STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of:	)	
	)	Case No. 2010-RC-003-SAL
NURSERYMEN'S EXCHANGE, INC.,	)	(36 ALRB No. 6)
	)	ORDER DENYING
Employer,	)	EMPLOYER'S REQUEST
	)	FOR REVIEW;
and	)	ORDER DENYING
	)	UNION'S REQUEST FOR
UNITED FARM WORKERS OF AMERICA,	)	REVIEW
	)	
Petitioner.	)	Admin. Order No. 2011-02

On February 16, 2011, Nurserymen's Exchange, Inc. (NEI or Employer) filed a Request for Review of the Executive Secretary's dismissal of two election objections filed by it in the above-entitled representation matter. On February 17, 2011, the United Farm Workers of America (UFW), which did not file election objections, filed a Request for Review of the Executive Secretary's decision to hold a hearing on five of NEI's election objections.

The Board has considered the Employer's and the Union's Requests for Review and materials submitted in support thereof and has decided to adopt the conclusions of the Executive Secretary insofar as consistent with our discussion herein and dismiss Employer's objections 4 and 8. We deny the UFW's Request for Review.

In order to be entitled to an evidentiary hearing on election objections, complainants must present a *prima facie* case that specific misconduct tainted the election. *Lindeleaf v. ALRB* (1986) 41 Cal.3d 861, 874; *J.R. Norton Co. v. ALRB* (1979) 26 Cal.3d 1, 17. Employer has failed to do so with Objection Number Four, in which it alleges that 94 employees who received Worker Adjustment and Retraining Notice (WARN) Act notices on July 1, 2010 that they would be terminated effective August 31, 2010 were ineligible to be considered for purposes of determining peak employment. The Board has rejected this argument in its decision on the challenged ballots in this matter, 36 ALRB No. 6 (2010) and in Employer's motion for reconsideration, Administrative Order 2011-01. We disagree with the Executive Secretary in dismissing this objection as moot, as a case is considered moot when, because of intervening events, it becomes impossible to grant the complaining party any effectual relief. *Wilson & Wilson v. Redwood City* (2011) 191 Cal. App. 4th 1559, 1574. We affirm the Executive Secretary's dismissal not because the issue is moot, but because the arguments underlying the objection have been previously found to be without merit.

We affirm the Executive Secretary's dismissal of Employer's Objection Number 8 to the effect that the UFW engaged in electioneering in the quarantine area. Although the fact that the UFW organizers ultimately moved after their conversation with Board agent Val Verde raises the question whether there was electioneering going on within the quarantine area, it does not rise to the level of a *prima facie* showing of misconduct sufficient to set aside an election. Employer provided no declarations

showing that the UFW's alleged conduct, even if true, reasonably tended to coerce or intimidate the workers in their exercise of free choice in the election.

As the Executive Secretary pointed out, had the declarations clearly indicated that the alleged electioneering took place within the quarantine area, the declarations describe only the passing out of UFW buttons. The Board consistently has held that it will not set aside an election based on electioneering near the polls on a *per se* basis, but only on a showing that the conduct would reasonably tend to interfere with employee free choice. *Lindeleaf v. ALRB, supra,* p. 875; *Anderson Vineyards, Inc.* (1998) 24 ALRB No. 5, pp. 2-4. Furthermore, the Board has specifically held that the mere passing out of union buttons within the quarantine area is not a ground for setting aside an election. *D'Arrigo Bros. of California* (1977) 3 ALRB No. 37, p. 18.

We deny the UFW's Request for Review of the Executive Secretary's decision to set Employer's Objections Number 1, 3, 5, 6 and 7 for hearing. California Code of Regulations, title 8, section 20393(a), provides for review of an Executive Secretary's dismissal of election objections upon request by the party whose objections were dismissed. There is no provision in the Board's regulations for review of the Executive Secretary's decision to set an objection for hearing. Pursuant to Labor Code section 1142(b)[1], the Board does have the authority to review *sua sponte* any action taken by personnel to whom it has delegated powers concerning representation matters. However, the Board will do so only in extraordinary circumstances where failure to give such consideration would create a result that is manifestly contrary to the policies

[1] All references are to the California Labor Code unless otherwise stated herein.

underlying the Agricultural Labor Relations Act or is necessary to protect the integrity of the election process. *Conagra Turkey Company* (1993) 19 ALRB No. 11, pp. 3-4; *GH & G Zysling Dairy* (2006) 32 ALRB No. 2, p.4, fn. 3. Here, the UFW has failed to demonstrate how the decision to set Objections 1, 3, 5, 6 and 7 for hearing constitutes extraordinary circumstances warranting *sua sponte* review.

ORDER

The Requests for Review filed February 16 and 17, 2010 by NEI and the UFW, respectively, are DENIED.

By Direction of the Board.

Dated: March 10, 2011

_____
J. ANTONIO BARBOSA
Executive Secretary, ALRB