AGRICULTURAL LABOR RELATIONS BOARD
CASE DIGEST SUPPLEMENT
VOLUME 40 (2014)

202.06 Alleged custom harvester found to be a farm labor contractor when it had no investment in the crop and bore no loss of risk therefor, owned no equipment, and no showing was made that its business decisions and judgments materially affected the grower's opportunity for profit or loss, especially considering that grower leased the land, and grew, sold, and transported the crop.
GEORGE AMARAL RANCHES, INC., 40 ALRB No. 10

300.03 Except in cases where the union disclaims interest in representing the bargaining unit or becomes defunct, the union remains certified until removed or replaced through the ALRA's election procedures, regardless of any bargaining hiatus or union inactivity that may have occurred.
TRI-FANUCCHI FARMS, 40 ALRB No. 4

300.03 Employer's claim that it was not obligated to bargain with certified union due to an alleged period of inactivity by the union did not represent a legally cognizable defense to the duty to bargain under the ALRA and the ALJ correctly declined to take evidence on that issue.
TRI-FANUCCHI FARMS, 40 ALRB No. 4

300.03 Employer's claim that certified union disclaimed interest in representing bargaining unit because the union did not engage in bargaining for 20 years was legally insufficient as the Board has been clear that an extended bargaining hiatus does not result in the forfeiture of a union's certification.
TRI-FANUCCHI FARMS, 40 ALRB No. 4

308.01 A desire on the part of bargaining unit employees to have an election is not a factor that may be considered by a mediator in an MMC case.
ARNAUDO BROTHERS, LP and ARNAUDO BROTHERS, INC.,
40 ALRB No. 7

308.01 Workforce turnover does not undermine a union's certification.
ARNAUDO BROTHERS, LP and ARNAUDO BROTHERS, INC.,
40 ALRB No. 7

316.11 Regardless of whether motive is relevant to determining the effect on free choice of a grant of benefits, no effect on free choice where six weeks prior to election the employer eliminated the requirement to work in muddy fields and employer was found to be merely acceding to the demands of strikers, who would understand that the change was in response to their demands. The opposite conclusion would have the perverse consequence of prohibiting an employer from acceding to any demands of striking employees if the strike is accompanied by an incipient organizing campaign. Such a policy would exacerbate, rather than resolve, potentially volatile labor disputes.
UNITED FARM WORKERS OF AMERICA (Corralitos Farms), 40 ALRB No. 6

320.05 A desire on the part of bargaining unit employees to have an election is not a factor that may be considered by a mediator in an MMC case.
ARNAUDO BROTHERS, LP and ARNAUDO BROTHERS, INC., 40 ALRB No. 7

320.05 Workforce turnover does not undermine a union's certification.
ARNAUDO BROTHERS, LP and ARNAUDO BROTHERS, INC., 40 ALRB No. 7.

323.07 The Board has consistently followed the practice of the NLRB in proscribing the relitigation in unfair labor practice proceedings of matters previously resolved in representation proceedings, absent a showing of newly discovered or previously unavailable evidence, or other extraordinary circumstances. A party who attempts to reargue matters previously considered and rejected by the Board has not shown "extraordinary circumstances."
UNITED FARM WORKERS OF AMERICA (Corralitos Farms), 40 ALRB No. 6

323.07 The same standards apply to reconsideration of underlying representation decisions regardless of whether a union was certified or a "no union" result was certified. The duty of the Board is to protect the free choice of employees by fairly evaluating any claims that an election was marred by misconduct that affected free choice, regardless of which party allegedly has engaged in the misconduct. It would be inconsistent with that duty for the Board to apply different standards in that evaluation depending on the ramifications of finding or not finding misconduct, whether it is the initial evaluation or the determination of whether to reconsider an earlier decision.
UNITED FARM WORKERS OF AMERICA (Corralitos Farms), 40 ALRB No. 6

323.14 While the Board conducts a de novo review, it need not reiterate or rephrase the findings and conclusions of the ALJ with which it fully agrees and which warrant no further analysis. To do so would engender delay and serve no purpose. Where the Board adopts the findings and conclusions of an ALJ, they become the decision of the Board in the same manner as any findings made directly by the Board. "extraordinary circumstances." UNITED FARM WORKERS OF AMERICA (Corralitos Farms), 40 ALRB No. 6

400.01 Threats by Employer and supervisor to call law enforcement on a union organizer from a certified bargaining representative while organizer was properly taking access to Employer's fields constitute unfair labor practices in violation of section 1153(a) of the Act.
GEORGE AMARAL RANCHES, INC., 40 ALRB No. 10

400.01 The giving of shifting or inconsistent justification constitutes strong circumstantial evidence of the existence of an undisclosed and forbidden motive.
KAWAHARA NURSERIES, INC., 40 ALRB No. 11

401.08 Certified bargaining representative is entitled to take access at reasonable times and places post-certification, for any purpose relevant to its duty to bargain collectively. Taking access to determine whether fieldworkers are part of the bargaining unit, and to investigate working conditions is proper. Failure to give advance notice of access is excused if the employer's conduct indicates that access would not have been permitted had notice had been given.
GEORGE AMARAL RANCHES, INC., 40 ALRB No. 10

407.01 Employer violated section 1153(a) of the Act by confronting and striking a union organizer in the presence of employees; Employer's defense that he was trying to confiscate the organizer's cell phone because he believed the organizer was recording the confrontation was not valid, as Employer's actions violated the organizer's access rights and had a coercive effect on the employee witnesses.
GEORGE AMARAL RANCHES, INC., 40 ALRB No. 10

414.02 The giving of shifting or inconsistent justification constitutes strong circumstantial evidence of the existence of an undisclosed and forbidden motive.
KAWAHARA NURSERIES, INC., 40 ALRB No. 11

414.03 Where there is no direct evidence of an employer's anti-union animus, motivation can be inferred from circumstantial evidence based on the record as a whole.
KAWAHARA NURSERIES, INC., 40 ALRB No. 11

414.03 In evaluating circumstantial evidence of employer motivation, the Board may look to such factors as inconsistencies between the proffered reasons for the adverse action and other actions of the employer, disparate treatment of certain employees compared to other employees with similar work records or offenses, deviations from past practice, and proximity in time of the adverse action to union activity.
KAWAHARA NURSERIES, INC., 40 ALRB No. 11

414.04 The giving of shifting or inconsistent justification constitutes strong circumstantial evidence of the existence of an undisclosed and forbidden motive.
KAWAHARA NURSERIES, INC., 40 ALRB No. 11

416.01 Former employees who alleged that they were unlawfully denied rehire were not excused from the requirement of submitting an application where the employer did not convey to the employees a clear message that further applications would be futile.
KAWAHARA NURSERIES, INC., 40 ALRB No. 11

417.01 In finding employees were fired and did not quit, the fact of discharge does not depend on the use of formal words of firing. It is sufficient if the words or actions of the respondent would logically lead a prudent person to believe that he or she has been terminated.
P & M VANDERPOEL DAIRY, 40 ALRB No. 8

417.01 If the employer's words create ambiguity as to whether the employee was fired, the burden of the results of the ambiguity fall on the employer.
P & M VANDERPOEL DAIRY, 40 ALRB No. 8

417.01 A discharge occurs if an employer's conduct or words would reasonably cause employees to believe that they were discharged, and in such circumstances, it is the employer's obligation to clarify its intent. Supervisor's statement to employee that there was "no more work" for her reasonably caused her to believe she had been discharged.
GURINDER S. SANDHU dba SANDHU BROTHERS POULTRY AND FARMING, 40 ALRB No. 12

421.01 Where an employer is accused of committing an unfair labor practice, the fact that the employer committed other contemporaneous unfair labor practices may serve as circumstantial evidence of the employer's unlawful motivation.
KAWAHARA NURSERIES, INC., 40 ALRB No. 11

421.02 In assessing the lawfulness of an employer's motivation, while the treatment of other known union supporters might be relevant, it is well-established that a discriminatory motive, otherwise established, is not disproved by an employer's proof that it did not weed out all union adherents.
KAWAHARA NURSERIES, INC., 40 ALRB No. 11

421.04 The timing of the adverse action is an important consideration in establishing animus. Timing alone, however, will not establish a violation. Other circumstantial evidence includes disparate treatment, interrogations, threats and promises of benefits directed toward the protected activity, the failure to follow established rules or procedures, the cursory investigation of alleged misconduct, the commission of other unfair labor practices, false or inconsistent reasons given for the adverse action, the absence of prior warnings, and the severity of the punishment for the alleged misconduct.
GURINDER S. SANDHU dba SANDHU BROTHERS POULTRY AND FARMING, 40 ALRB No. 12

421.10 The giving of shifting or inconsistent justification constitutes strong circumstantial evidence of the existence of an undisclosed and forbidden motive.
KAWAHARA NURSERIES, INC., 40 ALRB No. 11

421.18 Anti-union speeches, even if not unlawful, are regarded as evidence of anti-union animus.
KAWAHARA NURSERIES, INC., 40 ALRB No. 11

421.23 An employee's failure to seek unemployment insurance benefits following separation from employment is not evidence of a quit rather than a discharge, and is insufficient to justify an inference that the employee quit.
P & M VANDERPOEL DAIRY, 40 ALRB No. 8

423.01 The protected nature of employees' concerted activity does not depend on the reasonableness of the employees' demands. Activity which would otherwise be protected will only lose that status if it is unlawful, violent, in breach of contract, or indefensibly disloyal.
P & M VANDERPOEL DAIRY, 40 ALRB No. 8

423.01 A conditional threat to quit in the future, designed to induce the employer to act favorably regarding a wage demand advanced by employees, constitutes protected concerted activity, and is distinguishable from an actual resignation.
P & M VANDERPOEL DAIRY, 40 ALRB No. 8

423.01 In order to be protected, employee action must be concerted in cases not involving union activity. This generally means that the employee must act in concert with, or in coordination with others (*Meyers Industries, Inc.* (1984) 268 NLRB 493, revd. (1985) 755 F.2d 1481, decision on remand, (1986) 281 NLRB 882, aff'd. (1987) 835 F.2d 1481) – in contrast to the Board's earlier acceptance of the proposition that a single employee could engage in concerted activity where the object of employee protest could be deemed to be collective by virtue of protective legislation. (*Alleluia Cushion Co.* (1975) 221 NLRB 999.)
GURINDER S. SANDHU dba SANDHU BROTHERS POULTRY AND FARMING, 40 ALRB No. 12

423.01 Employee was engaged in concerted activity for the purpose of mutual aid or protection when she, along with some of her co-workers, complained to Respondent's supervisors about sexual harassment and other working conditions.
GURINDER S. SANDHU dba SANDHU BROTHERS POULTRY AND FARMING, 40 ALRB No. 12

423.04 In order to be protected, employee action must be concerted in cases not involving union activity. This generally means that the employee must act in concert with, or in coordination with others (*Meyers Industries, Inc.* (1984) 268 NLRB 493, revd. (1985) 755 F.2d 1481, decision on remand, (1986) 281 NLRB 882, aff'd. (1987) 835 F.2d 1481) – in contrast to the Board's earlier acceptance of the proposition that a single employee could engage in concerted activity where the object of employee protest could be deemed to be collective by virtue of protective legislation. (*Alleluia Cushion Co.* (1975) 221 NLRB 999.)
GURINDER S. SANDHU dba SANDHU BROTHERS POULTRY AND FARMING, 40 ALRB No. 12

423.07 Employees engaged in protected concerted activity in meeting with respondent's manager on company property at conclusion of their shift and asking for a pay raise. Despite resulting delay in start of next shift, the employees' activity was peaceful and did not constitute a sit-down strike.
P & M VANDERPOEL DAIRY, 40 ALRB No. 8

424.04 Employees engaged in protected concerted activity in meeting with respondent's manager on company property at conclusion of their shift and asking for a pay raise. Despite resulting delay in start of next shift, the employees' activity was peaceful and did not constitute a sit-down strike.
P & M VANDERPOEL DAIRY, 40 ALRB No. 8

439.01 Under the ALRA, labor organizations are "certified until decertified" subject to only two exceptions. Once a union has been certified, it remains the exclusive collective bargaining representative of the employees in the unit until it is decertified or a rival union is certified, or until the union becomes defunct or disclaims interest in representing the unit employees. Only if the union has become defunct can it be said to be incapable of representing the employees in the unit; and only if the union has disclaimed its status as the collective bargaining representative can it be said to be unwilling to represent those employees.
ARNAUDO BROTHERS, LP and ARNAUDO BROTHERS, INC., 40 ALRB No. 3

439.10 The ALRB will follow NLRB precedent in determining whether there has been a disclaimer of interest. Thus, a disclaimer by a union must be clear and unequivocal and made in good faith. In order for a disclaimer to be effective, the union's conduct must not be inconsistent with the alleged disclaimer. The party asserting disclaimer of interest bears the burden of proving the disclaimer occurred.
ARNAUDO BROTHERS, LP and ARNAUDO BROTHERS, INC., 40 ALRB No. 3

439.13 Board rejected employer's defense of abandonment to charges of unlawfully failing to timely respond to certified union's request for information and failing to meet with union to bargain, notwithstanding 30-year gap between the union's participation in the most recent negotiating session and its current request for information and for resumption of bargaining. The union's absence alone does not constitute a waiver of its right to represent the employees of the bargaining unit. A period of dormancy of bargaining and union inactivity, even if prolonged, does not establish union abandonment of a certification.
ARNAUDO BROTHERS, LP and ARNAUDO BROTHERS, INC., 40 ALRB No. 3

439.13 Except in cases where the union disclaims interest in representing the bargaining unit or becomes defunct, the union remains certified until removed or replaced through the ALRA's election procedures, regardless of any bargaining hiatus or union inactivity that may have occurred.
TRI-FANUCCHI FARMS, 40 ALRB No. 4

439.13 Employer's claim that it was not obligated to bargain with certified union due to an alleged period of inactivity by the union did not represent a legally cognizable defense to the duty to bargain under the ALRA and the ALJ correctly declined to take evidence on that issue.
TRI-FANUCCHI FARMS, 40 ALRB No. 4

440.03 Workforce turnover does not undermine a union's certification.
ARNAUDO BROTHERS, LP and ARNAUDO BROTHERS, INC.,
40 ALRB No. 7

440.03 Workforce turnover does not undermine a union's certification.
ARNAUDO BROTHERS, LP and ARNAUDO BROTHERS, INC.,
40 ALRB No. 7

440.05 Except in cases where the union disclaims interest in representing the bargaining unit or becomes defunct, the union remains certified until removed or replaced through the ALRA's election procedures, regardless of any bargaining hiatus or union inactivity that may have occurred.
TRI-FANUCCHI FARMS, 40 ALRB No. 4

440.05 Employer's claim that it was not obligated to bargain with certified union due to an alleged period of inactivity by the union did not represent a legally cognizable defense to the duty to bargain under the ALRA and the ALJ correctly declined to take evidence on that issue.
TRI-FANUCCHI FARMS, 40 ALRB No. 4

442.09 Union representative may make recordings while engaged in protected activity on an employer's property, so long as recordings are not used for threats or coercion, unless the recording process is unduly intrusive into restricted workspace and interferes with employees' work.
GEORGE AMARAL RANCHES, INC., 40 ALRB No. 10

443.03 Union found to have violated ALRA section 1154, subdivision (h) by demanding to be recognized as the exclusive representative and threatening to picket until it received such recognition, in an attempt to seek indirect review of a decision by the Board in an underlying representation case certifying a "no union" result. The Board declined to decide if section 1158 is applicable to attempts by a union to seek indirect review of a representation decision through the commission of a technical unfair labor practice because it is an issue of the availability of judicial review that is best left to the appellate courts. Nor is it a question that must be decided by the Board in the first instance in order to preserve the issue for appeal.
UNITED FARM WORKERS OF AMERICA (Corralitos Farms), 40 ALRB No. 6

449.00 Board regulation 20243 contains a procedure for a "motion for decision for lack of evidence" akin to a motion for directed verdict or motion for judgment as a matter of law but does not preclude the making of other types of dispositive motions.
TRI-FANUCCHI FARMS, 40 ALRB No. 4

449.00 The power of the ALJ to consider a demurrer to the answer or motion for judgment on the pleadings is reasonably encompassed within the ALJ's authority to regulate hearings and dispose of motions and is consistent with prior Board decisions that have allowed motions in the nature of summary judgment and judgment on the pleadings.
TRI-FANUCCHI FARMS, 40 ALRB No. 4

450.01 The General Counsel is not required to take employee declarations during the investigation of an unfair labor practice charge. The rule in *Giumarra Vineyard, Inc.* (1977) 3 ALRB No. 21, and codified in Board regulation section 20236 and 20274, requiring worker witness declarations to be turned over to the respondent only after the worker testifies, applies only if worker declarations are taken in the first place.
P & M VANDERPOEL DAIRY, 40 ALRB No. 8

452.06 An unfair labor practice violation not alleged in the complaint may be found where the unlawful activity was related to and intertwined with the allegations in the complaint, and the matter was fully litigated before the Administrative Law Judge.
GEORGE AMARAL RANCHES, INC., 40 ALRB No. 10

455.01 While the Board conducts a de novo review, it need not reiterate or rephrase the findings and conclusions of the ALJ with which it fully agrees and which warrant no further analysis. To do so would engender delay and serve no purpose. Where the Board adopts the findings and conclusions of an ALJ, they become the decision of the Board in the same manner as any findings made directly by the Board.
UNITED FARM WORKERS OF AMERICA (Corralitos Farms), 40 ALRB No. 6

455.02 Employer's exception that unfair labor practice allegation was barred by laches was waived where the employer provided no argument or authority in support of the exception in its brief.
TRI-FANUCCHI FARMS, 40 ALRB No. 4

455.02 A party failing to comply with Board regulation 20282(a) requiring exceptions to include citations to the record and the ALJ's decision may be required to refile or exceptions may be dismissed.
KAWAHARA NURSERIES, INC., 40 ALRB No. 11

456.03 The General Counsel is not required to take employee declarations during the investigation of an unfair labor practice charge. The rule in *Giumarra Vineyard, Inc.* (1977) 3 ALRB No. 21, and codified in Board regulation section 20236 and 20274, requiring worker witness declarations to be turned over to the respondent only after the worker testifies, applies only if worker declarations are taken in the first place.
P & M VANDERPOEL DAIRY, 40 ALRB No. 8

457.01 Employer's exception that unfair labor practice allegation was barred by laches was waived where the employer provided no argument or authority in support of the exception in its brief.
TRI-FANUCCHI FARMS, 40 ALRB No. 4

457.12 The Board has consistently followed the practice of the NLRB in proscribing the relitigation in unfair labor practice proceedings of matters previously resolved in representation proceedings, absent a showing of newly discovered or previously unavailable evidence, or other extraordinary circumstances. A party who attempts to reargue matters previously considered and rejected by the Board has not shown "extraordinary circumstances."
UNITED FARM WORKERS OF AMERICA (Corralitos Farms), 40 ALRB No. 6

457.12 The same standards apply to reconsideration of underlying representation decisions regardless of whether a union was certified or a "no union" result was certified. The duty of the Board is to protect the free choice of employees by fairly evaluating any claims that an election was marred by misconduct that affected free choice, regardless of which party allegedly has engaged in the misconduct. It would be inconsistent with that duty for the Board to apply different standards in that evaluation depending on the ramifications of finding or not finding misconduct, whether it is the initial evaluation or the determination of whether to reconsider an earlier decision.
UNITED FARM WORKERS OF AMERICA (Corralitos Farms), 40 ALRB No. 6

458.01 Even assuming that employee was discharged in retaliation for concertedly complaining about sexual harassment, Board lacks the authority to order Respondent's supervisors to undergo sexual harassment training as a component of the remedy for the unfair labor practice. The Board does not have the authority to issue orders beyond the scope of its statutory mandate, which is the prevention of unfair labor practices, not the substantive prevention of sexual harassment.
GURINDER S. SANDHU dba SANDHU BROTHERS POULTRY AND FARMING, 40 ALRB No. 12

459.01 Where Employer confronted and physically struck a union organizer in the presence of employees, then fired said employees after the confrontation and refused the employees' requests to go back to work, and then offered them reinstatement as they left the premises, the employees' rejection of said offer was reasonable, as they feared the employer, and were thus entitled to backpay from the time of termination until their eventual reinstatement.
GEORGE AMARAL RANCHES, INC., 40 ALRB No. 10

459.01 An award of front pay in lieu of reinstatement falls within the Board's remedial authority. Although front pay is not a replacement for the standard order of reinstatement, there are limited areas where it is appropriate to order front pay in lieu of reinstatement as a remedy, such as cases where there is a "serious question" as to whether reinstatement would make a discriminatee whole. In a case where an unlawfully discharged employee justifiably refused an offer of reinstatement in the absence of any reasonable assurance that she could trust Respondent's supervisors to protect her from sexual harassment, employee is entitled to backpay from the date of her discharge to the date of judgment, and front pay for her lost compensation from the date of judgment until Respondent makes a valid offer of reinstatement which assures that onerous working conditions, including a sexually abusive environment, no longer exist at Respondent's operations. Such award is, of course, subject to the employee's duty to mitigate damages.
GURINDER S. SANDHU dba SANDHU BROTHERS POULTRY AND FARMING, 40 ALRB No. 12

460.06 An offer of employment must be specific, unequivocal and unconditional in order to toll backpay and satisfy a respondent's remedial obligation. Respondent's offer to reinstate discharged employee to her former position met this standard as it was unconditional in that it had no deadline for acceptance, and although offer did not specify a pay rate, since employee had been paid at the minimum wage, the offer could not have been for a lower rate than her former rate of pay.
GURINDER S. SANDHU dba SANDHU BROTHERS POULTRY AND FARMING, 40 ALRB No. 12

460.06 The fact that an employer communicates its offer to reinstate a discharged employee to a Board agent, rather than directly to the employee, does not necessarily make the offer invalid. However, when an employer chooses to offer reinstatement through third parties, the employer bears the risk if the indirect communication results in confusion. If the offer is otherwise valid, and is accurately conveyed by the third party to the employee, the Board will conclude that a facially valid offer was made.
GURINDER S. SANDHU dba SANDHU BROTHERS POULTRY AND FARMING, 40 ALRB No. 12

460.06 Absent special circumstances, the rejection of an employer's unconditional offer of reinstatement ends the accrual of potential backpay liability. An objective standard is used to determine whether an employee's refusal of a reinstatement offer does not operate to end the accrual of backpay. Under this standard, the trier of fact weighs the evidence to determine whether a reasonable person would refuse the offer of reinstatement on the basis of the employer's conduct. Where the employer's conduct was egregiously unlawful, and particularly, where it included physical abuse or harassment or the threat of such abuse or harassment, a refusal to accept reinstatement will be found to be reasonable and will not end the accrual of backpay. In examining whether an employee is obligated to accept reinstatement, Board will consider evidence of sexual harassment in the workplace just as it would consider the evidence of any other type of onerous working conditions.
GURINDER S. SANDHU dba SANDHU BROTHERS POULTRY AND FARMING, 40 ALRB No. 12

460.08 Even though employee was found to have been discharged because of her concerted activity in protesting a change in work assignments and related pay issues, but not because of her concerted activity in complaining about sexual harassment, it is proper to consider the harassment in order to determine whether it was reasonable for the employee to refuse Respondent's offer of reinstatement.
GURINDER S. SANDHU dba SANDHU BROTHERS POULTRY AND FARMING, 40 ALRB No. 12

460.08 Under circumstances where discharged employee, along with Respondent's other female employees, had been subjected to sexual harassment by supervisor, with high likelihood that if reinstated she would continue to work in close proximity to the perpetrator of the harassment without any reasonable assurance that she could trust Respondent's other supervisors to protect her from abuse, employee was justified in rejecting offer of reinstatement; therefore, Respondent's backpay liability did not terminate on the date that employee rejected the offer.
GURINDER S. SANDHU dba SANDHU BROTHERS POULTRY AND FARMING, 40 ALRB No. 12

463.01 Where an employer refused to bargain for the purpose of challenging Board precedent in appellate court but was not seeking review of a certification election, the F&P Growers applies to the issue of whether makewhole is appropriate, rather than the J.R. Norton standard.
TRI-FANUCCHI FARMS, 40 ALRB No. 4

463.01 Where employer's position that it was not obligated to bargain with certified union was based upon an "abandonment" theory that had been clearly rejected by long-standing Board precedent, the employer's position does not further the policies and purposes of the ALRA within the meaning of F&P Growers.
TRI-FANUCCHI FARMS, 40 ALRB No. 4

463.03 Where an employer refused to bargain for the purpose of challenging Board precedent in appellate court but was not seeking review of a certification election, the F&P Growers applies to the issue of whether makewhole is appropriate, rather than the J.R. Norton standard.
TRI-FANUCCHI FARMS, 40 ALRB No. 4

464.01 Agency delay alone does not toll or negate an employer's makewhole liability.
TRI-FANUCCHI FARMS, 40 ALRB No. 4

464.02 Agency delay alone does not toll or negate an employer's makewhole liability.
TRI-FANUCCHI FARMS, 40 ALRB No. 4

466.01 Even assuming that employee was discharged in retaliation for concertedly complaining about sexual harassment, Board lacks the authority to order Respondent's supervisors to undergo sexual harassment training as a component of the remedy for the unfair labor practice. The Board does not have the authority to issue orders beyond the scope of its statutory mandate, which is the prevention of unfair labor practices, not the substantive prevention of sexual harassment.
GURINDER S. SANDHU dba SANDHU BROTHERS POULTRY AND FARMING, 40 ALRB No. 12

502.01 The Board declined to decide if section 1158 is applicable to attempts by a union to seek indirect review of a representation decision through the commission of a technical unfair labor practice because it is an issue of the availability of judicial review that is best left to the appellate courts. Nor is it a question that must be decided by the Board in the first instance in order to preserve the issue for appeal. A Board decision merely sustaining the allegations in the complaint allows the union to perfect an appeal arguing that section 1158 is applicable and will not result in any prejudice to the employer in its efforts to argue before the courts that section 1158 is not applicable in these circumstances.
UNITED FARM WORKERS OF AMERICA (Corralitos Farms), 40 ALRB No. 6

600.03 The ALRB will follow NLRB precedent in determining whether there has been a disclaimer of interest. Thus, a disclaimer by a union must be clear and unequivocal and made in good faith. In order for a disclaimer to be effective, the union's conduct must not be inconsistent with the alleged disclaimer. The party asserting disclaimer of interest bears the burden of proving the disclaimer occurred.
ARNAUDO BROTHERS, LP and ARNAUDO BROTHERS, INC., 40 ALRB No. 3

600.03 If the employer's words create ambiguity as to whether the employee was fired, the burden of the results of the ambiguity fall on the employer.
P & M VANDERPOEL DAIRY, 40 ALRB No. 8

600.03 In order to establish unlawful retaliation, the General Counsel must first prove, by a preponderance of the evidence, that the employee's protected conduct was a substantial or motivating factor in the employee's adverse employment action. The General Counsel satisfies this burden by showing that (1) the employee was engaged in protected activity, (2) the employer had knowledge of the protected activity, and (3) the employer bore animus toward the employee's protected activity. Animus may be inferred from circumstantial evidence, including timing and disparate treatment. If the General Counsel meets this burden, the burden of persuasion shifts to the employer to demonstrate that the same action would have taken place even in the absence of protected activity. (*Wright Line* (1980) 251 NLRB 1083, 1089, enfd. (1st Cir. 1981) 662 F.2d 899.)
GURINDER S. SANDHU dba SANDHU BROTHERS POULTRY AND FARMING, 40 ALRB No. 12

600.04 The timing of the adverse action is an important consideration in establishing animus. Timing alone, however, will not establish a violation. Other circumstantial evidence includes disparate treatment, interrogations, threats and promises of benefits directed toward the protected activity, the failure to follow established rules or procedures, the cursory investigation of alleged misconduct, the commission of other unfair labor practices, false or inconsistent reasons given for the adverse action, the absence of prior warnings, and the severity of the punishment for the alleged misconduct.
GURINDER S. SANDHU dba SANDHU BROTHERS POULTRY AND FARMING, 40 ALRB No. 12

600.14 The Board will not disturb credibility resolutions based on demeanor unless the clear preponderance of evidence demonstrates they are in error. In instances where credibility resolutions are based on factors other than demeanor, such as reasonable inferences, consistency of witness testimony, or the presence or absence of corroboration, the Board will not overrule the ALJ's credibility determinations unless they conflict with well-supported inferences from the record considered as a whole. Also, it is both permissible and not unusual to credit some but not all of a witness's testimony.
P & M VANDERPOEL DAIRY, 40 ALRB No. 8

600.17 An employee's failure to seek unemployment insurance benefits following separation from employment is not evidence of a quit rather than a discharge, and is insufficient to justify an inference that the employee quit.
P & M VANDERPOEL DAIRY, 40 ALRB No. 8

600.17 Adverse inferences are permitted where a party fails to produce evidence or witnesses under its control, or introduces weaker or less satisfactory evidence than is within its power to produce. However, when a witness is equally available to either party, no unfavorable inference should be drawn from the failure to call that witness.
P & M VANDERPOEL DAIRY, 40 ALRB No. 8

604.01 The doctrine of laches is not available as a defense to unfair labor practice charges under the ALRA.
TRI-FANUCCHI FARMS, 40 ALRB No. 4

604.01 Even assuming that the doctrine of laches applies to unfair labor practice allegations under the ALRA, employer's laches defense failed where employer did not demonstrate that it was prejudiced by union's alleged delay in pursuing bargaining.
TRI-FANUCCHI FARMS, 40 ALRB No. 4

604.02 The doctrine of unclean hands is not available as a defense to unfair labor practice charges under the ALRA.
TRI-FANUCCHI FARMS, 40 ALRB No. 4

604.02 Even assuming that the doctrine of unclean hands applies to unfair labor practice allegations under the ALRA, employer's unclean hands defense failed where employer did not demonstrate prejudice.
TRI-FANUCCHI FARMS, 40 ALRB No. 4

700.06 Requirement that employer have "committed an unfair labor practice" is satisfied when the Board has issued a final decision and order holding that an unfair labor practice ("ULP") has occurred, regardless of whether said decision and order has been reduced to a judgment or is undergoing appellate review.
PEREZ PACKING, INC., 40 ALRB No. 1

700.06 Although initial demand to bargain is a prerequisite for MMC, nothing in the MMC process requires that the initial demand to bargain must have been made before January 1, 2003. Rather, the law requires only that for a union certified before that date, the renewed demand to bargain must have been made on or after that date.
PEREZ PACKING, INC., 40 ALRB No. 5

701.03 Hearing necessary where parties have made competing factual allegations that, if true, may provide the basis for estopping either party from asserting or denying the existence of the initial and/or renewed requests to bargain that are prerequisite to a referral to mandatory mediation and conciliation.
PEREZ PACKING, INC., 40 ALRB No. 1

701.11 While the statutory language pertaining to the mediator's consideration of the factors set forth in Labor Code section 1164(e) is permissive, in this context the term "may" means "must".
ARNAUDO BROTHERS, LP and ARNAUDO BROTHERS, INC.,
40 ALRB No. 7

701.11 The factors listed in Labor Code 1164(e) are not exhaustive and there is no question that the mediator is not limited to the specific categories listed.
ARNAUDO BROTHERS, LP and ARNAUDO BROTHERS, INC.,
40 ALRB No. 7

701.11 Under the canon of ejusdem generis, the nature of the factors to be considered by mediators as enumerated in Labor Code section 1164(e) leads to the conclusion that the Legislature did not intend for mediators to consider the degree of employee support for the union when fashioning the terms of MMC contracts.
ARNAUDO BROTHERS, LP and ARNAUDO BROTHERS, INC.,
40 ALRB No. 7

701.11 Given that loss of majority is irrelevant to the continuing validity of a union's certification, it would be highly anomalous for an alleged loss of employee support to be treated as a factor undermining a union's position in MMC proceedings or as justifying ordering less favorable terms than would otherwise be ordered.
ARNAUDO BROTHERS, LP and ARNAUDO BROTHERS, INC., 40 ALRB No. 7

701.11 There is no indication that MMC proceedings, which are designed to improve bargaining relationships by forming initial contracts, were intended to become a venue for litigating loss of majority allegations, nor would such a result further the purposes of the MMC statutes or the ALRA as a whole.
ARNAUDO BROTHERS, LP and ARNAUDO BROTHERS, INC., 40 ALRB No. 7

701.11 Mediator's ruling limiting the duration of a union security clause in an MMC contract was arbitrary and capricious where the mediator based his ruling on his suspicion that bargaining unit employees might no longer 701.11wish to be represented by the union.
ARNAUDO BROTHERS, LP and ARNAUDO BROTHERS, INC., 40 ALRB No. 7

701.11 A mediator in an MMC case is not permitted to consider the degree of employee support for the union in setting the terms of the MMC contract.
ARNAUDO BROTHERS, LP and ARNAUDO BROTHERS, INC., 40 ALRB No. 7

701.11 A desire on the part of bargaining unit employees to have an election is not a factor that may be considered by a mediator in an MMC case.
ARNAUDO BROTHERS, LP and ARNAUDO BROTHERS, INC., 40 ALRB No. 7

701.11 Where the mediator relied upon purported lack of employee support for the union and a purported desire on the part of employees for an election, his ruling was arbitrary and capricious.
ARNAUDO BROTHERS, LP and ARNAUDO BROTHERS, INC., 40 ALRB No. 7

701.11 A mediator is not required to treat past MMC reports as binding precedent, but Labor Code 1164(e) does require the mediator to consider comparable contracts when ruling on competing proposals.
ARNAUDO BROTHERS, LP and ARNAUDO BROTHERS, INC., 40 ALRB No. 7

701.11 Where a mediator had an established record of ordering three-year contracts in prior MMC cases, the mediator was required to explain his decision to order a one-year contract under apparently similar circumstances.
ARNAUDO BROTHERS, LP and ARNAUDO BROTHERS, INC., 40 ALRB No. 7

701.12 Transcript of final MMC mediation session could not serve as mediator's report where the transcript was filed by the parties rather than the mediator (Labor Code 1164(d)) and where the document was not signed by the mediator (Board regulation 20407(d)).
ARNAUDO BROTHERS, INC., 40 ALRB No. 2

701.12 Transcript of final MMC mediation session could not serve as mediator's report where the transcript failed to establish the final terms of the collective bargaining agreement in that the transcript referenced sections and clauses to be included in the contract without providing the substance of those provisions.
ARNAUDO BROTHERS, INC., 40 ALRB No. 2

701.12 Given that some or all of a mediator's report in an MMC case may become the final order of the Board and thus the final collective bargaining agreement, any document submitted as a report should allow the parties and the affected employees to determine the final terms of the agreement.
ARNAUDO BROTHERS, INC., 40 ALRB No. 2

701.12 Mediator's "Supplemental Report" remanding the issue of second-year wage rates to parties for negotiations without stating any basis for the determination and without any reference to the record failed to meet the minimum standards for a mediator's report as set forth in the MMC statutes and regulations.
ARNAUDO BROTHERS, LP et al., 40 ALRB No. 9

702.05 Mediator's finding of fact that unit employees never had an opportunity to express their wishes concerning union representation was clearly erroneous where employees had selected the union through a secret ballot election.
ARNAUDO BROTHERS, LP and ARNAUDO BROTHERS, INC.,
40 ALRB No. 7

702.06 Where a mediator had an established record of ordering three-year contracts in prior MMC cases, the mediator was required to explain his decision to order a one-year contract under apparently similar circumstances.
ARNAUDO BROTHERS, LP and ARNAUDO BROTHERS, INC.,
40 ALRB No. 7

702.06 Where the mediator relied upon purported lack of employee support for the union and a purported desire on the part of employees for an election, his ruling was arbitrary and capricious.
ARNAUDO BROTHERS, LP and ARNAUDO BROTHERS, INC.,
40 ALRB No. 7

702.06 Mediator's ruling limiting the duration of a union security clause in an MMC contract was arbitrary and capricious where the mediator based his ruling on his suspicion that bargaining unit employees might no longer wish to be represented by the union.
ARNAUDO BROTHERS, LP and ARNAUDO BROTHERS, INC.,
40 ALRB No. 7