

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

GERAWAN FARMING, INC.,	)	Case No.	2013-RD-003-VIS
	)		(39 ALRB No. 20)
Employer,	)		
	)		
and	)		
	)		
SILVIA LOPEZ,	)	ORDER TO SEVER AMENDED	
	)	CONSOLIDATED COMPLAINT	
Petitioner,	)	AND EXPEDITE HEARING OF	
	)	ELECTION OBJECTIONS	
and	)		
	)		
UNITED FARM WORKERS OF	)		
AMERICA,	)		
	)	Admin. Order No. 2014-27	
Certified Bargaining Representative.	)		
	)		
<hr/> GERAWAN FARMING, INC.,	)	Case Nos.	
	)		
Respondent,	)	2012-CE-041-VIS	2013-CE-041-VIS
	)	2012-CE-042-VIS	2013-CE-042-VIS
and	)	2012-CE-046-VIS	2013-CE-043-VIS
	)	2012-CE-047-VIS	2013-CE-044-VIS
UNITED FARM WORKERS OF	)	2013-CE-007-VIS	2013-CE-045-VIS
AMERICA,	)	2013-CE-009-VIS	2013-CE-055-VIS
	)	2013-CE-025-VIS	2013-CE-058-VIS
Charging Party.	)	2013-CE-027-VIS	2013-CE-060-VIS
	)	2013-CE-030-VIS	2013-CE-062-VIS
	)	2013-CE-038-VIS	2013-CE-063-VIS
	)	2013-CE-039-VIS	

On September 9, 2014, the General Counsel issued an Amended Consolidated Complaint in the above-captioned unfair labor practice cases (2012-CE-041-VIS, etc.).

In a Prehearing Conference Order, dated September 10, 2014, at pages 2-3, and in view of the newly Amended Consolidated Complaint, the assigned administrative law judge (ALJ) considered the issue of “Possible Severance on New Causes of Action in Amended Consolidated Complaint” and opined that “[he] reads the Board’s earlier orders as directing a consolidated hearing,” and made a final ruling that even if the timing of ALRB Regulations section 20244 permitted severance, “he will not have the authority typically granted by ALRB Regulation section 20244, subdivision (c), to sever some of the charges from the upcoming hearing.”

By Respondent’s Motion to Sever Amended Consolidated Complaint and to Enforce 39 ALRB No. 20, dated September 15, 2014, Respondent Gerawan Farming, Inc. (Gerawan or Respondent) requests “that the Board order [the ALJ] to sever all allegations in the consolidated Amended Complaint which do not set forth the precise factual issues in Objection No. 1 or 2013-CE-27-VIS, as it was amended on October 25, 2013.” (Resp. Motion, p. 13, ll: 10-13.) Respondent further requests that the Board sever 2013-CE-039-VIS, “except to the extent that they directly overlap the precise factual issues set forth in UFW Objection No. 2. (*Id.*, at p.13, ll. 17-18.) Finally, Respondent states that the Board “should instruct [the ALJ] to exclude any evidence which does not specifically relate to the precise factual allegations set forth in UFW Objections Nos. 1 and 2, or for the purposes of establishing an unfair labor practice not alleged in 2013-CE-027-VIS (as amended on October 25, 2013) or set forth in Objection 2.” (*Id.*, at p. 14, ll: 7-10.)

By administrative order dated September 16, 2014, the Board allowed for written responses by 5:00 p.m., September 18, 2014. (Admin. Order No. 2014-25.)

By response dated September 18, 2014, the Charging Party, United Farm Workers of America (UFW) opposed Respondent's motion, arguing that the General Counsel has "final authority" pursuant to Labor Code section 1149 and ALRB Regulation section 20244(a) to issue and prosecute unfair labor practices, which "permits General Counsel to consolidate complaints, even if the Board may disagree with that consolidation." (UFW Response, p. 2, ll: 10-17.) The UFW argues that because the General Counsel has exercised her authority pursuant to section 20244(a), the Board cannot thereafter take action to effectuate the Act with respect to this case. (*Id.*, at p. 2, ll: 18-26.) The UFW's remaining arguments continue to sound the theme that the General Counsel's statutory "final authority" proscribes the Board's authority to act once the General Counsel has issued her complaint and made a case management decision. (UFW Response, pp. 5-6.)

In her response filed on September 18, 2014, the General Counsel propounds the same theme relating to her "final authority," arguing for the same conclusion that the Board has no power to act and argues that since the regulations provide for General Counsel discretion regarding consolidation and severance issues until 10 days prior to the hearing, the Respondent's motion filed on September 15, 2014, is untimely.

For the reasons described below, both the UFW and the General Counsel misapprehend the General Counsel's role once the complaint is issued. While Board

Regulation section 20244 authorizes the General Counsel to consolidate charges or complaints prior to ten days before the commencement of a hearing, that regulation does not purport to abrogate the power of the Board to manage the processing of unfair labor practice cases, including by consolidating or severing complaints. Furthermore, Board Regulation section 20244, subdivision (e) states that “Consolidation of unfair labor practice proceedings with objections proceedings . . . shall be governed by section 20335(c) of these regulations.” Board Regulation section 20335 subdivision (c) states that the Board may order consolidation of unfair labor practice and election cases. Board Regulation section 20335 also makes clear that the Board may order transfer, consolidation, or severance “whenever it appears necessary in order to effectuate the purposes of the Act and, specifically, may order that election matters “Be severed from any other proceeding with which it may have been consolidated pursuant to this section.” (Board Regulation § 20335 subd. (a).)

Furthermore, even under Board Regulation section 20244, severance would be proper, particularly within the 10-day period prior to the hearing. Because of the abbreviated period between the amended complaint and hearing, the ALJ made a decision on consolidation and severance. The ALJ’s order brought the matter within our jurisdiction. Thus, the matter is before us and, even if we were to disregard Respondent’s motion, the Board has authority to rule particularly where our ruling today is within the 10-day period. (See ALRB Regulation § 20244(c); cf. § 20335.)

To begin to analyze the ALJ’s Prehearing Conference Order, dated September 10, 2014, and the respective positions of the parties with respect to

Respondent's motion, the Board must re-visit the background of its own decisions and orders and the accompanying procedural history that precedes this motion.

In *Gerawan Farming, Inc.* (2013) 39 ALRB No. 20, the Board ordered that, pursuant to section 1156.3(e)(2) of the Agricultural Labor Relations Act (ALRA), an investigative hearing on the following objections filed by the UFW in the above-captioned matter be conducted on a date and place to be determined. The Board ordered that the investigation be conducted in accordance with the provisions of Board regulation section 20370, and that the investigative hearing in the above-captioned matter be held and the Investigative Hearing Examiner (IHE) take evidence on the following issues:

1. Did the Employer unlawfully initiate, assist in and support the gathering of signatures for the decertification petition and decertification campaign?  
Pursuant to Board regulation section 20335(c) the Board further ordered that this objection (UFW Objection 1) be consolidated with the hearing in case no. 2013-CE-027-VIS.
2. Did the Employer give preferential access to decertification supporters by allowing them to circulate the decertification petition during work time while prohibiting UFW supporters from circulating a pro-UFW petition during work time, and if so did this conduct have a tendency to affect free choice in the November 5, 2013 election to the extent that setting aside the election is warranted? (UFW Objection 2 to be consolidated with case no. 2013-CE-039-VIS should a complaint issue.)

A consolidated hearing in the above-captioned matter was previously set by the Board's Executive Secretary on March 12, 2014, but the Executive Secretary rescinded his order on April 11, 2014, when the General Counsel filed objections to the March 12, 2014 notice of hearing. At that time the General Counsel stated that unfair labor practice (ULP) charge no. 2013-CE-039-VIS was still under investigation and no

complaint, dismissal letter or other appropriate determination by the Visalia Regional Office had issued.

On July 24, 2014, the General Counsel stated in her response to a motion by the UFW to schedule a hearing on consolidated ULP cases 2012-CE-041-VIS, et al. (allegations also involving Gerawan Farming, Inc.) that she opposed the UFW's request to schedule the hearing on cases 2012-CE-041-VIS et al. in August or September 2014 because that would delay the hearing on election-related case nos. 2013-CE-027-VIS and 2013-CE-039-VIS.<sup>1</sup> The General Counsel also stated that she expected the hearing on the election-related cases to go forward in late September 2014, that the election-related cases were a priority, and that a delay of the hearing in the election-related cases would be harmful due to the large number of potential employee witnesses and the possibility of their unavailability during the off-season.

By order dated July 31, 2014, the Board ordered that the Executive Secretary re-set the matter for hearing, as then consolidated, beginning September 29, 2014. (Admin. Order 2014-22.).

As noted above, on September 9, 2014, and just 20 days before the scheduled hearing, the General Counsel filed her omnibus Amended Consolidated Complaint.

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<sup>1</sup> The Board denied the UFW's motion to schedule consolidated ULP cases 2012-CE-041-VIS, et al. for hearing in August or September 2014 on July 31, 2014, by Administrative Order No. 2014-21.

Notwithstanding this tortured history, we find that the ALJ misapprehends the Board's intention with respect to the resolution of the outstanding election disputes. As explained in 39 ALRB No. 20, discussed above, and subsequent expressions by the Board in its administrative orders,<sup>2</sup> we have directed that every effort should be made to expedite the resolution of that aspect of the amended complaint which involves subject matter arising in the run up to the election itself, i.e., namely, UFW Objection 1 to be consolidated with the hearing in case no. 2013-CE-027-VIS and UFW Objection 2 to be consolidated with case no. 2013-CE-039-VIS.

As argued by Respondent, the Amended Consolidated Complaint presents issues and matters that are far removed from the above-referenced pre-election questions at issue. At the same time, Respondent's suggestion to narrowly sever the Amended Consolidated Complaint and hold a limited consolidated hearing does not satisfy the Board's direction to expedite the resolution of all allegations that are necessary to dispose of that portion of the amended complaint which addresses immediate pre-election election issues. That was, and continues to be, the direction of this Board.

Both the UFW and the General Counsel assert the "final authority" of the General Counsel with respect to managing unfair labor practice cases. The Board is empowered to make orders to effectuate the purposes of the Act and to avoid unnecessary delay. (See, ALRB Regulation § 20335.) The ultimate authority for

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<sup>2</sup> Administrative Orders Nos. 2014-21 and 2014-22, issued July 31, 2014.

guaranteeing employee choice under the Act resides with the Board, and the Board alone subsequent to the issuance of a complaint.

Thus, it is the Board's responsibility to realize this statutory objective through prompt and expeditious resolution of the pre-election issues. In this regard, the General Counsel misses the point. Our Order is designed to avoid the long delay in *D'Arrigo* to which she alludes. Our objective is to address the pre-election issues and thus to resolve the ballot box dispute in 2014.

Accordingly, so that the ALJ and the parties have clear direction on the question of priority under the Act and the Board's intent, the Board ORDERS, as follows:

1) The ALJ shall sever and consolidate the complaint, as amended, to give priority to the hearing and resolution of

(a) UFW Objection 1 with 2013-CE-27-VIS, 2013-CE-42-VIS

(b) UFW Objection 2 with 2013-CE-39-VIS<sup>3</sup>

(c) UFW Objections 9 and 10 with 2013-CE-25-VIS

(d) UFW Objections 11 and 12 with 2013-CE-58-VIS and 2013-CE-60-VIS

(e) UFW Objection 17 with 2013-CE-46-VIS

(f) UFW Objection 18 with 2013-CE-55-VIS

(g) UFW Objection 19 with 2013-CE-62-VIS

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<sup>3</sup> Chairman Gould did not participate in *Gallo Vineyards, Inc.* (2004) 30 ALRB No. 2 and *D'Arrigo Bros. Co. of California* (2013) 39 ALRB No. 4, and expresses no view as to those cases.



(h) UFW Objection 21 with 2013-CE-43-VIS

(i) UFW Objection 32

(j) 2013-CE-63-VIS <sup>4</sup>

2) The ALJ shall limit the witnesses and evidence in the case, as severed and consolidated by this Order, to resolve only those allegations germane to the pre-election conduct at issue.

3) The ALJ shall issue a decision on the above-referenced matters prior to reopening the hearing with regard to the remaining unfair labor practices allegations.

The Board further ORDERS that the administrative law judge issue a revised case scheduling order on or before Wednesday, September 24, 2014.

Dated: September 19, 2014

William B. Gould IV, Chairman

Genevieve A. Shiroma, Member

Cathryn Rivera-Hernandez, Member

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<sup>4</sup> The Board reminds the General Counsel of Admin. Order 2014-26 directing that the General Counsel provide a status report on the investigation of unfair labor practice charges 2013-CE-048-VIS and 2013-CE-051-VIS relating to UFW election objections 22 and 23. Resolution of those investigations is of the utmost importance given their relationship to pending election objections.