AGRICULTURAL LABOR RELATIONS BOARD
CASE DIGEST SUPPLEMENT
VOLUME 38 (2012)

100.03 The legislative purpose behind authorizing a strike election to occur within forty-eight hours of the filing of a representation petition was the legislature's recognition of the inherently volatile nature of a strike and the potential for violence and/or disruption in production. A strike election should be held as soon as possible, provided adequate notice is provided to the parties and the employees, no party is prejudiced, and eligible employees are not denied an opportunity to vote.
GEORGE AMARAL RANCHES, INC., 38 ALRB No. 5

101.05 The Board is not required by Labor Code section 1148 to follow National Labor Relations Board (NLRB) procedure. *Tex-Cal Land Management, Inc. v. ALRB* (1979) 24 Cal.3d 335, 350-351.
PREMIERE RASPBERRIES, LLC dba DUTRA FARMS, 38 ALRB No. 11

300.01 An election tally showing that the number of employees alleged to have been on strike at the time a representation petition was filed is not a majority of total eligible voters warrants a hearing on the question whether the number of employees on strike at the time the election petition was filed was less than a majority of total eligible voters.
GEORGE AMARAL RANCHES, INC., 38 ALRB No. 5

303.02 The appropriate standard of review to be applied to the Regional Director's determination that an election petition is timely in past peak cases is, as the IHE reasoned, that set forth in Charles Malovich (1979) 5 ALRB No. 33, i.e., whether the Regional Director's determination that the 50 percent of peak employment requirement was met was reasonable in light of the information available at the time of the election.
NURSERYMEN'S EXCHANGE, INC., 38 ALRB No. 1

303.02 The IHE correctly reasoned that, absent any special circumstance or factor, the Regional Director's use of multi-year averaging of peak to determine whether the 50 percent of peak employment requirement had been met in a past peak case was unreasonable.
NURSERYMEN'S EXCHANGE, INC., 38 ALRB No. 1

313.04 A strike election should be held as soon as possible, provided adequate notice is provided to the parties and the employees, no party is prejudiced, and eligible employees are not denied an opportunity to vote.
GEORGE AMARAL RANCHES, INC., 38 ALRB No. 5

313.04 An election tally showing that the number of employees alleged to have been on strike at the time a representation petition was filed is not a majority of total eligible voters warrants a hearing on the question whether the number of employees on strike at the time the election petition was filed was less than a majority of total eligible voters.
GEORGE AMARAL RANCHES, INC., 38 ALRB No. 5

313.04 Inherent in the inquiry whether a majority of employees were on strike at the time a representation petition was filed, in the event that a majority were not on strike, is the secondary question whether the Regional Director's conclusion that a majority were on strike was reasonable based on the information available to him at the time of the election.
GEORGE AMARAL RANCHES, INC., 38 ALRB No. 5

314.01 Election objection that Board failed to provide adequate notice of an election to non-striking employees failed to state a *prima facie* case. Section 20365(c)(2)(b) of the Board's regulations require that declarations set forth with particularity the details of each occurrence and the manner in which it is alleged to have affected or could have affected the outcome of the election. Employees' declarations did not show that they did not vote or were prevented from voting, and were insufficient on their face.
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314.01 Election objection that Board created a threatening and intimidating environment by allowing separate voting processes for striking and non-striking employees resulting in striking employees beating up on non-striking employees failed to state a *prima facie* case. Section 20365 (c)(2)(B) of the Board's regulations require that declarations set forth with particularity the details of each occurrence and the manner in which it is alleged to have affected or could have affected the outcome of the election. The employee observer declarations failed to state who caused the observers to feel threatened and intimidated, or how.
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315.02 Election objected based on inadequate notice of an election will generally be dismissed unless the objecting party can show that an outcome determinative number of voters will be disenfranchised.
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GEORGE AMARAL RANCHES, INC., 38 ALRB No. 5

315.02 In making the determination, pursuant to section 1156.3(f) of the ALRA, as to whether employer misconduct warrants not only a refusal to certify the results of the election, but also, certification of the union as the exclusive bargaining representative notwithstanding the election results, the Board applies an objective test in determining the effect of election misconduct upon free choice.
CORRALITOS FARMS, LLC, 38 ALRB No. 10

317.01 Election objection that Board created a threatening and intimidating environment by allowing separate voting processes for striking and non-striking employees resulting in striking employees beating up on non-striking employees failed to state a *prima facie* case. Section 20365 (c)(2)(B) of the Board's regulations require that declarations set forth with particularity the details of each occurrence and the manner in which it is alleged to have affected or could have affected the outcome of the election. The employee observer declarations failed to state who caused the observers to feel threatened and intimidated, or how.
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319.01 Unit clarification petitions seeking to expand the scope of bargaining units to include agricultural operations acquired by an employer that did not exist when the union was originally certified must be analyzed in the same manner as initial unit determinations.
SUN WORLD INTERNATIONAL, LLC, 38 ALRB No. 3

319.01 The unit description "all agricultural employees of an employer in the State of California" simply reflects at the time of the original certification, the unit included all of an employer's operations in the State. This description has no independent legal significance regarding the appropriateness of the inclusion—via a unit clarification petition—of any operations acquired by the employer after the union was originally certified.
SUN WORLD INTERNATIONAL, LLC, 38 ALRB No. 3

319.01 The Board noted that it had previously clarified in *Coastal Berry. LLC* (2000) 26 ALRB No. 2, that there was no statutory presumption or preference in favor of a statewide bargaining unit when the employer's operations are in two or more noncontiguous areas.
SUN WORLD INTERNATIONAL, LLC, 38 ALRB No. 3

319.01 Certifications that have long been inactive generally cannot be the basis of noncontiguous accretions sought in a unit clarification proceeding; however, there may be circumstances where discontinued operations are revived in noncontiguous areas and it may be appropriate to accrete them to the original certification.
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319.01 Because the Board found that accretions sought by the union in a unit clarification proceeding were inappropriate because there was no community of interest between an employer's current unionized operations and its non-unionized operations in a non-contiguous geographical area, the Board declined to rule on whether the National Labor Relations Board's "accretion doctrine," was applicable under the ALRA.
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CORRALITOS FARMS, LLC, 38 ALRB No. 10

321.02 Under the rule set forth in *Mann Packing Co.* (1989) 15 ALRB No. 11, where evidence of the merits of an election objection is dependent on resolution of issues in a pending unfair labor practice charge, the Board must defer to the exclusive authority of the General Counsel with respect to the investigation of the charge and the issuance of a complaint.
CORRALITOS FARMS, LLC, 38 ALRB No. 10

323.08 Election objection that Board failed to provide adequate notice of an election to non-striking employees failed to state a *prima facie* case. Section 20365(c)(2)(b) of the Board's regulations require that declarations set forth with particularity the details of each occurrence and the manner in which it is alleged to have affected or could have affected the outcome of the election. Employees' declarations did not show that they did not vote or were prevented from voting, and were insufficient on their face.
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GEORGE AMARAL RANCHES, INC., 38 ALRB No. 5

324.04 Whereas no extension of time may be provided for the filing of election objections, making the timely filing of them jurisdictional, the timely service of those objections on the parties is not similarly jurisdictional under the Board's regulations.
GEORGE AMARAL RANCHES, INC., 38 ALRB No. 5

324.04 Union alleged no prejudice resulting from receiving an after-hours fax transmission of election objections on the day the objections were required to be filed with the Executive Secretary. Section 20365 of the Board's regulations does not require responsive pleadings in response to election objections.
GEORGE AMARAL RANCHES, INC., 38 ALRB No. 5

326.01 Unit clarification petitions seeking to expand the scope of bargaining units to include agricultural operations acquired by an employer that did not exist when the union was originally certified must be analyzed in the same manner as initial unit determinations.
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326.01 The unit description "all agricultural employees of an employer in the State of California" simply reflects at the time of the original certification, the unit included all of an employer's operations in the State. This description has no independent legal significance regarding the appropriateness of the inclusion—via a unit clarification petition—of any operations acquired by the employer after the union was originally certified.
SUN WORLD INTERNATIONAL, LLC, 38 ALRB No. 3

326.01 The Board noted that it had previously clarified in *Coastal Berry. LLC* (2000) 26 ALRB No. 2, that there was no statutory presumption or preference in favor of a statewide bargaining unit when the employer's operations are in two or more noncontiguous areas.
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326.01 Certifications that have long been inactive generally cannot be the basis of noncontiguous accretions sought in a unit clarification proceeding; however, there may be circumstances where discontinued operations are revived in noncontiguous areas and it may be appropriate to accrete them to the original certification.
SUN WORLD INTERNATIONAL, LLC, 38 ALRB No. 3

326.01 Because the Board found that accretions sought by the union in a unit clarification proceeding were inappropriate because there was no community of interest between an employer's current unionized operations and its non-unionized operations in a non-contiguous geographical area, the Board declined to rule on whether the National Labor Relations Board's "accretion doctrine," was applicable under the ALRA.
SUN WORLD INTERNATIONAL, LLC, 38 ALRB No. 3

400.01 Objectionable misconduct in the context of elections cannot be tested by the subjective individual reactions of employees. The test is whether the conduct, when measured by an objective standard, was such that it reasonably would tend to interfere with employee free choice.
GEORGE AMARAL RANCHES, INC., 38 ALRB No. 5

453.11 The Board will only hear interim appeals of interlocutory rulings pursuant to Regulation 20242(b) that cannot be addressed effectively through exceptions filed pursuant to Regulations 20282 or 20370(j).
PREMIERE RASPBERRIES, LLC dba DUTRA FARMS, 38 ALRB No. 11

453.11 The Board will reject an application for special permission for interim appeals if it fails to state the necessity for interim review as required by Regulation 20242(b).
PREMIERE RASPBERRIES, LLC dba DUTRA FARMS, 38 ALRB No. 11

453.11 Section 20242 (b) of the Board's regulations clearly prohibits the filing of further pleadings in support of a special appeal unless requested by the Board through the Executive Secretary.
PREMIERE RASPBERRIES, LLC dba DUTRA FARMS, 38 ALRB No. 11

461.09 In light of the unique circumstances presented when a very lengthy delay in calculating bargaining makewhole involved a complex amalgam of agency inaction, employer recalcitrance, and union indifference, it is appropriate to make the award of interest on the principal owed contingent upon the employees who were employed during the makewhole period being located. All such employees who are located are entitled to the full bargaining makewhole principal and interest as normally calculated. Any principal amounts remaining by virtue of employees not being located, despite diligent efforts to do so, within two years of the date the money is collected on their behalf shall be deposited, as required by ALRA section 1161, in the Agricultural Employees Relief Fund, without any interest due on such amounts.
SAN JOAQUIN TOMATO GROWERS, INC., 38 ALRB No. 4

464.01 Board rejects employer's claim that it owes nothing in bargaining makewhole because it was paying the highest piece rate anywhere for tomato harvesters. Even if this claim is accepted as true, effective collective bargaining may have achieved not only higher wages, but also benefits such as health insurance and pension contributions. While a makewhole specification must be a reasonable measure of what good faith bargaining would have achieved, Respondent's claim is not a supportable stopping point in estimating the amounts owed.
SAN JOAQUIN TOMATO GROWERS, INC., 38 ALRB No. 4

464.01 Despite a very long period of delay – 16 years from the date the case was released for compliance until the General Counsel's issuance of a makewhole specification – innocent employees should not be penalized for agency delay. Interest on a makewhole award is not a penalty, but is the method of fully reimbursing victims for the time value of the money that they lost and the employer had in the interim.
SAN JOAQUIN TOMATO GROWERS, INC., 38 ALRB No. 4

464.03 Fringe benefits (holiday, vacation, etc.) that are available under other contracts considered under the contract averaging method should not be included in a makewhole award if, in order to trigger the payment of such benefits under those other contracts, the employees must work more hours than are contained in the season worked by Respondent's employees.
SAN JOAQUIN TOMATO GROWERS, INC., 38 ALRB No. 4

464.04 Other collective bargaining agreements should not be used as a comparable contract in a bargaining makewhole case where those other contracts cover geographic areas where wages are generally lower than those paid in the area where Respondent operates, or where they were reached outside the bargaining makewhole period, or where they were unexecuted and nonbinding. Likewise, it is improper to consider a CBA as a comparable contract where that CBA was executed after the employer either unlawfully refused to bargain or engaged in unlawful surface bargaining, as both an outright refusal to bargain or surface bargaining necessarily undermines the union's subsequent bargaining position.
SAN JOAQUIN TOMATO GROWERS, INC., 38 ALRB No. 4

464.04 The use of contract averaging methodology may be reasonable and appropriate in determining the proper measure of makewhole. Board precedent clearly permits alternate formulas when there are no comparable contracts.
SAN JOAQUIN TOMATO GROWERS, INC., 38 ALRB No. 4

466.08 In light of the unique circumstances presented when a very lengthy delay in calculating bargaining makewhole involved a complex amalgam of agency inaction, employer recalcitrance, and union indifference, it is appropriate to make the award of interest on the principal owed contingent upon the employees who were employed during the makewhole period being located. All such employees who are located are entitled to the full bargaining makewhole principal and interest as normally calculated. Any principal amounts remaining by virtue of employees not being located, despite diligent efforts to do so, within two years of the date the money is collected on their behalf shall be deposited, as required by ALRA section 1161, in the Agricultural Employees Relief Fund, without any interest due on such amounts.
SAN JOAQUIN TOMATO GROWERS, INC., 38 ALRB No. 4

467.01 Method for calculating interest in makewhole specification is established by the remedy ordered by the Board following liability proceedings and is fixed by the order adopted by the Board in connection with the liability proceeding. Subsequent change in NLRB law regarding method of calculating interest in unfair labor practice proceeding, set out in *Kentucky River Medical Center* (2010) 356 NLRB No. 8, has no effect on the method to be used in cases already in compliance phase on the date *Kentucky River* issued. (*Rome Electrical Services,* Inc. (2010) 356 NLRB No. 38.) The issue of whether the ALRB should follow the NLRB's new policy under which interest on backpay is compounded on a daily basis, replacing the simple interest method previously used, is an appropriate issue for consideration in a case that is still in the liability phase, rather than in a compliance proceeding.
SAN JOAQUIN TOMATO GROWERS, INC., 38 ALRB No. 12

700.03 A contract need not be formalized or signed in order to be binding. Rather, a binding collective bargaining agreement may be formed by a variety of manifestations of acceptance of an outstanding offer, whether or not the agreement is reduced to writing or signed. However, it is the parties' intent that controls, and parties are free to make formalization and execution a condition precedent to enforceability. No previous binding contract where the evidence showed that the understanding and intent of both parties was that the agreement would not be binding and enforceable until it was formalized and executed.
SAN JOAQUIN TOMATO GROWERS, INC., 38 ALRB No. 2

701.10 MMC is a hybrid mediation/binding interest arbitration process with a level of formality that is largely controlled by the parties and the mediator. Regulation 20407, subdivision (a)(4), specifically states that the rules of evidence need not be observed. Whether or not a comparable contract technically falls within the hearsay exception for business records is not controlling. Mediator properly found that the declaration of union's lead negotiator was sufficient to indicate the trustworthiness of the contract as a business record where employer did not proffer any reasonable basis for doubting the authenticity of the contract.
ACE TOMATO COMPANY, INC., 38 ALRB No. 6

701.10 Pursuant to Regulation 20407, the mediator has broad authority to control the conduct of the MMC process and rule on the admissibility of evidence, which necessarily would include reopening of the record for good cause. Therefore, mediator properly allowed submission of a recently negotiated comparable contract after the deadline given for the parties' final submissions to the mediator.
ACE TOMATO COMPANY, INC., 38 ALRB No. 6

701.11 Mediator properly utilized contract of larger grower, as he explained that while its operations may be more widespread, when it harvests tomatoes in the San Joaquin Valley the operations covered by the contract used for comparison constitute "similar agricultural operations with similar labor requirements," one of the appropriate factors mediators may consider that are listed in Labor Code section 1164, subdivision (e).
ACE TOMATO COMPANY, INC., 38 ALRB No. 6

702.05 Mediator properly utilized contract of larger grower, as he explained that while its operations may be more widespread, when it harvests tomatoes in the San Joaquin Valley the operations covered by the contract used for comparison constitute "similar agricultural operations with similar labor requirements," one of the appropriate factors mediators may consider that are listed in Labor Code section 1164, subdivision (e).
ACE TOMATO COMPANY, INC., 38 ALRB No. 6

702.05 Mediator's finding that employer's concerns of difficult economic conditions were outweighed by certainty and needed stability in the parties' bargaining relationship provided by establishing wage and piece rates for all three years of contract, rather than having 2nd and 3rd year reopeners, not clearly erroneous nor arbitrary or capricious.
ACE TOMATO COMPANY, INC., 38 ALRB No. 6

702.05 Review not warranted based on mediator's comments about employer's ability to pay wage rates or adjust prices where mediator's statements did not constitute clearly erroneous findings of material fact, were not arbitrary or capricious, and no provisions of the report were improperly based on those statements.
SAN JOAQUIN TOMATO GROWERS, INC., 38 ALRB No. 7

702.05 Mediator properly used recently negotiated contract covering comparable operations as basis for wage rates, including increases in 2nd and 3rd year. But review granted to allow mediator to clarify intent in light of apparent arithmetic error.
SAN JOAQUIN TOMATO GROWERS, INC., 38 ALRB No. 7

702.05 Mediator properly included bonus program that had existed previously to avoid inappropriate wage concession. But review granted to allow mediator to clarify intent as to what appeared to be clearly erroneous inclusion of tractor drivers. No review granted as to amount of bonus for punchers, as employer failed to explain why punchers should receive a lower amount, nor did it cite any relevant evidence in the record.
SAN JOAQUIN TOMATO GROWERS, INC., 38 ALRB No. 7

702.05 Mediator decision to have a 3-year contract with set wage rates was appropriate and would serve to add stability to bargaining relationship in light of parties' bargaining history, the failure to reach a contract, and employer's unilateral implementation of changes in wage rates.
SAN JOAQUIN TOMATO GROWERS, INC., 38 ALRB No. 7

702.06 Mediator's finding that retroactive wage increase for transplant crews was warranted to ensure that they benefited from 2012 wage rates fixed in his report was reasonable and certainly nothing in the record indicated that this finding was clearly erroneous, or arbitrary or capricious.
ACE TOMATO COMPANY, INC., 38 ALRB No. 6

702.06 Mediator did not err by making contract retroactive to beginning of picking season, as no basis in law for concluding that retroactive provisions that normally may be part of collective bargaining agreements are precluded from inclusion in contracts imposed in the MMC process.
SAN JOAQUIN TOMATO GROWERS, INC., 38 ALRB No. 7

703.02 Section 1160.8 not applicable to MMC case, as by its terms it applies only to court review and enforcement of Board decisions in unfair labor practice cases. Distinct statutory provisions govern MMC cases, including court review. (ALRA sections 1164-1164.13.) Moreover, the enforcement provision of section 1160.8 expressly applies only where the time for review of the Board's decision has lapsed.
ACE TOMATO COMPANY, INC., 38 ALRB No. 8

703.02 Section 1164.3, subdivision (f), provides a procedure for reducing a Board decision to a judgment where no appellate court review has been sought and cannot be utilized where the time for review has not yet lapsed.
ACE TOMATO COMPANY, INC., 38 ALRB No. 8

703.02 The Board's decisions are not self-enforcing. Rather, in order to enforce its decisions, the Board must first obtain a judgment. That can occur in two ways, 1) obtaining an order of an appellate court affirming the Board's decision, or 2) where a Board order becomes final because the time for appellate court review has lapsed and the Board reduces its final order to a judgment by order of a superior court pursuant to ALRA section 1164.3, subdivision (f). Consequently, there is no legal mechanism through which the Board can seek to enforce its decision when the time for appellate review has not expired.
ACE TOMATO COMPANY, INC., 38 ALRB No. 8

703.02 The location of the second sentence of section 1164.3, subdivision (f), limiting the grounds for staying a Board decision, is the result of an obvious drafting error and that sentence actually belongs in section 1164.5, which governs court review of Board decisions in MMC cases.
ACE TOMATO COMPANY, INC., 38 ALRB No. 8

703.02 There are no provisions of the ALRA governing the MMC process that may be construed to provide any authority for seeking temporary injunctive relief during the pendency of the 30-day period for seeking appellate review.
ACE TOMATO COMPANY, INC., 38 ALRB No. 8