designed to provide a remedy for a problem identified by the Board in *Giumarra Vineyards Corporation* (2006) 32 ALRB No. 5. In that case, the Board noted a

> systemic problem with the adjudication of election objections where . . . there is an ostensible "No Union" victory and no parallel unfair labor practice charges are filed. In these instances, the Agricultural Labor Relations Act (ALRA) confers on the Board only the authority to uphold or set aside the election. The statute does not provide for any other sanctions for engaging in misconduct affecting the results of an election. * * * Where, as is common in complex cases involving numerous disputed issues, resolution of challenged ballots and election objections may take more than a year, the election bar has expired. Even where the disputed

> issues are resolved in less than a year, all that is at stake is a diminishing portion of the one-year election bar.
>
> In these circumstances, due to the lack of any sanctions other than setting aside the election, there is no method of removing the taint on employee free choice created by the election misconduct. As a result, the setting aside of the election merely returns the situation to the status quo before the election petition was filed, but with the residual effect on free choice from the misconduct. Obviously, this allows wrongdoers to profit from their misconduct even if it results in the setting aside of the election.
>
> Thus, we are forced to conclude that the election objections process where, as here, the tally of ballots indicates an ostensible "No Union" victory, is all but a meaningless exercise in terms of its [sic] affect on the rights of the parties and the employees. Regrettably, the statute in its present form does not provide the Board with remedial authority through which it might address this problem. Consequently, it is a problem that may be addressed only by the Legislature.

SB 126 sought "to address this [Giumarra] problem by requiring [among other things] the ALRB to issue bargaining orders if an employer is found to have coerced an election outcome, compelling the employer to negotiate with the labor organization aggrieved by the election misconduct." Senate Floor Analysis, SB 126, September 9, 2011, p. 7.

Respondent contends that, by permitting the Board to certify a union outside of its having won an election, the Act must also now be read to give the Board the authority to recognize employer withdrawals of recognition where there has been a prolonged failure on the part of the union to assert bargaining rights. However, the fact that the Legislature created a new avenue for certification in cases of *employer misconduct* casts no doubt on the Board's general rule that, absent defunctness or disclaimer, termination of representative status must be pursuant to explicit statutory procedures. See, e.g., *Harry Carian Sales v Agricultural Labor Relations Board* (1985) 39 Cal 3d 209 (Board's

issuance of bargaining orders as a remedy for employer misconduct, not inconsistent with the Act's "ordinary" electoral scheme, 39 Cal 3d at 228.)[7] Indeed, the addition of a remedy for employer mischief in the election process seems to reinforce the Board's rejection of abandonment as a defense since the ground of that rejection has always been that the Legislature intended to prohibit employers from playing any role in determining whether or not to bargain with a union. The Board's reasoning in this respect has been upheld in *F & P Growers Association v Agricultural Labor Relations Board*,(1985) 168 Cal App 3d 667, 676:

> We therefore agree with the Board. . . . that the NLRA precedent [concerning good faith doubt] is inapplicable here because of California's legislative purpose and because of the differences in the two acts. * * * [I]t does appear that Legislature's purpose in enacting the ALRA was to limit the employer's influence in determining whether or not it shall bargain with a particular union. Therefore, to permit an agricultural employer to rely on its good faith belief in order to avoid bargaining with an employee chosen agricultural union, indirectly would give the employer over those matters in which the Legislature clearly appears to have removed employer influence. This court will not permit the agricultural employer to do indirectly, by relying on the loss of majority support defense, what the Legislature has clearly shown it does not intend the employer to do directly." Ibid[8]

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[7] The Board has also been given express statutory authority to decertify a union when a union has been found to have violated either state or federal anti-discrimination laws. Labor Code Section 1156.3(h)(1)and (2.)

[8] Since Section 1156.3(f) did not alter the statutory scheme that precluded employers from playing any role in whether or not to recognize a union, the Legislature must be presumed to have acquiesced in the court's interpretation of the ALRA which, on the basis of that scheme, ruled out employer "doubt." *Marina Point, Ltd v Wolfson* (1982) 30 Cal 3d 721, 734 ("[W]hen the Legislature amends a statute without altering portions of the provision that that have been judicially construed, it is presumed to have been aware of and to have acquiesced in the previous judicial construction.")
I might add that to the extent that the Board's "certified until decertified rule" can be considered, as Respondent's argument would have it, as an extension of the judicially-approved rejection of the 'good faith doubt' defense, the Board's rule comes with its own

Finally, to construe Section 1156.3(f) in the way Respondent would have me construe it would be inconsistent with the procedure for Mandatory Mediation and Conciliation (MMC.) The legislative history reveals that MMC was enacted to cure what proponents of the measure characterized as "lost decades" during which the purpose of the Act to provide collective bargaining rights for agricultural employees was not fulfilled:

> Proponents of this bill assert that elections determining labor union representation for agricultural employees are meaningless unless employers come to the bargaining table to negotiate post-election contracts. Proponents further assert that this bill is necessitated by the continued refusal of agricultural employers to come to the bargaining table once an election has occurred. Without this measure, proponents contend, already represented employees will continue to languish without the negotiated contracts they have elected to secure.
>
> Proponents argue that this bill is necessary to help farm workers who have waited for years while negotiations for union contracts drag on without hope of progress. Of the 428 companies where farm workers voted for the United Farm Workers in secret elections since 1975, only 185 have signed union contracts.
>
> Proponents assert that efforts by ALRB bring employers to the bargaining table were successful in the early years of ALRB's existence. However, enforcement in the '80s and '90s was almost non-existent and bad faith bargaining became the rule rather than the exception. This bill's adoption of an alternative dispute resolution process seeks to correct that. [Off. of Assem. Floor Analyses, 3rd Reading of SB 1156 (2001-2002 Reg. Sess, August 31, 2002, pp. 7-8; Off. of Assem. Floor

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presumption of correctness: "The Legislature is presumed to be aware of a long-standing administrative practice …. If the Legislature . . . makes no substantial modifications to the act, there is a strong indication that the administrative practice [is] consistent with the legislative intent." *Thornton v Carlson* (1992) 4 Cal App 4th 1249, 1257. The fact that the "employers hands-off" electoral scheme has been strengthened by Section 1156.3(f) without any explicit change to the "certified until decertified" rule strongly indicates the Legislature approves of the Board's construction.

Analysis, conc. In Sen. Amendments of Assem. Bill No. 2596 (2001-2002 Reg. Sess.) August 31, 2002, pp. 6-7]

Under Labor Code Section 1164.11, the only criteria a union certified before 2003 must meet in order to invoke MMC are that 1) it has failed to reach agreement with the employer for at least one year after the date on which it made its initial request to bargain; (2) the employer has committed an unfair labor practice; and (3) the parties have not previously had a binding contract between them. Missing from these requirements is one that a union must demonstrate a history of representational activity in order to invoke MMC.[9] It seems clear from the bill analyses that the Legislature concluded that employer unfair labor practices combined with problems in enforcement spoiled the possibilities for fruitful collective bargaining. Accordingly, it seems inconsistent with the intent of the Legislature in creating MMC to read Section 1156.3(f) to permit an employer to withdraw recognition based on lack of union representational activity that began in the very period during which the Legislature recognized that the collective bargaining process had broken down and for which it provided MMC as a remedy.[10]

For all these reasons, I do not read Labor Code Section 1156.3(f) to affect the rule that a union remains "certified until decertified."

[9] Conversely, the Board has held that a defense to MMC on the grounds of abandonment does not defeat a petition for MMC which meets the statutory requirements of Sections 1164 and 1164.11, See, e.g. *San Joaquin Tomato Growers,* supra.

[10] I am only construing MMC in light of Respondent's specific argument that the Act has been amended to require the Board to recognize the defense of abandonment. I am not addressing whether or not MMC is available to this union.

C. The equitable defenses

Respondent also contends that the Union's lack of activity for 24 years privileges its withdrawal of recognition on the grounds of laches, unclean hands, and equitable estoppel.

Assuming, arguendo, that any of these defenses is available before the Board, all of them require some proof of injury. *Gibson v Mitchell* (1937) 9 Cal 2d 718, *Estate of Hartoonian* (1945) 38 Cal2d 242; *Driscoll v City of Los Angeles* (1967) 67 Cal 2d 297, 30; *Abbott v City of Los Angeles* (1958) 50 Cal 2d 438. Since the Board has stated that an employer's freedom from the bargaining obligation is not an injury, but rather a benefit.[11] *Tri-Fanucchi Farms* (1986) 12 ALRB No. 8, Respondent's equitable defenses are unavailing.[12]

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[11]In *Abbott v City of Los Angeles* (1958) 50 Cal 2d 438, various plaintiffs, recipients of pensions from the City of Los Angeles, which were based on service and earnings prior to 1925 or 1927, brought an action for declaratory relief to the effect that each of them was entitled to a fluctuating pension upon the grounds that city charter amendments of 1925 and 1927, which had the effect of substituting fixed pensions for previously provided fluctuating pensions, were unconstitutional. They also sought money judgments for the difference between the pension amounts they might have been owed if the pensions had been calculated under a fluctuating system and the amounts they received under the fixed pension system. The action was filed in 1955, decades after any of the plaintiffs had begun to be paid under the fixed formula, and at least 12 years after the change in calculation method made a difference to any of them. The court rejected the city's defense of laches: "It . . . appears that no injury has been shown to have been occasioned to defendant city and the defense of laches is therefore not supported." *Abbott*, ibid, 50 Cal 3d at 459 The court noted that because any money claims could not extend beyond the three year statute of limitations, the City actually "gained an advantage" for the years between when any of the plaintiffs first suffered injury and when they brought their claims within the statute.

[12]It is settled that unclean hands may only be asserted in connection with the very subject matter concerning which the complaint is made, which, in this case, concerns only the various refusals of 2012, and that laches cannot be used to defeat a cause or claim

The Motion in Limine, construed as a demurrer to the Answer, is granted. Respondent's evidence of abandonment is excluded. The allegations as admitted by Respondent are taken as true and General Counsel is entitled to an Order.

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brought within the appropriate statute of limitations, *Unilogic v Burroughs* (1992) 10 Cal App 4th 612, as the charges in this case were.