STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BAORD

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| CATTLE VALLEY FARMS,<br>Employer/Petitioner,<br>and<br>UNITED FARM WORKERS OF AMERICA, AFL-CIO,<br>Certified Bargaining Representative, | Case No. 81-RD-3-EC |
| NICK J. CANATA,<br>Employer/Petitioner,<br>and<br>UNITED FARM WORKERS OF AMERICA, AFL-CIO,<br>Certified Bargaining Representative. | Case No. 81-RD-2-D<br><br>8 ALRB No. 24 |

ERRATUM

At the bottom of page 10 please add the following "[Citation.] as well as to determining what"

Dated: April 29, 1982

HERBERT A. PERRY, Member

JOHN P. McCARTHY, Member

JEROME R. WALDIE, Member

ALFRED H. SONG, Member

Coacnella, California
Earliment, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

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DECISION ON BLOCKING ELECTIONS

The two above-captioned cases present the question of the applicability of the National Labor Relations Board (NLRB) "blocking-charge" policy to decertification elections held under our Act. Each of the two cases came before us pursuant to a Request for Review of the Regional Director's dismissal of a timely-filed decertification petition. On September 28, 1981, we reversed the Regional Director's action, and ordered him to conduct an election and to impound the ballots in each case.

Because of the importance and general interest of the issue presented, we scheduled the matter for oral argument and

invited numerous interested parties to present their views both in writing and orally. Supplemental briefing on certain questions raised at oral argument was also invited and received. Upon consideration of all the arguments presented, and for the reasons stated below, we have decided to affirm our prior decisions ordering that an election be held in each of the above-captioned cases and that the ballots be impounded, and, further, to announce a general policy regarding the applicability of the NLRB's "blocking-charge" practice to our conduct of elections under the Agricultural Labor Relations Act (Act or ALRA).

Although in the past this Board has blocked elections, we have not announced any standards or procedures for implementing that practice. In the absence of the standards and procedures hereinafter set forth, blocking could have been implemented only on the ad hoc basis which was criticized by the court in San Diego Nursery v. ALRB (1979) 100 Cal.App.3d 128. Our blocking policy is to take effect prospectively and is not be applied to the instant cases. In each of these cases an election has already been held, a hearing on the alleged unfair labor practices has either been scheduled or is in progress, and we believe it would be fairer to all the parties concerned to let the hearings proceed.

After a careful review of the statutory language, purpose, and policies of both the NLRA and the ALRA, and careful consideration of the positions presented in the briefs of the parties and in their oral arguments before the Board on November 23, 1981, we have come to the following conclusions regarding a blocking policy under our Act.

While we find that the rationale for the NLRB's blocking practice applies also in the agricultural setting, the particular manner in which that practice would impinge upon the decertification process under the ALRA requires that it be adopted with certain modifications and that our statute be interpreted so as to afford a somewhat broader avenue for decertification than we have heretofore provided. Briefly stated, the principal aspects of our new election-blocking policy are as follows:

1. Upon request of the employer, a union, or any other interested party,[1/] the Board, exercising its independent judgment, will review a Regional Director's determination that the election be blocked. This review will be conducted in a prompt and thorough manner, so as not to unduly delay the holding of an election where a valid question concerning representation exists.

2. Neither the Board nor any Regional Director will block an election except in appropriate cases wherein a complaint has already issued, whereas under NLRB practice the mere filing of an unfair labor practice charge may be sufficient to warrant blocking an election. Stale or eleventh-hour charges which may subsequently be the basis for a complaint will not be permitted to delay or block a scheduled election.

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[1/] Regulation section 20393 provides that the Board review the dismissal of an election petition upon request by the party whose petition was dismissed. Since there are no provisions under our Act for employers to petition for elections, this section would seem to preclude an employer from requesting that the Board review a Regional Director's decision to block a decertification election. Since we are hereby providing a special procedure for blocking and adopting, in part, the NLRB's blocking practice, we will allow employers, as well as petitioners, to request review by the Board when an election is blocked by the Regional Director.

3. In accordance with the interpretation of our statute by the court in Montebello Rose Co. (1981) 119 Cal.App.3d 1, we hereby authorize the Regional Director, in any case where there is a valid question concerning representation, to conduct a decertification election on the basis of a representation petition filed pursuant to section 1156.3 when there is no collective bargaining agreement in existence between the parties. This will help obviate the difficulties which the contract and peak requirements of section 1156.7 pose for the traditional means of decertification. Such obstacles to decertification do not exist under the NLRA.

The NLRB's blocking policy has been utilized since the earliest days of the Wagner Act (United States Coal and Coke Co. (1937) 3 NLRB 398 [1-A LRRM 551]). The policy involves delaying the proceeding (i.e., blocking the election) in any representation case where there are concurrent charges of unfair labor practices affecting some or all of the same employees. The blocking usually remains in effect until the withdrawal or dismissal of the charges, or full compliance with a Board order or court decree. A blocked representation case is "unblocked" where a Regional Director's investigation indicates that the pending unfair labor practice charges are without merit (which would require dismissal or withdrawal of the charges) and that there is a bona fide question concerning representation. However, if the Regional Director's investigation indicates that the employer has violated section 8(a)(2) (analogous to § 1153(b) of our Act) by dominating or assisting a labor organization, or that the employer has violated section 8 (a) (5) [§ 1153 (e)] or the union has violated section

8(b)(3) [§ 1154 (c)], by unlawfully refusing to bargain, a complaint issues and the election petition is generally dismissed. Where the charge is analogous to a section 8(a)(l) [§ 1153(a)], 8(a)(3) [§ 1153(c)], or 8(a)(4) [§ 1153(d)] charge or a section 8(b)(l) [§ 1154{a)], 8(b)(2) [§ 1154(b)], 8(b)(4) [§ 1154(d)], 8(b)(5) [§ 1154(e)], or 8(b){6) [§ 1154(f)] charge under our Act, further proceedings in the representation cases are delayed (blocked) unless the charging party waives the rule by filing a Request to Proceed.[2/] The rationale for the NLRB's blocking practice is that the probable impact of the alleged unfair labor practice(s) would be to deprive the employees of a free and uncoerced choice in a representation election and to permit the charged party to profit from its unfair labor practices. If the charge alleges unlawful assistance or refusal to bargain, the NLRB finds that blocking is warranted because there is no valid question concerning representation. As the Fifth Circuit Court of Appeal stated in Bishop v. NLRB (5th Cir. 1974) 502 F.2d 1024, 1929 [87 LRRM 2524]:

> If the employer has in fact committed unfair labor practices and has thereby succeeded in undermining union sentiment, it would surely controvert the spirit of the Act to allow the employer to profit by his own wrongdoing. In the absence of the 'blocking charge' rule, many of the NLRB's sanctions against employers who are guilty of misconduct would lose

[2/] We emphasize that the NLRB will not block an election based on these charges unless the conduct alleged is such that it would tend to affect the employees' free choice in the election. Certain charges would be less likely to deprive the employees of their free choice. For example, it is highly unlikely that a decertification or rival union election would be blocked by an allegation that the union violated the Act by unlawfully refusing to bargain with the employer.

> all meaning. Nothing would be more pitiful than a bargaining order where there is no longer a union with which to bargain.

In determining that the rationale for the NLRB's blocking policy is applicable in the agricultural setting, we considered the arguments against adopting the NLRB's blocking policy which were presented in the briefs and oral arguments. Perhaps the most-often emphasized point was the limited time period during which an election petition (representation, decertification, or rival-union) can be filed under the ALRA. The briefs argued, for example, that since decertification petitions and rival-union petitions can only be filed pursuant to section 1156.7 (c) or section 1156.7(d) respectively, and since both of those sections require that such petitions be filed during the last year of a collective bargaining agreement, there could be situations where a bargaining unit of agricultural employees would have only one chance in perpetuity to choose a collective bargaining representative. For example, if a union were certified, but thereafter failed to reach a contract or subsequently abandoned the unit, there would never be another time period during which a decertification or rival-union petition could be timely filed under those sections. Likewise, if one contract expired and a new one was not thereafter negotiated, a new petition under section 1156.7 would never be timely. In our view, the Legislature did not intend to forever preclude bargaining units of agricultural employees from further changes in

representation.[3/] Therefore, we find that section 1156.7 is not to be deemed the only means by which a valid decertification or rival-union petition can be filed. Henceforth, in any situation where either the ouster of a certified representative, or its replacement by a rival union, is sought and where there is no contract between the employer and the incumbent union, the election petition shall be filed under, and processed in accordance with, section 1156.3(a) rather than 1156.7.

The above construction is consistent with our ruling in Kaplan's Fruit and Produce Co., Inc., Etc. (April 1, 1977; 3 ALRB No. 28 and the Fifth District Court of Appeal's ruling in Montebello Rose Co. (1981) 119 Cal.App.3d 1, where the issue was the continuing duty to bargain after the certification year. The Montebello court, relying on the Board's rule in Kaplan's explained that "certification" is a term of art and has two distinct meanings under the Act. The first refers to the Board's certification of a union, which triggers the employer's duty to bargain, on request, with the union pursuant to section 1155.2(a) and section 1153(e). That duty, the court held, continues until the union is decertified pursuant to section 1156.3 or section 1156.7. The second meaning of certification refers to the union's certification status that bars other elections for one year, and it is that certification

[3/] When words of a statute are clear and indicate the legislative intent, there is no room for interpretation. Cadiz v. ALRB (1979) 92 Cal.App.3d 365; Teachers Management and Inv. Corp. v. City of Santa Cruz (1976) 64 Cal.App.3d 438, 134 Cal.Rptr. 523. However, as the California Supreme Court has stated, the literal meaning of the words of a statute may be disregarded to avoid absurd results. Silver v. Brown (1966) 63 Cal.2d 841, 48 Cal.Rptr. 609.

bar which expires 12 months after the Board's certification issued. Thus, the term "currently certified" in section 1156.3(a)(3) does not preclude an election if 12 months or more have passed since the incumbent union was certified. When no contract is in existence and twelve months, or more, have passed, a new petition can be filed, and a new election can be held under section 1156.3 to challenge a certified union since there is no "currently certified union" in the sense of a certification bar.

Since we have held that decertification and rival-union petitions can be filed pursuant to section 1156.3(a) when there is no contract, blocking an election based on either of those two types of petition during the last year of a contract would not, as argued in the briefs and oral arguments, preclude in perpetuity the filing of a decertification or rival-union petition after the contract expires.

Several briefs argued that, if an election were blocked, another election could not be held until the employer's payroll again reflected 50 percent of its peak agricultural employment, possibly a full year after the original (blocked) petition was filed. It was also argued that the ALRA embodies a "vote now, litigate later" policy, and that such a policy is made manifest by the 7-day election requirement of section 1156.3 and the election objections procedure set forth in section 1156.3 (c), which requires that all election objections be resolved after the election. We interpret those sections of the Act as necessary to preserve the purpose of the peak requirement; that is, in order to insure that elections will be held among a representative group of the

employer's work force.[4/] In an agricultural setting, holding an election months, or even weeks, after a petition is filed would in many or most cases result in the disenfranchisement of a substantial number of workers, particularly when the petition is filed near the end of a peak season. The NLRB sometimes holds lengthy pre-election hearings to resolve issues of voter eligibility and composition of the bargaining unit. In the highly seasonal agricultural setting, such hearings would inevitably cause delay affecting the representative status of the work force and risk the disenfranchisement of eligible voters.

We believe that the Legislature had two somewhat competing goals in mind in drafting the election procedures section of the Act. First, the Legislature wanted to make certain that elections would be held among a representative group of the employer's employees. However, the Act also expresses the Legislature's intent to insure that employees are able to express a free choice with respect to the selection, or rejection, of a bargaining representative and to maintain peace in the agricultural fields by guaranteeing stability in labor relations. When a

[4/] Bercut-Richards Packing Company (1946) 70 NLRB 84 [18 LRRM 1336: was cited by the parties and amici curiae for nonapplicability of blocking elections in seasonal industries. That case, which did not result in an NLRB certification of representative, involved an election ordered during a period selected to minimize the impact of seasonality of the industry and conducted without any objection from the incumbent union (the C.I.O. was then in the midst of its intense competion with the A.F.L.) and therefore has little precedental value beyond its own unique facts. See Bercut-Richards (1945) 64 NLRB 133 [17 LRRM 85] ; First Supplemental Decision (1946) 65 NLRB 1052 [17 LRRM 263] ; Second Supplemental Decision (1946) 68 NLRB 605 [18 LRRM 1145]; Third Supplemental Decision, op. cit.; Fourth Supplemental Decision (1946) 70 NLRB 272 [18 LRRM

petition is filed alleging that employees desire to express their choice concerning representation, but there is an outstanding complaint indicating that no bona fide question concerning representation exists or that it would be impossible to hold an election in which employees could express a choice unfettered by an employer's or a union's unfair labor practices, we must weigh the employees' expressed desire to have an election against the damage which might result if an election were held. If there is an already-established bargaining relationship between an employer and a currently-certified bargaining representative, conducting an election in a coercive atmosphere would tend to undermine the stability of that relationship. Other sections of the ALRA indicate that the Legislature intended to protect the stability of an already-established bargaining relationship, even if employees seek another election. For example, the Act prohibits any elections for one year after a certification issues (or for two years if the certification is extended pursuant to section 1155.2(b) and, if a contract is reached, the contract bars a new election until the last year of the contract. Sections 1156.3(a), 1156.7(c) and 1156.7(d).

The NLRA, like the ALRA, does not mandate that an election be held merely because a petition has been filed. The courts have recognized the broad discretion granted to the national Board to determine if and when an election should be held:

> The control of the election proceeding, and the determination of the steps necessary to conduct that election fairly [are] matters which Congress entrusted to the Board alone. [Citations.] This delegation applies to selection of the proper time

> constitutes fair surrounding circumstances [citations] .... Suprenant Mfg. Co. v. Alpert (1st Cir. 1963) 318 F.2d 396, 399 [53 LRRM 2405] .

See also Furr's, Inc. v. NLRB (10th Cir. 1965) 350 F.2d 84 [59 LRRM 2769]; Nishikawa Farms, Inc. v. Mahoney (1977) 66 Cal.App.3d 781. Pursuant to both the NLRA and the ALRA, the Regional Director must first investigate the matter and determine that all the statutory prerequisites have been met and that there are no bars to the conduct of the election. Where there are outstanding unfair labor practice charges alleging conduct which indicates that it would not be possible to hold a fair election, the NLRB defers conducting an election until the charges are withdrawn or dismissed or until the unfair labor practices are fully remedied. The prosecution and remedying of such unfair labor practices may easily take over a year to complete, and the NLRB does not hold an election throughout that period. We believe that any delay which may be caused by blocking an election, under the standards we have announced, is outweighed by the importance of preserving the integrity of the election process and the stability of an already-existing bargaining relationship, where such integrity and stability would be seriously undermined by conducting an election in a coercive atmosphere. In implementing a blocking procedure, however, we will, as noted above, take into consideration the various problems presented by the Act's peak requirement and the difficulty of re-running elections in the agricultural setting.

Another argument raised in the oral argument and briefs

was based on the specific language of section 1156.7 (c) . That section states that, upon the filing of a decertification petition supported by a 30 percent showing of interest during the last year of a contract, the Board "... shall conduct an election by secret ballot ...." It was argued that this language mandates that the Board conduct a decertification election whenever a petition is filed which meets the showing-of-interest and peak requirements of section 1156.7(c).

We find, however, that such an interpretation of section 1156.7(c) is unreasonable and inconsistent with the policies of the Act and the discretion granted to the Board thereunder. Statutory language must be interpreted in a manner that is consistent with the purpose of the law. Steilberg v. Lackner (1977! 69 Cal.App.3d 780. Section 1156.3(a) requires that, upon receipt of a petition, the Board shall "... immediately investigate such petition ..." to determine whether there is reasonable cause to believe that a bona fide question concerning representation exists. Section 1156.7 (d) contains similar language, as does section 9(c) of the NLRA, which applies to all petitions filed with the national Board. Even though section 1156.7(c) contains no explicit language requiring the Board to conduct such an investigation, section 1142 (b) clearly authorizes the Board to delegate to regional office personnel its powers "... to investigate and provide for hearings ..." (emphasis added) in all representation cases, and the Board has also provided in its regulations for such investigations (8 Cal. Admin. Code § 20390 (c)).

The courts have recognized the Board's discretion to

investigate the showing of interest accompanying an election petition, noting that the Board should not be put to the unnecessary expense of holding an election when there is no bona fide question concerning representation. Nishikawa Farms, Inc. v. Mahoney (1977) 66 Cal.App.3d 781. Pursuant to section 20300(j)(5) of the Board's regulations, the Regional Director's determination of the sufficiency of the showing of interest is non-reviewable. This regulation is consistent with NLRB practice and has been upheld by the courts. Radovich v. ALRB (1977) 72 Cal.App.3d 36.

The purposes of the Act would not be furthered by interpreting section 1156.7(c) to prohibit the Board's Regional Directors from investigating decertification petitions. The investigation of a decertification petition is no less important or necessary than the investigation of a representation or rival-union petition. Furthermore, section 1156.7 (c) also states that, once the election is held, the Board "shall certify the results." Were we to adopt the literal interpretation suggested in the briefs, we would have to hold that the Board has no discretion to review election objections alleging conduct which might be grounds for setting aside a decertification election. Labor Code section 1156". 3 (c). Again, such a result could not have been contemplated in a statute designed to protect employee choice.

In section 1142(b) of the Act, the Board is empowered to delegate to the personnel of its regional offices "... such powers as it deems appropriate ... to determine whether a question of representation exists . . . . " The Board is also granted certain

powers in section 1151 "For the purpose of all hearings and investigations, which, in the opinion of the board, are necessary and proper for the exercise of the powers invested in it by Chapters 5 [representation matters and elections] ... and 6 ...." We find that these provisions of the Act give the Board the same authority, and obligation, to investigate decertification petitions as it has with respect to the investigation of representation and rival-union petitions.

Having determined that the rationale for a blocking policy retains its validity in the agricultural setting and that statutory and practical considerations do not preclude application of such a policy under the ALRA, we shall now set forth at greater length the appropriate blocking policy which was outlined earlier in this decision. Henceforth, when a petition for certification or decertification is filed, the Regional Director shall immediately investigate and determine whether any unfair labor practices alleged in an outstanding complaint against the employer(s) and/or union(s) involved in the representation proceeding will make it impossible to conduct an election in an atmosphere where employees can exercise their choice in a free and uncoerced manner. If the Regional Director determines that blocking the election is warranted, he or she shall promptly notify the parties of his or her decision to block the election and the basis therefor. When charges are filed so close to the time or date of the election that such a determination cannot be made prior to the election, the Regional Director will have discretion to postpone the election for a few days if peak employment is expected to continue, or to

hold the election and impound the ballots until the investigation of the charges has been completed. Where unfair-labor-practice charges have been pending for a protracted period of time prior to the filing of the petition for certification or decertification, and there is a complaint outstanding, the Regional Director will determine whether the pendency of the unfair-labor-practice case would reasonably tend to affect employee choice and, if so, whether blocking the election would be warranted.

Where the Regional Director has decided to block an election and has served notice of that decision on all parties, including the employer, any party, including the employer, may file with the Board an appeal from the Regional Director's decision, in which event this Board will, on an expedited basis, review the Regional Director's decision and exercise its independent judgment as to whether the election should be blocked. In this manner we shall ensure that elections will be conducted in the proper atmosphere while minimizing the possibility of blocking elections unnecessarily.

Dated: March 25, 1982

HERBERT A. PERRY, Member

JOHN P. McCARTHY, Member

JEROME R. WALDIE, Member

ALFRED H. SONG, Member

CASE SUMMARY

Cattle Valley Farms

and Nick J.

Canata

8 ALRB No. 24
Case Nos. 81-RD-3-EC
81-RD-2-D

REGIONAL DIRECTORS' DECISION

A petition for decertification was filed with the El Centro Regional Office by employees of Cattle Valley Farms, and a petition for decertification was filed with the Delano Regional Office by employees of Nick J. Canata. In each case the Regional Director dismissed the petition on the grounds that there was a pending unfair labor practice complaint against the employer which necessitated blocking the decertification election. In Nick J. Canata, the complaint alleged violations of section 1153(a) and the Regional Director determined that, in light thereof, a free and fair election was not possible. In Cattle Valley Farms the complaints alleged violations of sections 1153 (a) and 1153 (e), and, in light thereof, the Regional Director determined that no bona fide question of representation was raised by the petition. The employer in each case appealed to the Board the Regional Directors' dismissal of the petition.

BOARD DECISION

In each case, the Board reversed the Regional Director's action and ordered him to conduct an election and impound the ballots. The Board then consolidated the two cases for oral argument and briefing. It decided to affirm its initial decision in each case and went on to announce a general policy regarding the applicability of the NLRB's "blocking-charge" practice to the conduct of elections under the ALRA. Such policy was given prospective application only since in each of the instant cases an election had already been held, a hearing on the alleged ULP's had either been scheduled or was in progress, and the Board believed it would be fairer to all parties concerned to let the hearings in these matters proceed.

The NLRB's blocking policy involves delaying the proceeding in any representation case where there are concurrent charges of unfair labor practices affecting some or all of the same employees. The rationale for that policy is that the probable impact of the alleged unfair labor practice(s) would be to deprive the employees of a free and uncoerced choice in a representation election and to permit the charged party to profit from its unfair labor practices. While the Board found that the rationale for the NLRB's blocking practice also applies in the agricultural setting, it determined that the particular manner in which that practice would impinge on the decertification process under the ALRA required that it be

adopted with certain modifications and that the ALRA be interpreted so as to afford a somewhat broader avenue for decertification than the Board had previously provided.

The essence of the Board's new election-blocking policy was stated as follows:

1. Upon request of the employer, a union, or any other interested party, the Board, exercising its independent judgment, will review a Regional Director's determination that the election be blocked.

2. Neither the Board nor any Regional Director will block an election except in appropriate cases wherein a complaint has already issued. Stale or eleventh-hour charges which may subsequently be the basis for a complaint will not be permitted to delay or block a scheduled election.

3. In any case where there is a valid question concerning representation, the Regional Director is authorized to conduct a rival-union election or a decertification election on the basis of a representation petition filed pursuant to section 1156.3 when there is no collective bargaining agreement in effect between the employer and an incumbent union. Where such an agreement is in effect, a decertification petition may be filed pursuant to section 1156.7(c), or a rival-union petition may be filed pursuant to section 1156.7(d).

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This Case Summary is furnished for information only and is not an official statement of the case, or of the ALRB.

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