STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of: THE HESS COLLECTION WINERY, **Employer,** and JOSE NAPOLEON SERVIN, **Petitioner,** and UNITED FOOD AND COMMERCIAL WORKERS, LOCAL 5, **Certified Bargaining Representative.**	Case No. 2010-RD-001-SAL ORDER DENYING REQUEST FOR REVIEW AND UPHOLDING REGIONAL DIRECTOR'S DECISION TO BLOCK ELECTION Admin Order No. 2010-11

BACKGROUND

On March 11, 2010, Petitioner Jose Napoleon Servin (Petitioner) filed a decertification petition seeking decertification of the United Food and Commercial Workers Union, Local 1096 (Union)[1] as the exclusive bargaining representative of the agricultural employees of The Hess Collection Winery (Employer). The Salinas Regional Director (RD) of the Agricultural Labor Relations Board (ALRB or Board) ordered an investigation pursuant to *Cattle Valley Farms* (1982) 8 ALRB No. 24, to

[1] In the blocking decision, the Regional Director stated that the UFCW Local 1096 is now UFCW Local 5.

determine whether there were any unremedied unfair labor practice complaints (ULPs) pending against Employer. On March 18, 2010, the RD issued a decision blocking the election because of several pending ULPs and the failure of Employer to comply with the collective bargaining agreement imposed pursuant to *Hess Collection Winery* (2003) 29 ALRB No. 6. Employer filed timely a request for review on March 26, 2010.

Pursuant to California Code of Regulations, title 8, section 203939(d), the Board requested that the Union submit a response on or before April 7, 2010 to the RD's decision blocking the election. Union timely filed its response. Petitioner, through counsel, also filed a "position statement" on April 8, 2010 and argued that the Board had the discretion to accept the filing under section 20393 (d) of its regulations. That section is inapplicable here, as the "position statement" is actually a request for review of the RD's decision to block the election and, as such, must have been filed within five (5) days of service of the RD's decision to block the election. Petitioner's response is hereby rejected as an untimely petition for review. We do, however, address the arguments made therein given that they have been made, with slight variance, by the Employer in its timely filed request for review.

The Board has considered the arguments made in the RD's decision to block the election, the Employer's Request for Review, which raised the same arguments, albeit differently posed, as those made in the Petitioner's position statement, as well as the Union's response. We uphold the Regional Director's decision to block.

Regional Director's Decision to Block

The RD found several unremedied pending ULPs which, in his estimation, could reasonably tend to affect employee choice:

1. Case Number 07-CE-17-SAL: On June 18, 2007, Maria Gomez (Gomez) filed a ULP charge against Employer alleging that, on or about February 23, 2007, she was terminated by Employer's agent Sergio Robledo (Robledo) for engaging in protected concerted and union activities.
2. Case Number 07-CE-18-SAL: On June 18, 2007, Gomez filed a ULP charge against Employer alleging that around February 2007 she was intimidated, harassed, and surveilled by Employer's agent Agustin Sanchez (Sanchez) for engaging in protected concerted and union activities.
3. Case Number 07-CE-21-SAL: On June 18, 2007, Dolores Rubio (Rubio) filed a ULP charge against Employer alleging that around February 2007, she was intimidated, harassed, and surveilled by Sanchez because she engaged in protected concerted and union activities.
4. Case Number 07-CE-22-SAL: On June 18, 2007, Rubio filed a ULP charge against Employer alleging that, around February 2007, she was terminated from employment by Sanchez because she engaged in protected concerted and union activities.

A consolidated complaint issued in the above-mentioned charges. The RD concluded that, upon investigation, there was sufficient evidence to support the

allegations in the charges. Efforts by the Region and Employer to settle the charges were still ongoing at that time, with each blaming the other for the lack of progress.

The RD stated that although Gomez and Rubio no longer work for Employer, their former co-workers continue to work for Employer and are well aware of the circumstances surrounding their discharges. The RD further argued that Sanchez, who is alleged to have terminated Rubio and intimidated, harassed, and surveilled Rubio and Gomez because of their protected concerted and union activities, continues to work as a foreman. As a result, the RD concluded that this unremedied allegation of misconduct on the part of the Employer, although it occurred some time ago, can be said to have shaped the opinions of the current workforce, especially since Sanchez remains in a position of influence in supervising the workforce.

The RD also argued that Hess' non-compliance with Board orders in *Hess Collection Winery* (2003) 29 ALRB No. 6 and *Hess Collection Winery* (2009) 35 ALRB No. 3 were grounds for blocking, along with Employer's challenge to the validity of the collective bargaining agreement that resulted from mandatory mediation and conciliation under Labor Code section 1164–1164.14.[2] Particularly, the RD noted that after the appellate court affirmed 29 ALRB No. 6 on July 5, 2006,[3] Employer refused to comply with the collective bargaining agreement until it was implemented

[2] California Labor Code Section 1164 – 1164.14. All statutory references are to the California Labor Code unless otherwise stated.
[3] *Hess Collection Winery v. ALRB* (2006) 140 Cal.App.4th 1584.

November 28, 2006, and it has not paid makewhole[4] to at least 20 current members of Employer's workforce to whom the remedy is owed. The RD reasoned that the effect of Employer's failure to implement timely the collective bargaining agreement cannot be said to have dissipated.

Employer's Request for Review

Employer takes issue with the RD's arguments for blocking. Employer argues that the factual findings of the RD do not support the pending ULP charges and that these unremedied ULPs would not taint the election. Namely, Employer argues that the Region has failed to establish that Rubio and Gomez's former co-workers still employed with Employer constitute a majority of the bargaining unit such that the election would be tainted or, for that matter, to establish what the former co-workers know about the pending ULPs. Employer further argues that Sanchez's alleged involvement in the complained-of conduct does not, as the RD argued, heighten the effect of the pending ULPs since no supervisor "took a page out of Sanchez's playbook" and emulated his conduct. Moreover, the Employer argues Sanchez is neither an owner nor in senior management such that the effects of his alleged conduct are more likely to have dissipated.

Employer also takes issue with the RD's reliance on non-compliance with the imposed collective bargaining agreement as grounds for blocking the election. Employer cites a thirty-three (33) month delay between the implementation of the

[4] In this instance, "makewhole" refers to the amounts owed for the period from the effective date of the imposed contract to November 28, 2006, when Employer began complying with the contract.

collective bargaining agreement and the Region's issuance of a makewhole specification on August 7, 2009. Employer argues that the lack of compliance has no impact on the ability of the current employees to exercise their choice in a free and uncoerced manner. Employer also takes issue with what it sees as a "punitive posture" of the RD in citing Employer's legal challenge of the collective bargaining agreement and the MMC process in general as grounds for blocking, arguing that it was within its legal right to challenge the MMC statute as unconstitutional. Employer lays the failure to achieve compliance at the feet of the RD and touts itself as the driving force behind settlement of the makewhole specification. Employer argues that, unlike the *Ventura County Fruit Growers* case, Case No. 86-RD-02-OX, the conduct at issue in this case is far more removed in time (seven years) from the election than was the conduct in *Ventura County Fruit Growers* (two years) and less sustainable as grounds for blocking an election. Employer further notes that union sentiment has not been undermined by the outstanding makewhole, noting that in its effort[5] to negotiate a new collective

[5] On December 4, 2008, Employer and Union negotiated a private global settlement that would have settled "all outstanding issues" between the parties, including agreeing to withdraw or otherwise dismiss pending ULP charges, ALRB hearings, pending and potentially pending makewhole matters, and all pending civil litigation, but did not provide for any retroactive payments to employees for the period between the effective date of the imposed collective bargaining agreement and the date Employer implemented the agreement. These negotiations resulted in a new collective bargaining agreement effective November 28, 2008 through December 31, 2010. On January 22, 2009, the Salinas Regional Director and ALRB Assistant General Counsels requested the Board's advice on jurisdiction over compliance with the mediator-imposed collective bargaining agreement and the makewhole resulting therefrom. The Board held that Employer's failure to pay makewhole for the three-year period from the date the mediator-imposed collective bargaining agreement took effect as a final Board Order (October 1, 2003) to November 28, 2006, the date Employer actually

bargaining agreement and settle outstanding ULPs with the Union, the Union did not seek makewhole.

Employer also raised, in a footnote, the fact that the RD "found" that Employer allegedly failed to comply with notice reading and posting requirements stemming from the settlement of cases 07-CE-54-SAL, 07-CE-55-SAL, 07-CE-57-SAL, 07-CE-58-SAL and 07-CE-59-SAL, which were consolidated into one complaint. Complainants Bibiana Servin, Maria Gomez, Gabriela Marin, Dolores Rubio and Jorge Hernandez alleged that, on or about July 2007, Employer filed grievances against them in retaliation for their filing charges against Employer with the ALRB. Complainants further alleged that Employer threatened to seek binding mediation and arbitration and impose arbitration costs on them. The Board and Employer agreed to settle the consolidated complaint in 2008. Employer states that it was not until March 10, 2010 that the Region asked it to provide by March 18, 2010 dates to carry out reading, distribution and posting of the Notice to Employees resulting from the settlement. Employer states that it had complied with all parts of the settlement under its control.

Union's Response

Pursuant to Administrative Order 2010-08, the Union filed a response to Employer's Request for Review. In it response, the Union argued that a complaint had issued against Employer in a more recent matter, citing to the 07-CE-54-SAL

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implemented the agreement, was a compliance matter still within the Board's jurisdiction to enforce. Compromise of a final Board order could only be accomplished through a formal settlement agreement subject to the provisions of California Code of Regulations title 8, section 20298(f). *Hess Collection Winery*, Administrative Order 2009-09.

consolidated complaint, and that Employer should not be able to take advantage of its own delay to force processing of the decertification petition.

STANDARD OF REVIEW

Upon the filing of a petition for certification or decertification, the Regional Director shall immediately investigate and determine whether any unfair labor practices alleged in an outstanding complaint against the employer(s) and 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. *Cattle Valley Farms* (1982) 8 ALRB No. 24 at p. 14. 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. (*Id*. at p. 15.) When a Regional Director has decided to block an election, the Board exercises its independent judgment as to whether the election should be blocked. (*Ibid*.)

DISCUSSION

Rubio and Gomez ULPs

Employer argues that the RD failed to conduct a proper investigation before blocking the election. Employer argues that the RD failed to establish exactly what the employees were aware of regarding the Rubio and Gomez terminations and

failed to see that the terminations were meritorious. Both contentions are equally without merit.

An investigation of outstanding ULP complaints under *Cattle Valley Farms* is not an investigation into whether the charges in such complaints are true but whether they are such that they make it impossible to conduct an election in an atmosphere where employees can exercise their choice in a free and uncoerced manner. (*Cattle Valley Farms*, *supra*, at p. 15.) The Board must weigh the employees' expressed desire to have an election against the damage which might result if an election were held. (*Id*. at 10.) When there is an established bargaining relationship between an employer and a currently-certified bargaining representative, as there is in this case, "conducting an election in a coercive atmosphere would tend to undermine the stability of that relationship." (*Id*.)

At issue is not the merit, or lack thereof, of the pending complaints, but whether the nature of the allegations and the fact that they remain unresolved creates a coercive atmosphere. (*Cattle Valley Farms*, *supra*, at p. 14 ("[T]he Regional Director shall immediately investigate and determine whether any unfair labor practices alleged in the 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.").) It would not have been unreasonable for the RD to conclude that, given that Rubio and Gomez were terminated within the last three years without any resolution of their cases, coupled with their alleged harassment, intimidation and surveillance by a

foreman who continues to be employed by Employer, the ability of employees to exercise their free choice in an uncoercive atmosphere was not possible, especially since both Gomez and Rubio were the charging parties in the consolidated complaint in case number 07-CE-54-SAL et al. Nothing in *Cattle Valley Farms* or its progeny suggests that the RD's exercise of discretion in investigating pending charges must be an exact science by which to determine which employees are aware of pending charges and which are not. It is an exercise of discretion in light of the nature of the charges that *Cattle Valley Farms* requires of a RD before an election can be lawfully blocked.

Makewhole Relief Owing Pursuant to 29 ALRB No. 6

Employer argues that the election and the makewhole issue have nothing to do with one another, and the remoteness in time of the acts resulting in the makewhole due, coupled with the fact that the Union was willing to give up any makewhole due as a bargaining chip to achieve the most recent collective bargaining agreement, supports the conclusion that there is no effect on employees' ability to exercise their free choice in an uncoerced manner. This is not necessarily so.

The proper focus of the RD's investigation is not Employer's efforts to comply with 29 ALRB No. 6, but whether the protracted non-compliance would have a chilling effect on workers' free choice. It is not unreasonable for the RD to conclude that the fact that there has been no compliance with respect to makewhole, while twenty employees owed makewhole still work for Employer, may be attributed by employees to Employer's ability to delay and disempower the Union, or any other they might choose for that matter, even if that is not the case. It is not unreasonable for the RD to

have concluded that the effect of this unresolved matter on employee free choice has not yet dissipated.

The Region's Role in Non-Compliance and Reference to Employer's Legal Challenge to the MMC Statute

The fact that the Region can be said to have had some role in non-compliance in two matters cited as support for blocking – the Rubio/Gomez ULPs and makewhole in 29 ALRB No. 6 – as well as one matter not cited but supportive of blocking as well, 07-CE-54-SAL et al. – is worthy of attention. Such delays in enforcement of settlements or Board orders prejudices the interests of all parties and cannot continue. The greatest prejudice is to the interests of the employees who were the victims of the unlawful conduct.

In denying the Employer's Request for Review, the Board does not rely on the RD's reference to Employer's choice to challenge the constitutionality of the MMC statute and order in 29 ALRB No. 6 as grounds for blocking. All parties before the Board have the legal right to challenge the constitutionality, facially or as applied, of any state statute without recrimination. A party's invocation of its legal rights to challenge a statute will not, and cannot, serve as a basis for blocking an election.

ORDER

The Employer's Request for Review is DENIED and the decision of the Regional Director to block the election is upheld.

By Direction of the Board.

Dated: May 20, 2010

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J. ANTONIO BARBOSA
Executive Secretary, ALRB