

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of:)	Case No. 2010-RD-001-VIS
)	
FRANK PINHEIRO DAIRY dba)	
PINHEIRO DAIRY & MILANESIO)	ORDER DENYING REQUESTS
FARMS,)	FOR REVIEW AND UPHOLDING
)	REGIONAL DIRECTOR'S
)	DECISION TO BLOCK ELECTION
Employer,)	
)	Admin Order No. 2010-9
and)	
)	
GUILLERMO C. RIOS,)	
)	
Petitioner,)	
)	
and)	
)	
UNITED FOOD AND COMMERCIAL)	
WORKERS, LOCAL 5,)	
)	
Certified Bargaining)	
Representative.)	

On February 24, 2010, Guillermo C. Rios (Petitioner) filed a petition for a decertification election among the agricultural employees of Frank Pinheiro Dairy (Employer or Dairy). On February 26, 2010 the Employer filed its response to the petition. The Visalia Regional Director of the Agricultural Labor Relations Board (ALRB or Board) investigated the petition and found the showing of interest was met on February 27, 2010. The election was scheduled to be held on March 3, 2010.

On March 1, 2010, the Regional Director issued a decision blocking the election. Both Employer and Petitioner timely filed requests for review of the Regional Director's decision blocking the election pursuant to Board regulation section 20393 subsection (a). On March 17, 2010, the United Food and Commercial Workers, Local 5 (UFCW or Union) filed a response to the Employer and Petitioner's requests for review of the Regional Director's decision blocking the election.

Regional Director's Decision Blocking the Election

The basis on which the Regional Director blocked the election was an unfair labor practice (ULP) complaint that was issued on April 24, 2009.¹ The complaint alleged that the Employer unlawfully terminated three workers who had been supporters of the UFCW in the January 30, 2009 representation election in which the UFCW was certified as the collective bargaining representative. The ULP complaint, though not adjudicated, was the subject of an informal bilateral settlement agreement signed by Employer and the UFCW on December 8, 2009. The Regional Director argues that it is not possible to hold a free and fair election because the 60-day posting remedy agreed to in the settlement agreement will not be complete until April 18,

¹ Case No. 2009-CE-011-VIS, et al.

2010.² The settlement agreement provides that the Regional Director will withdraw the complaint after the posting period is complete.³

The Regional Director states that “the evidence has shown that the termination of three active union supporters after the election, the supervisor’s interrogation of workers about their union support, and the disciplinary actions taken against union supporters are indicia that would reasonably tend to create an atmosphere where employers could not exercise their choice in a free and uncoerced manner.” The Regional Director also points out that the workers’ signatures for the decertification petition were obtained before the reading of the Notice to Employees and the posting, and questions whether the workers would have signed the decertification petition had they known the information contained in the Notice.

The Regional Director also refers to the concurrent Mandatory Mediation and Conciliation (MMC) matter in which Employer and the UFCW are parties (Case No. 2009-MMC-02), and states that “the delays caused” in the MMC process are “severely prejudicing the union’s ability to effectively represent the workers.”

Petitioner’s and Employer’s Requests for Review of the Regional Director’s Decision

The Petitioner argues that the decision blocking the election should be reversed because the Regional Director’s determination was made without actually

²The reading of the Notice to Employees provided for in the settlement agreement was held on February 18, 2010, with the 60-day posting requirement commencing on the same day.

³The settlement agreement did not provide for the reinstatement of the three workers, but it did provide that the Employer pay a total of \$16,500.00 to be divided among the discriminatees as the Regional Director saw fit.

investigating the decertification petition to determine whether there was an ongoing impact of the ULP allegations, and because the Regional Director impermissibly treats unproven allegations as settled facts. The Petitioner further argues that the Regional Director did not properly apply the Board's blocking policy as set forth in *Cattle Valley Farms* (1982) 8 ALRB No. 24 because there is no outstanding complaint against the Employer. Petitioner states that the complaint in case no. 2009-CE-011-VIS, et al was withdrawn upon settlement of that matter.⁴ The Petitioner requests that the Board order that the election be held, and following the election, any conduct alleged to have affected the outcome of the election be litigated through the election objections process.

The Employer argues in its request for review that the ULP charges were never litigated, and despite the non-admissions clause in the settlement agreement, the Regional Director's decision to block treats the allegations in the complaint as conclusively proven facts.

Employer argues that the conduct alleged in the complaint occurred over a year ago, and there is no evidence to support the conclusion that there is an ongoing impact on the workforce. Like Petitioner, Employer complains that no one from the regional office has actually spoken to currently employed workers to determine whether they are working in a coercive atmosphere. The Employer further argues that completing the 60-day notice posting period is not necessary to ensure employee free

⁴We note that this is a misstatement of the current status of the complaint in case no. 2009-CE-011-VIS, et al. The settlement agreement provides that the Regional Director will withdraw the complaint after the posting remedy is complete, and this has not yet occurred.

choice, and distinguishes the present matter from *S&J Ranch* (1992) 18 ALRB No. 10, in which it was proven that an employer unlawfully instigated a decertification petition.

The Employer states that it is inappropriate to consider the pending MMC matter in the decision to block the election, and points out that because there has not yet been a mediator-imposed collective bargaining agreement, there is no contract which would serve as a bar to the election under Labor Code section 1156.7. Finally, the Employer argues that it is improper to presume that the Employer has engaged in bad faith bargaining simply because the parties have failed to reach a contract.

Employer urges the Board to reverse the Regional Director's decision to block the election and order that the election be held within 48 hours of the Board's order. Like Petitioner, Employer points out that any conduct alleged to have affected the outcome of the election be litigated through the election objections process following the election.

Union's Response to the Requests for Review

The Union argues that it is inappropriate to process a decertification petition because the MMC process has not been completed within the statutory time limits, and urges the Board to find that the Regional Director was correct in holding that the delay in the MMC process should block the election. The Union also argues that it is proper to block the election because the requirements of the settlement agreement in Case No. 2009-CE-011-VIS, et al. have not been fully satisfied. Moreover, the Union argues, the Employer has not granted access to Union representatives (it is not clear whether the Union's position is that the lack of access stems from a violation of the

parties' settlement agreement, or whether it is due to the fact that the MMC process, which would have resulted in a collective bargaining agreement, has been delayed by Employer's actions).

Discussion

The Board's seminal decision on blocking elections is *Cattle Valley Farms, supra*, 8 ALRB No. 24. The standard for blocking articulated in *Cattle Valley* is that when there is an outstanding ULP complaint against the employer (or union) involved in the representation matter, the Regional Director shall immediately investigate and determine whether the conduct alleged in an outstanding complaint is such that it would be impossible to conduct the election in an atmosphere where employees can exercise their choice in a free and uncoerced manner. (*Cattle Valley Farms, supra*, 8 ALRB No. 24 at p. 14.)⁵

In reviewing the Regional Director's decision to block the election in the present matter, the proper focus of the Board's inquiry is on the nature of the alleged conduct in the unadjudicated complaint, and whether the allegations are such that they

⁵In *Cattle Valley*, the Board found that the rationale underlying the NLRB's blocking practice—that the probable impact of the alleged ULP would tend to deprive employees of a free choice in a representation election and permit the charged party to profit from its unfair labor practices-- applied in the agricultural setting. (*Cattle Valley Farms, supra*, 8 ALRB No. 24 at pp. 5-6.)

would tend to create a chilling effect on the workers in the bargaining unit despite the fact that this complaint was settled and never adjudicated.⁶

The Board is not persuaded that the pending MMC matter is a proper basis for blocking the election. The Union implies it would not have requested MMC in September 2009 had the Employer been bargaining in good faith, and therefore the fact that an MMC case was opened in the first place signifies that there was employer misconduct. However, it is not appropriate to presume that there was bad faith bargaining solely because a collective bargaining agreement was not reached after six months following the union's certification.

While a contract that is imposed by a mediator's report and confirmed by the Board may bar a decertification petition filed after the MMC process is final, Employer is correct that there is presently no contract which would serve as a bar to the election under Labor Code section 1156.7.⁷

The Board finds that the Regional Director properly blocked the election because the conduct alleged in the outstanding complaint is such that, although never

⁶Both Employer and Petitioner complain that the Region did not actually contact members of the current workforce to ask them whether they were even aware of the allegations in the complaint, and thus did not properly apply the Board's blocking policy. The Board finds no merit in this argument. The investigation required by *Cattle Valley Farms* is an investigation into the nature of the allegations in the complaint, and whether, if true, there is no bona fide question concerning representation. The Board finds that under this standard, the Regional Director's investigation was adequate.

⁷Labor Code section 1156.7(b) provides that a written collective bargaining agreement, executed by an employer and the certified bargaining representative and incorporating the substantive terms and conditions of employment, will bar a petition for an election for the term of the agreement for a period not to exceed three years.

adjudicated and the subject of a settlement, would reasonably tend to continue to intimidate workers who otherwise would have been inclined to support the union. The complaint alleged that during the week prior to the January 30, 2009 representation election, Employer's agents made threats to retaliate against workers who supported the Union, and interrogated workers about the Union. The complaint also alleged that in February 2009, the Employer unlawfully terminated three workers who had been supporters of the Union. Such allegations are serious in nature and involve direct interference with employees' right to organize. The termination of the three employees directly following the election could reasonably be viewed as having a significant effect on the employees' perception of the consequences of their previous decision to support the Union. Moreover, at a small workplace such as Pinheiro, the allegations such as these would reasonably tend to have a significant chilling effect on workers wishing to exercise their rights.

Although the 60-day posting period will be complete on April 18, 2010, the Board finds it significant that the signatures for the decertification petition were obtained before the notice was read on February 18, 2010.⁸ As the Regional Director points out, the reading, distribution and the 60-day posting provided for in the settlement agreement was a strong educational tool providing workers with an explanation of what happened to the three workers fired in February 2009. Most importantly, the in-person reading of the notice provided for in the settlement agreement allowed the workforce to more fully understand their rights under the

⁸ The decertification petition was signed on February 15, 2010.

Agricultural Labor Relations Act (ALRA), including the right to exercise free choice in an election. The probable effects of the alleged misconduct would not have been dissipated prior to the employees signing the decertification petition. (*S & J Ranch, supra*, 18 ALRB No. 10 at p. 5.) Because the signatures were gathered at a time when there was still a reasonable likelihood of a chilling effect on the workforce from the conduct alleged in the complaint, the Board finds that the signatures in support of the decertification petition are void, and that the petition should be dismissed.

ORDER

The Petitioner and Employer's requests for review are DENIED and the Regional Director's decision to block the election in this case is upheld.

By Direction of the Board.

Dated: April 1, 2010

J. ANTONIO BARBOSA
Executive Secretary, ALRB