Salinas, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

UNITED FARM WORKERS OF AMERICA,	)	Case No. 2013-CL-008-SAL
Respondent,	)	40 ALRB No. 6 (39 ALRB No. 8)
and	)	
CORRALITOS FARMS, LLC,	)	(June 5, 2014)
Charging Party.	)	

DECISION AND ORDER

This case involves the commission of a technical unfair labor practice by a union in an attempt to seek indirect review of a decision by the Agricultural Labor Relations Board (Board or ALRB) in an underlying representation case pursuant to section 1158 of the Agricultural Labor Relations Act (ALRA).[1] Section 1158 is the provision which is commonly utilized by employers to engage in technical refusals to bargain in order to seek review of a Board decision certifying a union as the exclusive bargaining representative of the employers' agricultural employees.

On March 19, 2014, the General Counsel and the United Farm Workers of America (UFW) jointly filed a "Motion For Board Decision Based On Stipulated Facts And Record." The stipulated facts include the admission by the UFW that it engaged in the conduct alleged in the complaint. Specifically, despite the Board's decision in *Corralitos Farms, LLC* (2013) 39 ALRB No. 8, the UFW demanded to be recognized as

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

the exclusive representative of the agricultural employees of Corralitos Farms, LLC (Employer) and later threatened to picket until it received such recognition. In 39 ALRB No. 8, the Board dismissed the UFW's election objections as well as the General Counsel's complaint, both of which alleged election misconduct by the Employer. The Board therefore certified the results of the election, in which the "No Union" choice received a majority of ballots cast.

On April 8, 2014, the Board issued Admin. Order 2014-05, in which it set a briefing schedule to allow the parties to address, inter alia, the propriety of reconsidering the Board's decision in *Corralitos Farms, LLC* (2013) 39 ALRB No. 8, as well as any disputes regarding the content of the record. All parties timely filed briefs and replies. The UFW argues that indirect review pursuant to ALRA section 1158 is available in these circumstances and that the Board should reconsider its findings in 39 ALRB No. 8 and conclude instead that the election should be set aside and a bargaining order issue pursuant to ALRA section 1156.3, subdivision (f). The UFW also requests oral argument. The Employer argues that differences in agricultural labor relations warrant an interpretation that indirect review pursuant to ALRA section 1158 is not available to unions. As a result, the Employer also argues that reconsideration is not appropriate and that the underlying representation record is irrelevant. The General Counsel states that the UFW must meet the normative standard for reconsideration of representation decisions and, should the Board not reconsider the underlying representation decision, the stipulated record establishes the alleged violations and the Board should issue an appropriate order finding such violations. The General Counsel also states that should

the Board find that indirect review is available pursuant to ALRA section 1158 the inclusion of the record of the underlying representation case is necessary, just as it is in technical refusal to bargain cases.

DISCUSSION

The Applicability of Section 1158

The applicability of section 1158 to attempts by a union to seek indirect review of a representation decision through the commission of a technical unfair labor practice is solely an issue of the availability of judicial review. As such, it is an issue that inevitably and necessarily must be decided by the appellate courts. Nor is it a question that can be decided by the Board in the first instance in order to preserve the issue for appeal. A party seeking indirect review under section 1158 must commit a technical unfair labor practice, the unlawfulness of which is predicated on an underlying Board decision in a representation case. The violations alleged in the complaint in this case, and admitted to by the UFW, demanding to bargain and threatening to picket for recognition without being certified as the bargaining representative, are predicated on the Board's decision in 39 ALRB No. 8 certifying a "No Union" vote. A Board decision sustaining the allegations in the complaint may allow the UFW to perfect an appeal arguing that section 1158 is applicable. This issue of judicial review is, of course, for the judiciary and not for the Board. Accordingly, the Board cannot decide issues on the applicability of section 1158 to the matter herein, and the Board declines to do so. Rather, the Board will address only the merits of the unfair labor practice case that has been submitted to it for decision.

Reconsideration of the Board's Decision in 39 ALRB No. 8

This Board has consistently followed the practice of the National Labor Relations Board (NLRB) in proscribing the relitigation in unfair labor practice proceedings of matters previously resolved in representation proceedings, absent a showing of newly discovered or previously unavailable evidence, or other extraordinary circumstances. (*San Joaquin Tomato Growers, Inc*. (1994) 20 ALRB No. 13; *Limoneira Company* (1989) 15 ALRB No. 20; *Adamek & Dessert, Inc.* (1985) 11 ALRB No. 8; *Ron Nunn Farms* (1980) 6 ALRB No. 41; *Kings Markets, Inc.* (1977) 233 NLRB 455; *Le Fort Enterprises, Inc. d/b/a Merry Maids of Boston* (2014) 360 NLRB No. 119.) A party who attempts to reargue matters previously considered and rejected by the Board has not shown "extraordinary circumstances." (*Mario Saikhon, Inc*. (1991) 17 ALRB No. 6, at pp. 4-5.)

In adopting this practice, the Board explained that it expresses the proper balance between the statutory goals of achieving finality and stability in representation matters and the interest of the Board and the parties in assuring that there has been a full and fair opportunity for investigation of facts bearing on the propriety of the election and certification process. (*Perry Farms, Inc.* (1978) 4 ALRB No. 25.) This standard for reconsideration of prior decisions is not so narrow that it prevents the Board from reconsidering an underlying representation decision where the Board finds a manifest prejudicial error in the prior decision. (See *T. Ito & Sons Farms* (1985) 11 ALRB No. 36.)

The UFW acknowledges this established practice, but argues that a different approach should apply where the Board has denied certification of a representative in an underlying representation case. The UFW suggests that the existing standard for reconsideration of representation decisions is largely based on preventing employer delays in bargaining with certified unions. Further, the UFW argues that the policy underlying the ALRA is to promote collective bargaining.

There is no question that the central purpose of the ALRA is to promote the right of employees to engage in collective bargaining by freely choosing a bargaining representative. But as the Employer points out in its reply brief, employees also have the right to refrain from doing so. The duty of the Board is not only to promote the collective bargaining process but also to protect the free choice of employees by fairly evaluating any claims that an election was marred by misconduct that affected free choice, regardless of which party allegedly has engaged in the misconduct. It would be inconsistent with that duty for the Board to apply different standards in that evaluation depending on the ramifications of finding or not finding misconduct, whether it is the initial evaluation or the determination of whether to reconsider an earlier decision. Nor would such an approach prevent delay. On the contrary, the broader reexamination urged by the UFW would increase the time necessary for the issuance of a final Board decision that is subject to court review, whether that review is sought by the union if the underlying decision is affirmed by the Board or is sought by the employer should the Board reverse its earlier decision and certify the union.

Therefore, the Board will adhere to its existing standard for reconsideration and evaluate the UFW's claims of error accordingly.[2]

In the underlying representation case the UFW filed 43 exceptions to the decision of the administrative law judge (ALJ). The UFW claims that the Board substantively addressed only 5 of those exceptions, dismissed 10 others in a one-sentence footnote, and failed to address the remainder. The UFW argues that the Board has an obligation to address all of the exceptions itself and that merely affirming the ALJ's findings and conclusions as to those exceptions is unacceptable.

In this instance, the Board clearly stated, at page 5 of its decision, that it had conducted a de novo review and "affirmed the ALJ's factual findings and legal conclusions in full except as modified below." There is no authority that prohibits the Board from adopting the findings and conclusions of ALJs without providing its own discussion of the disputed issues, nor does the UFW cite any such authority. Indeed, the policy of issuing so-called "short form" decisions whereby the Board simply adopts the administrative law judge findings and conclusions without commentary is a practice followed by the National Labor Relations Board in a substantial number, if not the bulk

[2] The Board hereby takes official notice of the underlying record in 39 ALRB No. 8 in order to evaluate the propriety of reconsidering that decision. Having done so, it becomes part of the record in this unfair labor practice proceeding and part of the record that shall be sent to the appropriate court should review of this decision be sought. We note that the inclusion of the representation record will not prejudice the Employer's claim that the representation record is irrelevant because indirect review pursuant to section 1158 is not available in the present circumstances.

of cases from the beginning of the National Labor Relations Act (NLRA) itself. Our statute, of course, is in major respects modeled after the NLRA.[3]

While the Board conducts a de novo review, it need not reiterate or rephrase the findings and conclusions of the ALJ with which it fully agrees and which warrant no further analysis. To do so would engender delay and serve no purpose. Where the Board adopts the findings and conclusions of an ALJ, they become the decision of the Board in the same manner as any findings made directly by the Board.[4] The UFW's assertion that this practice somehow results in an incomplete record on appeal, or is in some other respect prejudicial, is without basis. Accordingly, the adoption of findings and conclusions of the ALJ without further comment does not constitute extraordinary circumstances warranting reconsideration.[5]

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[3] See Labor Code section 1148.

[4] Section 1160.3 of the ALRA specifically authorizes the Board to delegate to ALJs the conduct of evidentiary hearings and provides that the ALJ's recommended decision becomes the order of the Board if no exceptions are timely filed with the Board. (See also, Cal. Code Regs., tit. 8, § 20286, subd. (a); § 20370, subd. (i).)

[5] Several times in its brief the UFW suggests that the Board should be more explicit in its findings because this is the first case arising under ALRA section 1156.3, subdivision (f). That provision relates to the propriety of issuing a bargaining order where the Board has found that employer misconduct has affected the results of an election. It has no bearing on the evaluation of whether allegations of employer misconduct should be sustained. The Board having found no such misconduct, section 1156.3, subdivision (f) is not implicated in this case. The UFW's request for oral argument is largely premised on the importance of the Board's initial interpretation of new ALRA section 1156.3, subdivision (f). Since that provision is, in fact, not implicated in this case, it follows that it provides no basis for oral argument. Nor do we find that the issues properly presented warrant oral argument.

The UFW also cites numerous findings and conclusions contained in the Board's decision with which it takes issue. However, in all instances the issues raised were considered and addressed by the Board and/or the ALJ. The UFW simply disagrees with the Board's resolution of these issues. For example, the UFW argues that the ALJ and the Board erred in finding that the punchers were neither supervisors nor acting as agents of the Employer and that the Board should adopt a rule restricting captive audience speeches. The UFW also asserts that the Board failed to follow the California Supreme Court's decision in *Vista Verde v. ALRB* (1981) 29 Cal.3d 307, when in fact the UFW simply disagrees with the Board's interpretation of that decision. As noted above, disagreement with the Board's resolution of disputed issues does not constitute grounds for reconsidering an underlying representation decision.

However, there is one issue that warrants comment. One of the central factual issues in the underlying case concerned a change in policy regarding working in muddy fields that was alleged to be an improper provision of a benefit that interfered with free choice. About six weeks before the election the Employer adopted a new policy that no longer required employees to work in muddy fields. The ALJ found that the change was not motivated by any incipient organizing campaign, but instead was in direct response to the demands of striking employees that the policy be changed. He went on to conclude, in a statement endorsed in footnote 3 of the Board's decision in 39 ALRB No. 8, that under the particular circumstances of the case, even if the change was unlawfully motivated, it was too remote in time to have affected free choice in the election. The UFW asserts that this issue should be revisited because motive is irrelevant

to evaluating the effect of an employer's conduct on free choice. It also cites cases where similar periods of time were not considered too remote in time to affect free choice.

The cases cited by the ALJ involving the grant of benefits close in time to an election do appear to indicate that the inference of intent to discourage support for unionization is an element of the analysis. "It is well established that an employer's bestowal of benefits at a time closely preceding an election, when made with the intention of inducing employees to vote against the union, is a coercive exercise of the employer's economic leverage violative of protected employee rights." (*Anderson Farms Company* (1977) 3 ALRB No. 67, at pp. 17-18, citing *NLRB v. Exchange Parts Co*. (1964) 375 U.S. 405, 408-409. See, also, *Royal Packing Co. v. ALRB* (1980) 101 Cal.App.3d 826, 840.)

On the other hand, cases involving the promise of benefits close in time to an election do not include express inquiries into the intent of the promise of benefits, but appear to turn only whether such a promise of benefits was made sufficiently close to an election that it would tend to have a coercive effect on free choice. In *Arrow Lettuce Company* (1988) 14 ALRB No. 7, at p. 9, the Board stated:

> When evaluating allegations of a preelection threat of reprisal or promise of benefits, the Board must examine the statements within the totality of the circumstances. (Citation omitted) A prohibited promise of benefit need not be explicit to constitute conduct affecting the results of an election. The Board must determine whether a promise of benefit may reasonably be inferred from the employer's statements.

In *Limoneira Company* (1987) 13 ALRB No. 13, at p. 4, the Board's framing of the issue also did not include an element of intent:

> The question thus presented is whether the Board believes Colton uttered the statements (footnote omitted) attributed to him by Hinojosa and, if so, whether they were such that by an objective standard they would tend to interfere with employee free choice and affect the results of the election.

It is not necessary to resolve any inconsistency in these two lines of cases here. Under either approach, it is necessary to evaluate, considering the particular surrounding circumstances, whether the conduct was close enough in time to the election to have affected free choice. The ALJ and the Board answered "no" in this instance. In footnote 3, the Board emphasized that there is no particular time frame prior to an election that would be too remote in time to affect free choice. Instead, the facts and circumstances of each case must be considered in making that evaluation.

More importantly, it was found in this case that the granting of a benefit, eliminating the requirement to work in muddy fields, was not unlawfully motivated. The Employer was found to be merely acceding to the demands of strikers, who would understand that the change was in response to their demands. Thus, irrespective of motive, it cannot be concluded that the change in policy would have tended to affect free choice. The opposite conclusion would have the perverse consequence of prohibiting an employer from acceding to any demands of striking employees if the strike is accompanied by an incipient organizing campaign. Such a policy would exacerbate, rather than resolve, potentially volatile labor disputes.

In accordance with the discussion above, we find that the UFW has violated section 1154, subdivision (h) of the ALRA, and issue the appropriate remedial Order below.

ORDER

Pursuant to Labor Code section 1160.3, Respondent United Farm Workers of America, its officers, agents, successors and assigns shall:

1. Cease and desist from:

(a) Demanding that Corralitos Farms, LLC or any other agricultural employer recognize or bargain with a labor organization that is not currently certified as the bargaining representative of its agricultural employees.

(b) Picketing or causing to be picketed, or threatening to picket or cause to be picketed, Corralitos Farms, LLC or any other agricultural employer where the object thereof is to force or require the employer to recognize or bargain with a labor organization that is not currently certified as the bargaining representative of its agricultural employees.

(c) In any like or related manner restraining or coercing employees in the exercise of their rights guaranteed by section 1152 of the Agricultural Labor Relations Act (hereafter "Act"; Lab. Code § 1140 et seq.).

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

(a) Within 30 days after this Order becomes final, sign the attached Notice to Agricultural Employees and after its translation by a Board agent into appropriate languages, reproduce sufficient copies in each language for the purposes set forth below.

(b) Within 30 days after this Order becomes final, post copies of the attached Notice, in all appropriate languages, in conspicuous places at Respondent's business offices, meeting halls, and bulletin boards, as well as at locations provided to Respondent by Corralitos Farms, LLC, such places to be determined by the Regional Director, and exercise due care to replace any Notice which has been altered, defaced, covered or removed. Pursuant to Labor Code section 1151(a), agents of the Board shall have access to confirm the posting of the Notices.

(c) Within 30 days after this Order becomes final, arrange for a representative of Respondent or Board agents to distribute and read the attached Notice, in all appropriate languages, to all employees then employed by Corralitos Farms, LLC, at time(s) and place(s) to be determined by the Regional Director. Following the reading, the Board agents shall be given the opportunity, outside the presence of Respondent's representatives, to answer any questions the employees may have concerning the Notice and their rights under the Act. Should any employee lose wages from Corralitos Farms, LLC for time lost during the reading of the Notice and the question-and-answer period, Respondent shall reimburse such losses. The Regional Director shall determine a reasonable rate of compensation to be paid to all non-hourly employees.

(d) Mail copies of the attached Notice, in all appropriate languages, within 30 days after this Order becomes final, or when directed by the Regional Director, to all agricultural employees of Corralitos Farms, LLC employed during the period from June 20, 2013 to June 19, 2014.

(e) Provide a copy of the Notice to each agricultural employee hired to work for Corralitos Farms, LLC during the twelve-month period following the date this Order becomes final.

(f) Notify the Regional Director in writing, within 30 days after the date this Order becomes final, of the steps Respondent has taken to comply with its terms. Upon request of the Regional Director, Respondent shall notify the Regional Director periodically thereafter in writing of further actions to comply with the terms of this Order.

DATED: June 5, 2014

William B. Gould IV, Chairman

Genevieve A. Shiroma, Member

Cathryn Rivera-Hernandez, Member

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating charges that were filed by Corralitos Farms, LLC, in the Salinas Office of the Agricultural Labor Relations Board (ALRB), the General Counsel of the ALRB issued a complaint that we had violated the law. Based on the stipulated facts and record, the ALRB found that we had violated the Agricultural Labor Relations Act (Act) by demanding to bargain and threatening to picket if Corralitos Farms, LLC refused to bargain, even though we were not certified by the ALRB as your bargaining representative.

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 demand to bargain or picket or threaten to picket if an agricultural employer refuses to bargain if we have not been certified by the ALRB as the bargaining representative.

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

DATED:

UNITED FARM WORKERS OF AMERICA

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 342 Pajaro Street, Salinas, California. The telephone number is (831) 769-8031.

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

DO NOT REMOVE OR MUTILATE

CASE SUMMARY

UNITED FARM WORKERS OF AMERICA (Corralitos Farms, LLC)

Case No. 2013-CL-008-SAL
40 ALRB No. 6

Background

This case involves the commission of a technical unfair labor practice by a union in an attempt to seek indirect review of a decision by the Board in an underlying representation case pursuant to section 1158 of the Agricultural Labor Relations Act (ALRA). Section 1158 is the provision which is commonly utilized by employers to engage in technical refusals to bargain in order to seek court review of a Board decision certifying a union as the exclusive bargaining representative of the employers' agricultural employees. On March 19, 2014, the General Counsel and the United Farm Workers of America (UFW) jointly filed a "Motion For Board Decision Based On Stipulated Facts And Record." The stipulated facts include the admission by the UFW that, despite the Board's decision in *Corralitos Farms, LLC* (2013) 39 ALRB No. 8, the UFW demanded to be recognized as the exclusive representative of the agricultural employees of Corralitos Farms, LLC (Employer) and later threatened to picket until it received such recognition. In 39 ALRB No. 8, the Board dismissed the UFW's election objections as well as the General Counsel's complaint, both of which alleged election misconduct by the Employer. The Board therefore certified the results of the election, in which the "No Union" choice received a majority of ballots cast.

Board Decision

The Board found that the UFW violated section 1154, subdivision (h) of the ALRA. The Board declined to decide if section 1158 is applicable to attempts by a union to seek indirect review of a representation decision through the commission of a technical unfair labor practice because it is an issue of the availability of judicial review that must be decided by the appellate courts. Nor is it a question that can be decided by the Board in the first instance in order to preserve the issue for appeal. A Board decision merely sustaining the allegations in the complaint may allow the UFW to perfect an appeal arguing that section 1158 is applicable. The issue of judicial review is for the judiciary and not for the Board.

Following its long-established practice of refusing to relitigate in unfair labor practice proceedings matters previously resolved in representation proceedings, absent a showing of newly discovered or previously unavailable evidence, or other extraordinary circumstances, the Board found no basis to reconsider its decision in 39 ALRB No. 8. The issues raised by the UFW were considered and addressed by the Board in 39 ALRB No. 8. Disagreement with the Board's resolution of disputed issues does not constitute grounds for reconsidering an underlying representation decision. The Board rejected the UFW's argument that a different standard should apply to decisions where a union is not certified as the bargaining representative. The Board also rejected the argument that it must expressly address all disputed issues rather than adopting the findings and conclusions of the administrative law judge with which it fully agrees and which warrant no further analysis.

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