STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

GERAWAN FARMING, INC.,	)	Case Nos. 2015-CE-023-VIS
	)	2014-CE-015-VIS
Respondent,	)	2014-CE-021-VIS
	)	2014-CE-025-VIS
and	)	
	)	
UNITED FARM WORKERS OF AMERICA,	)	45 ALRB No. 3
	)	
Charging Party.	)	(January 24, 2019)
	)	

DECISION AND ORDER

On October 18, 2018, administrative law judge (ALJ) Mary Miller Cracraft issued a decision and recommended order in this matter involving charging party United Farm Workers of America (UFW) and respondent Gerawan Farming, Inc. (Gerawan). The ALJ concluded Gerawan committed unfair labor practices in violation of Labor Code section 1153, subdivision (a) by adopting a workplace rule prohibiting photography and video recording on its property in response to union activity, and by terminating farmworker Pablo Gutierrez's (Gutierrez) employment in July 2014 for violating this unlawfully promulgated rule.[1] The ALJ dismissed two other unfair labor practice allegations asserting Gerawan unlawfully terminated several employees without first

[1] We will refer to this rule as the "no-camera rule."

providing the UFW with notice and an opportunity to bargain, and for failing to respond to an information request concerning one employee's termination.[2]

Gerawan filed exceptions to the two unfair labor practice findings.[3] No exceptions were filed concerning the two unfair labor practice allegations dismissed by the ALJ. For the reasons set forth below, we reverse the two unfair labor practice findings by the ALJ and DISMISS the consolidated unfair labor practice complaint in its entirety.[4]

BACKGROUND

Gerawan maintains a no-camera rule at its worksites. The exact timing of Gerawan's promulgation of the rule is not entirely clear from the record, but we will

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[2] The allegation that Gerawan committed a unilateral change by terminating the employees without providing the UFW with notice or an opportunity to bargain was dismissed in a prehearing order following a motion for judgment on the pleadings filed by Gerawan. The ALJ incorporated that order in her final recommended decision in the event any party wished to file exceptions to it.

[3] Gerawan in its exceptions accuses the ALJ of bias and as unable "to discharge the obligations of the ALRA in a fair and lawful manner." We have reviewed the record and find no basis for these claims. Gerawan also repeats in this case its claims of bias against Board Member Isadore Hall III. We reject this claim for reasons previously stated. (See *Gerawan Farming, Inc.* (2018) 44 ALRB No. 11, p. 2, fn. 1.)

[4] We affirm the ALJ's dismissal of the two unfair labor practice allegations to which no exceptions were taken. With respect to the unilateral change allegation, we agree with the ALJ's dismissal based on *Total Security Management Illinois 1, LLC* (2016) 364 NLRB No. 106. Moreover, our recent decision in *Gerawan Farming, Inc.* (2018) 44 ALRB No. 10 decertifying the UFW as the exclusive bargaining representative of Gerawan's agricultural employees further requires dismissal of this allegation. (*Gerawan Farming, Inc.* (2018) 44 ALRB No. 11, p. 2, citing *Nish Noroian Farms* (1982) 8 ALRB No. 25, p. 14.) We additionally affirm the ALJ's dismissal of the information request allegation on this same basis. (*Ibid.*)

assume for purposes of this decision that the rule was promulgated sometime between late 2012 and late 2013, as the ALJ found. Gerawan has communicated the rule to its employees via their paystubs, a method Gerawan often uses to communicate new workplace rules and policies to its employees. Gerawan's no-camera rule, as set forth on employee paystubs, states in its entirety:

> To keep proprietary information secure, it has always been against company policy to photograph or videotape on company property without the owners' permission. Also, now some employees have complained that photography and videotaping are being done in violation of their right to privacy. So, please be reminded that as a condition of your employment you may not do any photography or videotaping of any kind. Any photos or video that you possess that was produced on company property belongs to Gerawan Farming and must immediately be sent to security@gerawan.com and deleted from your device.

Notices concerning this prohibition against photography and video-recording also are posted on signs near ranch entrances and the packing facility.

On July 24, 2014, Gerawan crew boss Martin Elizondo Cruz saw Gutierrez holding a cell phone like he was taking pictures or video-recording during his lunch break. Elizondo approached Gutierrez concerning this conduct, and then went to the office to report the violation of Gerawan's no-camera rule. Gutierrez's employment with Gerawan was terminated following this incident.

On July 28, 2014, the UFW filed an unfair labor practice charge alleging Gerawan terminated Gutierrez for violating its no-camera rule as a pretext for his support for the UFW. The General Counsel subsequently consolidated this charge with several

others in a complaint issued June 29, 2017. Insofar as is relevant here, the second cause of action of the General Counsel's complaint alleges Gerawan unlawfully terminated Gutierrez's employment in retaliation for engaging in protected activity. The fourth cause of action alleges Gerawan unlawfully "maintained and enforced" a no-camera rule that interferes with and restrains employees in the exercise of rights under the Agricultural Labor Relations Act (ALRA or Act)[5] "under applicable National Labor Relations Board precedent in *Whole Foods Market, Inc.*, 363 NLRB No. 87 (2015)."

The case proceeded to a one-day hearing held on June 20, 2018. The parties filed post-hearing briefs, after which the ALJ issued her recommended decision and order on October 18. The parties all agreed the validity of Gerawan's no-camera rule depended on application of the test outlined by the National Labor Relations Board (NLRB) in *The Boeing Co.* (2017) 365 NLRB No. 154 (*Boeing*), which overruled the "reasonably construe" prong of *Lutheran Heritage Village-Livonia* (2004) 343 NLRB 646. The ALJ, however, concluded:

> It is not necessary to analyze the facts in this case pursuant to the first prong of *Lutheran Heritage* as revised by *Boeing*. That is because *Boeing* did not disturb the second prong of *Lutheran Heritage* which holds that employers may not promulgate new rules in response to union or protected activity. Thus, an employer violates the Act by adopting a rule in response to union or protected activity.

The ALJ proceeded to find Gerawan *promulgated* its no-camera rule in response to the UFW's renewed bargaining demand and increased activity at its farm in

[5] The ALRA is codified at Labor Code section 1140 et seq.

the late 2012 to late 2013 timeframe, and that the rule thus "violates the Act and is unlawful because it was adopted in reaction to the presence of the UFW." From there, the ALJ found Gerawan's termination of Gutierrez for violating this unlawfully adopted rule also was unlawful. In addition to the usual notice remedies, the ALJ ordered Gerawan to reinstate Gutierrez with backpay and to cease-and-desist maintaining and enforcing its no-camera rule and to notify employees it has rescinded the rule.

ANALYSIS

The No-Camera Rule

A. Applicable NLRB Precedent and Legal Context for Our Analysis

As we are bound to follow applicable precedent developed under the National Labor Relations Act (NLRA[6]), the NLRB's decisions in *Lutheran Heritage* and *Boeing* frame our analysis of the validity of Gerawan's no-camera rule. (Lab. Code, § 1148.) The NLRB in *Lutheran Heritage* set forth a standard for evaluating facially neutral employer workplace rules, recognizing an employer violates the NLRA "when it maintains a work rule that reasonably tends to chill employees in the exercise of their Section 7 rights." (*Lutheran Heritage*, *supra*, 343 NLRB 646.) Under the standard adopted by the NLRB in that case,

> If the rule does not explicitly restrict activity protected by Section 7, the violation is dependent upon a showing of one of the following: (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights.

[6] The NLRA is codified at 29 U.S.C. § 151 et seq.

(*Id.* at p. 647.)

The NLRB in *Boeing* heavily criticized the "reasonably construe" prong set forth in *Lutheran Heritage* and expressly overruled it. (*Boeing*, *supra*, 365 NLRB No. 154, *6.) The NLRB then articulated a new standard to replace *Lutheran Heritage*'s "reasonably construe" inquiry:

> Under the standard we adopt today, when evaluating a facially neutral policy, rule or handbook provision that, when reasonably interpreted, would potentially interfere with the exercise of NLRA rights, the Board will evaluate two things: (i) the nature and extent of the potential impact on NLRA rights, and (ii) legitimate justifications associated with the rule.

(*Id.* at *12.)

The NLRB further delineated three categories into which it would place employer workplace policies as a result of this balancing test. (*Boeing*, *supra*, 365 NLRB No. 154, *13-14.) "Category 1" includes rules the NLRB finds lawful because the rule, "when reasonably interpreted," does not prohibit or interfere with protected rights or because the potential adverse impact on such rights is outweighed by justifications associated with the rule. (*Id.* at *13.) "Category 2" includes rules warranting individualized scrutiny on a case-by-case basis to determine whether the rule prohibits or interferes with protected rights and, if so, whether such adverse impacts are outweighed by legitimate justifications. (*Id.* at *13-14.) "Category 3" includes rules the NLRB finds unlawful to maintain because they would prohibit or limit protected activity and such adverse impacts are not outweighed by justifications for the rule. (*Id.* at *14.)

B. Gerawan's Maintenance of Its No-Camera Rule is Lawful

As stated above, the ALJ found Gerawan committed an unfair labor practice by promulgating its no-camera rule in response to union activity. Gerawan contends in its exceptions this was error and that a claim based on its alleged unlawful promulgation of the rule is beyond the scope of General Counsel's pleadings and issues litigated at hearing. For the following reasons, we agree.

The General Counsel's consolidated unfair labor practice complaint plainly challenges Gerawan's *maintenance* and *enforcement* of the no-camera rule, specifically citing as precedent for this allegation the NLRB's decision in *Whole Foods Market*, *supra*, 363 NLRB No. 87. The sole issue in *Whole Foods Market* was whether the employer's mere maintenance of a rule prohibiting recording in the workplace was unlawful. The NLRB found it was under prong 1 of the *Lutheran Heritage* test, i.e., employees reasonably would construe the rule to prohibit recording protected activity. (*Id.* at *14.) The employer's promulgation of its no-recording rule was not at issue. (See *id.* at *9.) The ALJ's second case management summary notes *Whole Foods Market* as the authority for the General Counsel's allegation concerning Gerawan's no-camera rule. The ALJ's prehearing conference summary reiterates this, and further describes the test adopted by the NLRB in *Boeing* to replace the "reasonably construe" inquiry of *Lutheran Heritage* as providing the framework for determining the validity of Gerawan's no-camera rule based on the General Counsel's allegation. Consistent with this, the General

Counsel in her opening statement at the hearing asserted that Gerawan's no-camera rule must be evaluated under "the balancing test set forth under the *Boeing Company* case."

The record thus establishes the General Counsel pursued her claim regarding Gerawan's no-camera rule on a narrow legal theory focusing on Gerawan's maintenance and enforcement of the rule, without any alternative or separate challenge asserted to the circumstances under which it was adopted. (See *Eagle Express Co.* (1984) 273 NLRB 501, 503; *Lamar Advertising of Hartford* (2004) 343 NLRB 261, 265.) An employer's unlawful promulgation of a rule is distinct from the employer's ongoing maintenance of an unlawful rule; "both may be unlawful, and, if so, both would involve illegal actions that occur at different times." (*Oaktree Capital Management, LLC* (2009) 353 NLRB 1242, 1271, adopted in *Oaktree Capital Management, LLC* (2010) 355 NLRB 706; *T-Mobile USA, Inc.* (2016) 363 NLRB No. 171, *3, fn. 4.) Indeed, contrary to the situations in *Oaktree Capital* and *T-Mobile* where the unfair labor practice complaints challenged both the employers' promulgation and maintenance of certain workplace rules, the General Counsel's complaint in this case challenged only the latter with no mention of any challenge to Gerawan's promulgation of its no-camera rule. The validity of Gerawan's no-camera rule was litigated through the completion of the hearing on this legal theory challenging only the rule's ongoing maintenance, and all parties agreed the NLRB's *Boeing* decision governed the determination of its validity. Accordingly, on the record before us, we conclude the ALJ erred by analyzing the issue and finding a

violation based on Gerawan's promulgation of its no-camera rule under prong 2 of *Lutheran Heritage*.

In reaching this conclusion, we reject the General Counsel's contention that the ALJ's unfair labor practice finding may be sustained under the unalleged violation doctrine. Under this doctrine an unfair labor practice not alleged in a complaint nevertheless may be found where the unlawful conduct "was related to and intertwined with the allegations in the complaint, and the matter was fully litigated before the Administrative Law Judge." (*George Amaral Farms* (2014) 40 ALRB No. 10, p. 17, quoting *Doral Hotel & Country Club* (1979) 240 NLRB 1112.) We cannot find on this record that the issue of Gerawan's promulgation of its no-camera rule was "fully litigated." While there was some testimony concerning the timing of Gerawan's promulgation of the rule, such testimony was limited and vague, at best. The ALJ recognized the record contained no specific evidence concerning when the rule was adopted. The NLRB has found "the simple presentation of evidence important to an alternative claim does not satisfy the requirement that any claim at variance from the complaint be 'fully and fairly litigated' in order for the Board to decide the issue without transgressing [the respondent's] due process rights." (*United Mine Workers of America, District 29* (1992) 308 NLRB 1155, 1158, citing *NLRB v. Quality C.A.T.V., Inc.* (7th Cir. 1987) 824 F.2d 542, 547.)[7]

[7] Apart from the fact that it was not fully litigated, a challenge to Gerawan's promulgation of its no-camera rule likely would be barred by the ALRA's six-month limitations period, a point the General Counsel acknowledges in asserting in its reply to

Having concluded the ALJ erroneously found a promulgation-based violation that was neither alleged in the complaint nor litigated at the hearing, we now turn to addressing the merits of whether Gerawan committed an unfair labor practice by maintaining and enforcing the no-camera policy. Under *Boeing* and the facts of this case, we believe the answer must be no. The NLRB in *Boeing* placed no-camera rules like the one maintained by Gerawan in Category 1 — facially neutral, lawful workplace rules. (*Boeing*, *supra*, 365 NLRB No. 154, *13, 74.) While the NLRB found Boeing's proffered justifications for its no-camera rule "especially compelling,"[8] the NLRB determined "that no-camera rules, in general, fall into Category 1, types of rules that the Board will find lawful ...." (*Id.* at *74.) The NLRB further found in reaching this conclusion that any negative impact posed by such a rule on employee protected activity generally was "slight," noting that it does not prohibit employees from engaging in protected activities but only restricts their ability to take pictures or recordings of such activities. (*Id.* at *83-84.) Gerawan's no-camera rule, like the rule at issue in *Boeing*, broadly prohibits the use of cameras in the workplace, and we find no basis to distinguish it from the rule found lawful in *Boeing*. *Boeing* holds that such a rule does not prevent

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Gerawan's exceptions that a finding the rule was unlawfully promulgated "may well be beyond the statute of limitations." (Lab. Code, § 1160.2; see *Oaktree Capital*, *supra*, 353 NLRB 1242, 1271 ["An employer may violate the Act by promulgating an unlawful rule, for which the violation would generally occur on the date the rule is promulgated"]; *T-Mobile USA*, *supra*, 363 NLRB No. 171, *3, fn. 4.)

[8] Boeing designs and manufactures military and commercial aircraft and contracts with the United States government, thus necessitating various security measures to protect sensitive information and against threats of espionage or attack. (*Boeing*, *supra*, 365 NLRB No. 154, *4, 75-83.)

employees from engaging in protected activities, and there is no evidence that Gerawan's no-camera rule actually interfered with or prevented employees from engaging in protected activity. (*Id.* at *84.)

In light of the foregoing, we find Gerawan's no-camera rule must be upheld pursuant to the analysis in *Boeing*. (See Lab. Code, § 1148.)[9] Therefore, we dismiss the claim Gerawan unlawfully maintained this rule.

Gerawan Did Not Commit an Unfair Labor Practice When It Terminated Gutierrez

The ALJ found Gerawan unlawfully terminated Gutierrez's employment based solely on her finding the no-camera rule under which he was disciplined was unlawfully adopted. Because we reverse the ALJ's finding Gerawan unlawfully adopted its no-camera rule,[10] we proceed to analyze whether Gutierrez was unlawfully terminated by applying a *Wright Line* analysis.[11] (*Wright-Line* (1980) 251 NLRB 1083, enfd. in *NLRB v. Wright Line* (1st Cir. 1981) 662 F.2d 899.) Under that test:

> The General Counsel bears the initial burden of setting forth a prima facie case of retaliation for engaging in protected concerted activity. This is established by showing that: 1) the

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[9] This is not to say Gerawan's enforcement of the rule is immune from challenge in future cases. As the NLRB explained in *Boeing*, *supra*, 365 NLRB No. 154, *16-17, "even when a rule's *maintenance* is deemed lawful, the Board will examine the circumstances where the rule is *applied* to discipline employees who have engaged in NLRA-protected activity, and in such situations, the discipline may be found to violate the Act." (Emphasis in original.)

[10] To be clear, we make no findings concerning whether Gerawan's promulgation of its no-camera rule was lawful as that issue is not properly before us. (*Linwood Care Center* (2018) 367 NLRB No. 14, *12, fn. 13.)

[11] We note the General Counsel and UFW both analyzed the issue under this framework before the ALJ.

> employee engaged in such activity; 2) the employer had knowledge of the activity; and 3) the adverse action taken by the employer was motivated at least in part by the protected activity.

(*H & R Gunland Ranches, Inc.* (2013) 39 ALRB No. 21, p. 3.)

After a prima facie case is established, the burden then shifts to the respondent to show it would have taken the same action in the absence of the protected activity. (*H & R Gunland Ranches*, *supra*, 39 ALRB No. 21, p. 4; *South Lakes Dairy Farm* (2013) 39 ALRB No. 1, at ALJ Dec. p. 45.) It is the General Counsel, however, who bears the ultimate burden of establishing an unfair labor practice, i.e., retaliatory discharge, by a preponderance of the evidence. (*Wright Line*, *supra*, 251 NLRB 1083, 1088, fn. 11.)

At the outset, Gerawan asserts this allegation must be dismissed outright because Gutierrez did not testify at the hearing. We find no merit in this contention. The Board previously has rejected similar arguments. (*Superior Farming Co.* (1982) 8 ALRB No. 77, p. 2 ["the testimony of the discriminatee or other victim of an unfair labor practice is not an essential element in proving a violation of the Act"], citing *George Lucas and Sons* (1979) 5 ALRB No. 62, pp. 3-4.) Nevertheless, while evidence from other sources often may be sufficient to prove a prima facie case of retaliation (*Superior Farming Co.*, *supra*, 8 ALRB No. 77, p. 2), on the record presently before us we find the General Counsel has failed to make such a showing.

The record does not establish Elizondo had knowledge of Gutierrez engaging in any alleged protected activity. The ALJ found Gutierrez was terminated "for

utilizing his cell phone to document his working conditions during his lunch time in violation of the no photography – no video rule." However, although the hearing transcript suggests a video was taken by Gutierrez, neither the video nor any transcript of it was offered or admitted into evidence and no witnesses were examined regarding the contents of the video allegedly taken by Gutierrez on the day his employment was terminated. Alejandro Paniagua, a farmworker who worked in the same crew as Gutierrez at the time he was terminated and who testified as a witness for the General Counsel, testified he saw Gutierrez record with his cell phone one time during July 2014, but he only recorded casual discussion such as asking a co-worker "how does this lunch taste to you" or "how are you feeling." It is undisputed that Elizondo only observed Gutierrez's conduct in using his cell phone to take pictures or a recording from a distance, and the record does not support a finding Gutierrez was engaged in any protected activity when photographing or recording. The record further does not establish Elizondo knew of any protected activity engaged in by Gutierrez when he reported this violation of the no-camera rule to the office.

Even assuming the General Counsel could establish Gutierrez engaged in protected activities and Gerawan knew of them, there is no evidence on this record to support a finding that Gerawan was motivated by Gutierrez's protected activities when it decided to terminate his employment. Turning to the various types of circumstantial evidence the Board generally considers, we find the evidence lacking as to each. (See *H & R Gunland Ranches*, *supra*, 39 ALRB No. 21, pp. 3-4.) There is no evidence that

Gerawan's termination of Gutierrez's employment occurred in close temporal proximity to any protected activity. (Cf. *South Lakes Dairy Farm*, *supra*, 39 ALRB No. 21, at ALJ Dec. p. 46 [even where temporal proximity exists some other circumstantial evidence of motive is necessary].) There is no evidence Gerawan deviated from or did not follow its established rules or procedures in the reporting of Gutierrez's violation of the rule or the termination of his employment for violating the rule, nor is there any evidence of Gerawan disparately applying its no-camera rule.

Accordingly, we conclude on the record before us the General Counsel has not established a prima facie case Gerawan unlawfully terminated Gutierrez for violating its no-camera rule as a pretext for Gutierrez's alleged support for the UFW. Therefore, we dismiss this allegation of the complaint.

ORDER

The Board hereby DISMISSES the consolidated unfair labor practice complaint in its entirety.

DATED: January 24, 2019

Genevieve A. Shiroma, Chairwoman

Cathryn Rivera-Hernandez, Member

Isadore Hall III, Member

CASE SUMMARY

GERAWAN FARMING, INC.
(United Farm Workers of America)

45 ALRB No. 3
Case Nos. 2015-CE-023-VIS
2014-CE-015-VIS
2014-CE-021-VIS
2014-CE-025-VIS

Background

Respondent Gerawan Farming, Inc. (Gerawan) maintains a workplace rule that prohibits employees from taking photographs or recordings on Gerawan's property. On July 24, 2014, Gerawan crew boss Martin Elizondo Cruz saw farmworker Pablo Gutierrez holding a cell phone like he was taking pictures or video-recording during his lunch break. Elizondo reported this violation of Gerawan's no-camera rule, and Gutierrez's employment with Gerawan was terminated following this incident. The administrative law judge (ALJ) found Gerawan unlawfully promulgated its no-camera rule in response to the United Farm Workers of America's (UFW) renewed bargaining demand and increased activity in the late 2012 to 2013 timeframe. The ALJ further found Gerawan's termination of Gutierrez's employment for violating this unlawfully promulgated rule also was unlawful.

Board Decision

The Agricultural Labor Relations Board (ALRB or Board) considered Gerawan's exceptions, and reversed the ALJ's unfair labor practice findings. The Board determined that the General Counsel did not plead or litigate a claim that Gerawan unlawfully promulgated its no-camera rule, but rather adopted a narrow theory of violation based solely on Gerawan's ongoing maintenance of the rule. The Board thus reversed the ALJ's finding Gerawan unlawfully promulgated the rule because that claim was neither alleged nor fully litigated. The Board then upheld Gerawan's maintenance of its no-camera rule under the National Labor Relations Board's decision in *The Boeing Co.* (2017) 365 NLRB No. 154. With respect to Gerawan's termination of Gutierrez's employment, the Board concluded the General Counsel failed to establish a prima facie case that Gerawan terminated him in retaliation for his alleged support for the UFW. Accordingly, the Board dismissed the unfair labor practice complaint in its entirety.

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STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

GERAWAN FARMING, INC. Respondent, and **UNITED FARM WORKERS OF AMERICA,** Charging Party	Case Nos.: 2015-CE-023-VIS 2014-CE-015-VIS 2014-CE-021-VIS 2014-CE-025-VIS

DECISION AND ORDER

Appearances:

For the General Counsel of the ALRB
Chris Schneider, Regional Director
Merced Barrera, Graduate Legal Assistant

For the Charging Party United Farm Workers of America
Charlotte Mikat-Stevens, Legal Fellow
Brenda Rizo, Paralegal
Martinez Aguilasocho & Lynch, A Professional Law Corporation

For the Respondent Gerawan Farming, Inc.
Ronald H. Barsamian, Esq.
Faith Driscoll, Esq.
Barsamian & Moody

Michael Mallery, General Counsel
Jose Erevia, Compliance Manager
Gerawan Farming, Inc.

The issues in these consolidated cases are:

- Whether Gerawan Farming, Inc. (Gerawan or Respondent) maintained and enforced a no photography – no video rule which interfered with and restrained employees in the exercise of their right to engage in protected and/or union activity in violation of Section 1153 (a) of the Agricultural Labor Relations Act (ALRA or the Act)[1];

- Whether in July 2014 Pablo Gutierrez (Gutierrez) was unlawfully discharged pursuant to the above no photography-no video rule in violation of Section 1153 (a) of the Act;[2] and

- Whether in May 2015 Respondent unlawfully failed to provide information to United Farm Workers of America (UFW) in violation of Section 1153 (e) and (a) of the Act.[3]

The consolidated complaint ("complaint") in this proceeding issued on June 29, 2017. Respondent duly answered on July 12, 2017, admitting and denying certain allegations and asserting various affirmative defenses. Hearing was held in Fresno on June 20, 2018.[4] All parties were provided an opportunity to call and fully examine witnesses. On the record as a whole, including the briefs of all parties, and after assessing the relative credibility of various witnesses,[5] the following findings of fact and conclusions of law are made.

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[1] California Labor Code Secs. 1140-1163. The parties agree that Respondent is an agricultural employer within the meaning of 1140.4 (c) and that United Farm Workers of America (UFW) is a labor organization within the meaning of 1140.4 (f). Thus, the ALRB has jurisdiction of this matter. The underlying unfair labor practice charge regarding this allegation was filed by the UFW on September 16, 2014 in Case No. 2014-CE-025-VIS.

[2] The underlying unfair labor practice charge regarding this allegation was filed by UFW on July 28, 2014 in Case No. 2014-CE-015-VIS.

[3] The underlying unfair labor practice charge regarding this allegation was filed by UFW on July 2, 2015 in Case No. 2015-CE-023-VIS.

[4] The hearing was conditionally closed on June 20, 2018, subject to potential surrebuttal evidence. No surrebuttal evidence was offered. The hearing was unconditionally closed by Order of June 28, 2018.

[5] Specific credibility resolutions have been made based upon a review of the entire record and all exhibits in this proceeding. Witness demeanor and inherent probability of the testimony have been utilized to assess credibility. Testimony contrary to the factual findings has been discredited on some occasions because it was in conflict with credited testimony or documents or because it was inherently incredible and unworthy of belief.

A. Background

On July 8, 1992, UFW was certified as the exclusive representative of all agricultural employees employed by Gerawan.[6] In October 2012, after a lengthy absence, the UFW sent Gerawan a request to bargain.[7]

Unfair labor practices evincing animus toward UFW ensued. In March 2013, Gerawan engaged in direct dealing with its employees by unilaterally implementing two wage increases and distributing flyers to employees advising that it had made the decision to grant the wage increases on its own and it hoped the union would not delay or obstruct the increases.[8] In October 2013, Gerawan unlawfully assisted in circulation of the decertification petition.[9] On October 25, 2013, Gerawan unlawfully implemented a temporary wage increase to its grape packing employees.[10]

On that same date, a decertification petition was filed.[11] A secret ballot election was conducted on November 5, 2013.[12] The ballots were impounded and no tally of ballots was issued at that time due, inter alia, to alleged unlawful taint of the petition for decertification.[13]

The ballots were opened and counted on September 18, 2018, on remand from the California Court of Appeal for the Fifth Appellate District.[14] As a result of the ballot count and the Board's finding that unfair labor practices did not interfere with employee free choice to such an extent that it affected the results of the election, the UFW lost its status as exclusive

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[6] *Gerawan Ranches* (1992) 18 ALRB No., pp. 1-2, 19-20.

[7] *Gerawan Farming, Inc.* (2014) 42 ALRB No. 1, decision of Administrative Law Judge (ALJD), p. 4.

[8] *Gerawan Farming, Inc.* (2018) 44 ALRB No. 10, p. 5.

[9] Id., 44 ALRB No. 10, pp. 2-3.

[10] Id., 44 ALRB No. 10, p. 3.

[11] Id., 44 ALRB No. 10, p. 2.

[12] Id.

[13] *Gerawan Farming, Inc.* (2014) 42 ALRB No. 1, pp. 68-69 (The ALRB held Gerawan's unlawful and/or objectionable conduct tainted the entire decertification process. Thus, the decertification petition was dismissed and the decertification election set aside).

[14] *Gerawan Farming, Inc. v. ALRB* (2018) 23 Cal.App.5th 1129 (reversing in part and remanding 42 ALRB No. 1.

representative of Gerawan's agricultural employees.[15] Throughout the period from 1992 to 2018, no collective-bargaining agreement was ever implemented.[16]

B. No Photography – No Video Rule

1. Facts

It is undisputed that Respondent maintains a no photography – no video rule[17] which states:

> To keep proprietary information secure, it has always been against company policy to photograph or videotape on company property without the owner's permission. Also, now some employees have complained that photography and video taping are being done in violation of their right to privacy. So, please be reminded that **as a condition of employment you may not do any photography or videotaping of any kind.** Any photo or video that you possess that was produced on company property belongs to Gerawan Farming and must immediately be sent to security@gerawan.com and then deleted from your device.

Agricultural worker Alejandro Paniagua (Paniagua)[18] has worked for Gerawan since 2008, about 10 years. He was aware of discussions about the union and employees wore union t-shirts. He recalled no rules about "our phones" before the union arrived. "But now, it is part of the company policy that it's zero usage of phones in work. Well, during work time. But during breaks we're free."

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[15] *Gerawan Farming,* supra, 44 ALRB No. 10, pp. 11-12.

[16] A contract was ordered through mandatory mediation and conciliation (MMC) but the contract was never implemented. This matter was litigated before the ALRB, (2013) *Gerawan Farming, Inc.* 39 ALRB No. 17, and the California courts, *Gerawan Farming, Inc. v. ALRB* (2017) 3 Cal. 5th 1118 (declining to find MMC categorically unconstitutional and holding employer may not refuse to bargain with union during ordinary bargaining or during MMC on the basis that union has abandoned its representative status), cert. denied (Oct. 1, 2018) 2018 U.S. Lexis 4800.

[17] This rule is set forth on employee pay stubs and is posted at some ranch entrances. Although the parties state on brief that the rule is contained in Gerawan's Employee Manual, no cite to a specific page or section of the manual is related. The version of the Employee Manual in evidence indicates it was last revised on July 20, 2009. Respondent does not assert that a more recent Employee Manual exists. There is no reference to the no photography – no video rule in the manual. Although the manual does not mention a no photography – no video rule, it does state that failure to follow any rules which may be distributed or posted from time to time may be grounds for discipline or discharge. Employee Manual at pp. 12-13 (Violations for Which You May Be Discharged and Violations for Which You May be Disciplined).

[18] The transcript spelling of Paniagua was phonetic: Panawa.

Both Gutierrez and Paniagua worked for crew boss Martin Elizondo (Elizondo). Elizondo was aware of the no photography – no video rule through pay stub information. He testified that he saw this policy beginning four to six years ago; i.e., around 2012-2014, four to six years prior to the hearing.

Compliance Manager Jose Erevia (Erevia) testified that the no photograph – no video rule was implemented "for the protection of employee privacy rights and the protection of company proprietary information." He did not provide a date for promulgation of the policy. "I know it's been several years, but I don't know exactly when."

He elucidated regarding employee privacy as follows:

> Well, there's – within the context there's obviously several areas. One for example will be the prevention of harassment complaints from people being filmed and then subsequently end up in social media outlets.
>
> The other one is obviously potential violent reactions from workers being filmed against their consent.
>
> And employee concerns about immigration issues now that immigration activity pries into social media outlets, obviously that's something very serious and something that we need to protect.

As to proprietary information, Erevia testified:

> We farm very uniquely. We, ourselves, fabricate and manufacture a lot of our own equipment, with very unique features. We also use special materials in some of our workers out there that our competitors don't use.
>
> . . . .
>
> One of them, it's the harvesting method that we use. As opposed to most of our competitors, we harvest in buckets that are specifically designed for a purpose. We don't harvest in bulk bins, for instance. Our trailers are specifically designed to prevent bruising during transport and things of that nature. . . . They're transported in what we call a bucket trailer [both bucket and trailer designed in-house] and transported to the plant.

Erevia agreed that Gerawan's fields or orchards might be seen from public streets adjacent to them. He also agreed that an observer from the public street would be able generally to observe Gerawan's buckets and trailers. Erevia did not believe an observer would be able to

see the design details of buckets or trailers because of the distance and because the design details are on the interior.

Erevia agreed that tours of the orchards are sometimes given to visitors. He did not know whether a company official allowed or did not allow any visitor to make photographs or videos. If such were allowed, he did not know whether the photographs or videos were reviewed prior to departure. Erevia believed the no photograph – no video signs were posted at the entries to some ranches and printed on pay stubs.[19]

There is no specific evidence regarding the exact date of promulgation of the no photography – no video rule. Utilizing Paniagua's testimony that there was no rule before the union arrived, the date of promulgation would have been between late 2012 to late 2013. Following the late 2012 UFW request to negotiate, a year of activity on behalf of Gerawan and the UFW ensued including discussions among employees and union t-shirts. Paniagua attended negotiations between Gerawan and the UFW. In November 2013, a secret ballot decertification election was conducted. Thus, the time of activity surrounding reappearance of UFW and the decertification election was late 2012 to late 2013. Paniagua tied the promulgation of the rule to this period.

Crew boss Elizondo thought the rule was promulgated "4, or 5, and 6 years back." Four to six years back would have been 2012 to 2014. Thus, Elizondo tied initial promulgation of the rule to the same time period that Paniagua did.

Compliance manager Erevia did not provide a date for initial promulgation other than he thought it was "several years" ago. This testimony was vague and contradicts written company documents of earlier existence of the rule. After all, Erevia's recollection of several years – three years – would mean the policy was implemented in June 2015. If that date were correct, the policy would not have been in place when Gutierrez was discharged in July 2014 for violating the policy. Gutierrez' pay stub of May 2014 clearly contains the no photography – no video rule. Thus, Erevia's recollection of the date is rejected.

[19] Elizondo also believed there were no photography – no video signs posted at the packing shed. Erevia disagreed. This disagreement is not material to resolution of the issue presented in this case.

The clearer recollections of Paniagua and Elizondo, who agreed on the timing, is relied upon. The evidence on the record as a whole convincingly proves the no photography – no video rule was issued after the UFW renewed its presence at Gerawan in late 2012. Accordingly, it is found that the no photography – no video rule was initially promulgated at the time of renewed UFW activity.

2. Analysis

(a) From *Lutheran Heritage* to *The Boeing Company*

At the time of issuance of the complaint, the relevant case authority regarding analysis of a facially neutral rule such as the one at issue here was *Lutheran Heritage*:[20]

> If [a] rule does not explicitly restrict activity protected by Section 7, the violation is dependent upon a showing of one of the following: (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights.

The "reasonably construe" test, that is, the first prong of *Lutheran Heritage,* was applied in *Whole Foods Market Group, Inc.*[21] to a rule prohibiting use of recording devices at company meetings or during conversations with team members. The National Labor Relations Board (NLRB) held that the company's broad, unqualified prohibition of all work place recording would be "reasonably construed" by employees to prohibit recording of concerted activity for mutual aid or protection as well as employee activity in support of a union.[22] Thus, the rule was found unlawful pursuant to the first prong of *Lutheran Heritage*.[23]

In *The Boeing Co,*[24] the NLRB overruled the "reasonably construe" component of analysis which was utilized in *Whole Foods* by application of the first prong of *Lutheran*

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[20] *Lutheran Heritage Village-Livonia* (*Lutheran Heritage*) (2004) 323 NLRB 646, 646-647.

[21] (2015) 363 NLRB No. 87 (*Whole Foods*), cited in the complaint as the basis for this cause of action.

[22] Id., slip op. at 4.

[23] Id., slip op. at 5 (finding maintenance of rule would reasonably chill employee-protected activity).

[24] (2017) 365 NLRB No. 154 (*Boeing*).

Heritage. In *Boeing*, the rule at issue restricted the use of camera-enabled devices such as cell phones while on Boeing property. The rule was not promulgated in response to union activity (second prong) and it had not been applied to restrict the exercise of protected or union activity (third prong). Thus, the second and third prongs of *Lutheran Heritage* were not at issue. *Boeing* did not overrule them.

The NLRB found multiple defects in the "reasonably construe" test, the first prong of the test enunciated in *Lutheran Heritage.*[25] It determined that a new standard would remedy those defects. The new standard enunciated in *Boeing* requires balancing the nature and extent of the potential impact on protected rights against legitimate justifications associated with the rule.[26]

To provide guidance in striking the proper balance between potential impact on protected rights and legitimate business justifications, the NLRB set forth separate categories of results. Thus, in analyzing cases pursuant to the new prong one balancing standard, three "categories" of cases were adopted. Category 1 cases were described as those in which it is lawful to maintain the rule because, "(i) the rule, when reasonably interpreted, does not prohibit or interfere with the exercise of [National Labor Relations Act] rights; or (ii) the potential adverse impact on protected rights is outweighed by justifications associated with the rule."[27] The NLRB found that because the rule's potential adverse impact on employee rights was comparatively slight, these employee rights were outweighed by Boeing's substantial and important business justifications. Thus, the no-camera rule at Boeing was found to be within Category 1.[28] Category 2 cases were those warranting individualized scrutiny.[29] Category 3 cases include rules that are unlawful to maintain such as a rule prohibiting discussion of wages or benefits with coworkers.[30]

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[25] *Boeing,* slip op. at 2. These included defects of "single-minded consideration," "perfection that literally is the enemy of good," "linguistic precision," did not allow NLRB "to recognize that some types of Section 7 activity may lie at the periphery of [the] statute," and "defied all reasonable efforts to . . . yield predictable results."

[26] *Boeing,* slip op. at 3.

[27] Id., slip op. at 3-4.

[28] Id., slip op. at 17. Further, a non-binding General Counsel memorandum (Memorandum GC 18-04), provides post-*Boeing* guidance. It seems to indicate that no photography or no video rules should generally be considered encompassed in Category 1 and therefore lawful. Memorandum at 5-6.

[29] Id., slip op. at 4.

[30] Id.

(b) Contentions

The General Counsel and the Charging Party argue that Respondent's rule should be analyzed pursuant to the first prong of *Lutheran Heritage* as revised by *Boeing*. They argue that the no photography – no video rule falls into Category 2 of the *Boeing* test and is an unlawful rule because Gerawan has not advanced a business justification for the rule which outweighs the invasion of employees rights. These parties note the potential for profound invasion of employee rights to document their working conditions such as shade provided in lunch areas. This was the subject of Gutierrez video. Gutierrez asked employees near him if they liked the lunch area as he documented it with his mobile phone.

In general, the General Counsel and the Charging Party note the need for workers to document other working conditions such as toilets, hand washing stations, and the names and warning labels of pesticides. In fact, the General Counsel notes that the California Department of Pesticide Regulation recommends that workers submit photographic documentation which reporting violations of pesticide laws.

The General Counsel also notes that farm work in particular requires photographic or video documentation. The very nature of the work requires that employees move frequently from place to place. Agricultural employees do not work in a static environment where there is time to write down or otherwise document particular working conditions that remain the same on a daily basis. Their restrooms, break areas, water coolers, and first aid stations change location from day to day. Agricultural employees are constantly on the move.

The General Counsel and the Charging Party argue that Gerawan's justification for its rule pales in comparison with those of Boeing, a defense contractor with a sophisticated security network and a target of international espionage. Gerawan's interest in its proprietary information is undermined, the General Counsel argues, by public visibility of its equipment and allowing visitors unsupervised opportunity to photograph or video the area.

Further, the General Counsel and the Charging Party argue that the employee privacy concerns of Gerawan are an afterthought. The General Counsel notes that the company website shows pictures of workers in the field. Although Erevia testified that the company obtained

permission from these workers to photograph them, the General Counsel argues that there is no reason why an employee could not similarly obtain permission. Thus, the General Counsel claims that a more narrowly tailored rule would have satisfied Gerawan's concerns for its employees' privacy.

Both the General Counsel and the Charging Party state that the timing of promulgation of the rule indicates that it sought to halt employee efforts to document their terms and conditions of employment once the UFW renewed its organizing efforts in order to counter a decertification effort. Neither of these parties explicitly argues, however, that the rule should be analyzed under *Lutheran Heritage* prong two as a rule promulgated in response to union activity.

On the other hand, Respondent argues that assuming *Boeing* requires balancing of each and every rule involving photography and/or video, its legitimate justifications for the rule outweigh any minimal potential impact on protected concerted activity. Respondent's evaluation of the impact on protected concerted activity separates documentation of terms and conditions from the activity itself. Thus, Respondent argues that inability to document has only a slight impact on protected concerted activity.

Respondent further claims that its legitimate justifications for the rule are considerable. These justifications include protecting employee privacy. Respondent cites in particular Elizondo's testimony that he observed Gutierrez from a distance and then heard from a coworker who complained about being photographed or videoed. Respondent notes that UFW utilizes photography and video extensively but asserts that there is no evidence that UFW obtains consent from workers whose images might be recorded.

Respondent also argues that the rule is necessary to protect its custom designed buckets and bins. This proprietary information is unique, according to Respondent, and affords it a high degree of competitive advantage.

When these legitimate business justifications are weighed against the potential impact on employee rights, Respondent asserts that its business justifications go to the very core of both employee privacy rights and its ability to maintain an edge over its competitors. The employee rights under the Act, on the other hand, are at the very periphery of the spectrum of protected

activity. Thus, utilizing the prong one, category two balancing test would result in a finding of legitimacy of the rule.

(c) Analysis Pursuant to Second Prong of *Lutheran Heritage*

It is not necessary to analyze the facts in this case pursuant to the first prong of *Lutheran Heritage* as revised by *Boeing*. That is because *Boeing* did not disturb the second prong of *Lutheran Heritage* which holds that employers may not promulgate new rules in response to union or protected concerted activity.[31] Thus, an employer violates the Act by adopting a rule in response to union or protected activity.[32]

The timing of promulgation of Respondent's no photograph – no video rule places it squarely at the time of renewed union activity. The timing of the adoption of the rule occurred in tandem with renewed union activity (per Paniagua). No other reason for the timing of adoption of the rule in 2012-2014 (dates per Elizondo) has been presented on this record.

None of the reasons explicated by compliance manager Erevia as requiring promulgation of the rule was tied to any particular time period. The purported business justifications asserted by the employer do not provide proof that the timing was for these other reasons. No facts have been enunciated requiring the broad prohibition of all employee photography and video in 2012-2014. Moreover, employee privacy concerns on the part of the employer were not supported by evidence of complaints from employees at that time.

Further, the enumerated business justifications[33] supporting the rule are not tied to any time period at all – much less, at or around the time of promulgation. No dates were provided by

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[31] *AdvancePierre Foods, Inc.* (2018) 366 NLRB No. 133, p. 2, fn. 4 (*Boeing* overruled the "reasonably construe" prong but not the "promulgated in response to union activity" prong of *Lutheran Heritage.*)

[32] See, e.g., *Gallup, Inc.* (2001) 334 NLRB 366, 366 (promulgation of a new rule at start of union campaign strong evidence of discriminatory intent), enfd. (5th Cir. 2003) 62 Fed.Appx. 557; *Portsmouth Ambulance Service* (1997) 323 NLRB 311, 320-321 (unlawful promulgation and maintenance of stricter policies in wake of union activity); *Cannondale Corp.* (1993) 310 NLRB 845, 849 (rule promulgated in response to union organizing activities unlawful).

[33] It is not necessary to determine whether the business justifications asserted in support of the no photography – no video rule are meritorious. Although the interiors of buckets and trailers may not be visible from public roads, Respondent agrees that the exterior of its equipment has always been visible from the road. Respondent agrees that visitors are allowed to photograph during tours of the property and Respondent did not present any evidence that these photographs were inspected to screen proprietary information from leaving with the visitors. Were it necessary to determine the merit of these assertions, the record does not indicate that

compliance manager Erevia. In short, none of these asserted justifications is linked to the timeframe for promulgation.

In these circumstances, it is reasonable to infer that UFW activity was the reason for promulgation of the new rule.[34] Based on the totality of the evidence, it is clear that no other reason for timing of the promulgation of the rule exists except renewed union activity. Thus, in this temporal vacuum with no plausible business or privacy explanation for the timing, it is found that the rule was promulgated due to renewed presence of the UFW in an atmosphere of contemporaneous unfair labor practices evidencing anti-union animus.

As such, the rule violates the Act and is unlawful because it was adopted in reaction to the presence of the UFW. For instance, in *Friendly Ice Cream*,[35] a facially neutral no-solicitation rule was found unlawful because it was promulgated at a time of intense union activity and first applied to discipline a leading union activist during a time of hostility toward the union as evidenced by contemporaneous unfair labor practices. In *Cannondale Corp.*,[36] an employer's promulgation of a rule shortly after union activity began was found unlawful when accompanied by an unlawful anti-union policy.[37] *Care One at Madison Avenue*,[38] is another instance of adoption of a rule which was found unlawful because it was adopted in direct reaction to union activity.[39] Thus, Gerawan's rule fails for the same reason. It was adopted in response to renewed

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(Footnote Continued)
Respondent polices leak of proprietary information nor photography by visitors or roadway occupants. For that reason, it would appear that the business justifications asserted in support of the rule are not meritorious.

[34] See, e.g., *LB&B Associates, Inc.* (2005) 346 NLRB 1025, 1026-1027 (facts warrant inference that true motive was unlawful), enfd. 232 Fed.Appx. 270 (4th Cir. 2007); *Desert Toyota* (2005) 346 NLRB 118, 126 (facts furnish basis for compelling inference of animus), enfd. (9th Cir. 2008) 265 Fed.Appx. 547; *Detroit Paneling Systems* (2000) 330 NLRB 1170, 1171 (timing leaves little to imagination warranting inference of pretext), enfd. sub nom. *Carolina Holdings Inc. v. NLRB* (4th Cir. 2001) 5 Fed.Appx. 236.

[35] (1981) 254 NLRB 1206, 1207, enf. denied (1st Cir. 1982) 677 F.2d. 170. Although enforcement was denied in *Friendly Ice Cream,* the NLRB's general approach has been upheld in similar cases. See, e.g., (2d Cir. 1988) *NLRB v. S. E. Nichols, Inc.* 862 F.2d 952, enforcing (1987) 284 NLRB 556, 557, cert. denied (1989) 490 U.S. 1108; *Restaurant Corp. of America v. NLRB,* (D.C. Cir. 1986) 827 F.2d. 799, enforcing in relevant part (1984) 271 NLRB 1080.

[36] Supra, 310 NLRB at 849.

[37] Implementation of an otherwise lawful rule pursuant to practice in place well before advent of union activity may not be unlawful, especially in the absence of otherwise unlawful activity. See, e.g., *Westinghouse Elec. Corp.* (1985) 277 NLRB 136, 148; *F.P. Adams,* (1967) 166 NLRB 967, 968.

[38] (2014) 361 NLRB 1462, enfd. (D.C. Cir. 2016) 832 F.3d 351.

[39] See also, *Southwest Gas Corp.* (1987) 283 NLRB 543, 546 (rule unlawful because directed solely at and in reaction to union activity), citing *C.O.W. Industries* (1985) 276 NLRB 960 (rule directed and in reaction to

UFW activity in an atmosphere of anti-union animus. Thus, the no photography – no video rule violates Section 1153 (a) of the Act.

C. Discharge of Pablo Gutierrez

1. Facts

The complaint alleges that Gutierrez was discharged on July 24, 2014, in retaliation for his exercise of rights under Section 1152 in violation of Section 1153 (a) of the Act. On July 24, 2014, during the lunch hour, crew boss Elizondo observed Gutierrez holding his mobile phone as if taking a picture or video. Elizondo told Gutierrez that taking photos and videos on company property was prohibited. Elizondo reported his observation to the office. On July 25, 2014, Gerawan did not allow Gutierrez to return to work. There is no evidence of an employer investigation prior to determining to discharge Gutierrez.[40]

UFW third vice-president Armando Elenes was familiar with Gutierrez' union support during the 2013-2014 UFW campaign at Gerawan. Elenes observed Gutierrez as a leader who was present at multiple union actions throughout the campaign. Gutierrez also attended contract negotiations. Elenes testified that the union utilized photographs, video, and audio recording extensively in its campaign at Gerawan. Elenes explained that workers also utilized photos and videos to document their terms and conditions of employment including problems with their lunch areas. In fact, Elenes has instructed employees who have complaints about specific treatment to document their complaints with photos or videos.

Gutierrez did not appear at the hearing in this case. Coworker Paniagua observed Gutierrez engage in union activity during break times during May, June, and July 2014. Paniagua testified that this activity was in front of Elizondo. Gutierrez wore a red union t-shirt to work. As part of Gutierrez' union activity, Gutierrez sometimes took photos and videos while on Gerawan

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(Footnote continued)
union activity invalid); *Montgomery Ward* (1985) 269 NLRB 598, 600 (same); *Paceco* (1978) 237 NLRB 399, 401 (same), enfd. in relevant part (5th Cir. 1979) 601 F.2d 180.

[40] On brief, Respondent cites to a Respondent exhibit regarding prior discipline of Gutierrez and a Respondent exhibit regarding appropriate sanction for violation of the no photography – no video rule. These exhibits were not offered in evidence. Additionally, Respondent argues on brief that the video taken by Gutierrez should not be allowed in evidence. In fact, the video was not offered in evidence by the General Counsel.

property during his break or lunch period. Paniagua saw crew boss Elizondo observe Gutierrez' making a recording on his phone. Paniagua thought this occurred in July 2014.

Elizondo testified that he saw Gutierrez make a recording or take photos with his cell phone at lunchtime. Elizondo reported Gutierrez' action to the office. After the unspecified date that Elizondo reported to the office, Gutierrez did not return to Elizondo's crew. Company documents date this report as July 24, 2014. Company documents indicate that Gutierrez was not allowed to return to work on July 25, 2014.

2. Analysis

Gutierrez was discharged for utilizing his cell phone to document his working conditions during his lunch time in violation of the no photography – no video rule. Gutierrez' discharge was unlawful because he was discharged for violating the unlawfully promulgated no photography – no video rule. As previously found, that rule was unlawful because it was adopted in response to renewed UFW activity.

Any disciplinary action taken pursuant to a rule which is unlawful is analogous to the "fruit-of-the-poisonous-tree" metaphor utilized in criminal law.[41] In such circumstances, it is unnecessary to utilize a *Wright-Line*[42] dual motive analysis.[43] Discharge pursuant to an unlawful rule violates the Act.[44] Thus, it is found that by discharging Gutierrez for violating the unlawful ban on photography and video violated Section 1153 (a) of the Act.

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[41] *Saia Motor Freight Line* (2001) 333 NLRB 784, 785, citing *Opryland Hotel* (1997) 323 NLRB 723, 728.

[42] *Wright Line* (1980) 251 NLRB 1083, enfd. (1st Cir. 1981) 662 F.2d 899, cert. denied (1982) 455 U.S. 989.

[43] *Saia Motor Freight,* supra, 333 NLRB at 785.

[44] See, generally, *Ozburn-Hessey Logistics, LLC* (2018) 366 NLRB No. 173, pp. 2-3 (employer violated Act by discharging employee for violating unlawfully adopted rule); *Continental Group, Inc.* (2011) 357 NLRB 409, 411-412 (discharge pursuant to unlawfully overbroad rule violates Act); *Frazier Industrial Co.* (1999) 328 NLRB 717, 718 (chain of events leading to discharge was direct result of enforcement of unlawful rule thus discharge unlawful), enfd. (D.C. Cir. 2000) 213 F.3d 750.

D. Information Request

1. Facts

Armando Elenes, third vice-president of UFW, represents employees who are disciplined and discharged and is the chief negotiator with Gerawan. Agricultural employee Rafael Amaro Marquez (Marquez), a member of the Gerawan bargaining unit, was suspended on April 24 and 27 and discharged on April 27, 2015. On April 27 and 29, 2015, Marquez and the UFW, respectively, filed unfair labor practice charges[45] alleging that Marquez was unlawfully discharged. By letter of May 4, 2015, Elenes requested three categories of disciplinary information including:

1) Disciplinary documents given to Marquez on April 24 or 27, 2015;
2) Reports and investigation summaries for the incident of April 24 and 27, 2015; and
3) Disciplinary action involving any suspension of three days or more given to any other Gerawan worker during the years 2012, 2013, 2014, and 2015.

The information request was sent to Gerawan counsel Ron Barsamian. Elenes testified that UFW has received no response to this letter to date. Counsel Barsamian acknowledged receiving the request for information.

On June 1, 2015, the ALRB filed a temporary restraining order action in Fresno County Superior Court seeking immediate reinstatement of Marquez at Gerawan. A TRO hearing was held on June 2, 2015. Gerawan filed its opposition to the TRO on June 2, 2015.

Although counsel Barsamian did not claim he formally replied to the UFW request for information, he testified that the requested disciplinary documents given to Marquez on April 24 or April 27, 2015, that is the first category of requested documents, were provided to Elenes at the June 2, 2015, TRO hearing.[46] Specifically, counsel Barsamian testified that TRO opposition documents were filed at that hearing and hand-delivered by counsel Barsamian to UFW counsel Mario Martinez. Counsel Barsamian recalled that he handed the TRO opposition documents to

[45] These charges, 2015-CE-011-VIS and 2015-CE-012, VIS, are not included in the current consolidated cases.

[46] The request for a TRO was filed by the ALRB seeking immediate reinstatement of Marquez. The action was filed in the Fresno County Superior Court.

counsel Martinez. Counsel Barsamian testified that he saw Elenes in the first row behind counsel Martinez.

According to counsel Barsamian, the disciplinary notices given to Marquez were included in the opposition documents. Counsel Barsamian did not testify that he notified either UFW counsel Martinez or UFW vice-president Elenes that the Marquez disciplinary notices were included in the TRO opposition documents.

Counsel Barsamian testified that there were no documents responsive to the second information item, that is, reports and investigatory summaries of the incidents of April 24 and 27, 2015. He did not testify that he told either counsel Martinez or vice-president Elenes that no documents existed that were responsive to the second category of the request.

As to the third category of requested documents, disciplinary action of suspension for three or more days for the years 2012-2015, counsel Barsamian testified that in attachments to a letter of May 12, 2015, he provided these documents to the ALRB (except for the year 2012). He was unable "to get all the documents together for 2012."

2. Analysis

Under the particular facts of this case, no violation is found. The May 2014 information request occurred after the decertification election of November 2013 and before the September 2018 tally of ballots and decertification of the UFW. Typically, a bargaining obligation dates from the earliest moment that employees manifest their choice of a bargaining representative.[47] Thus, where a union has prevailed in an election, an employer acts at its peril by failing to fulfill its bargaining obligation in the hiatus between the date of the election and certification of the election results.[48]

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[47] See, e.g., *Sumner Peck Ranch, Inc.* (1984) 10 ALRB No. 24, p. 4 (certification relates back to election it certifies); *George Arakelian Farms v. ALRB* (1986) 186 Cal. App. 3d 94, 105-106.

[48] See, e.g., *Mike O'Connor Chevrolet* (1974) 209 NLRB 701, 703; reversed and remanded on other grounds (8th Cir. 1975) 512 F.2d 684.

As the Board stated in *Highland Ranch:*[49]

> While an employer clearly is not under an obligation to bargain towards a comprehensive collective bargaining agreement during the pendency of election objections, Sundstrand, Inc. v. NLRB, 538 F.2d 1257, 92 LRRM 3266 (7th Cir. 1976), it acts at its own peril should it unilaterally decide to change the terms or conditions of employment. The NLRB fully explained this doctrine in Mike O'Connor Chevrolet, 209 NLRB 701, 85 LRRM 1419 (1974), rev'd on other grounds, 512 F.2d 684, 88 LRRM 3121 (8th Cir. 1975):
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> > The Board has long held that, absent compelling economic considerations for doing so, an employer acts at its peril in making changes in terms and conditions of employment during the period that objections to an election are pending and the final determination has not yet been made. And where the final determination on the objections results in the certification of a representative, the Board has held the employer to have violated Section 8 (a) (5) and (1) for having made such unilateral changes. Such changes have the effect of bypassing, undercutting, and undermining the union's status as the statutory representative of the employees in the event a certification is issued. To hold otherwise would allow an employer to box the union in on future bargaining positions by implementing changes of policy and practice during the period when objections or determinative challenges to the election are pending. ... [W]e find ... that Respondent was not free to make changes in terms and conditions of employment during the pendency of post-election objections and challenges without first consulting with the Union.

Further, if the union is defeated in a decertification election, the certification of results dates back to the date of the election. The concept was explicated in *Nish Noroian Farms* as follows:[50]

> Under the ALRA, the rule is as follows: After a union is certified, an employer has a duty to bargain upon request with that union. A filed petition, direction of election, or tally of ballots does not affect that duty. If a "no union" vote prevails in a decertification election or in a rival-union election, the certification of results dates back to the day of the election so that no violation can be found, and no remedial order imposed, based on an employer's refusal to bargain from that point forward. This is an application of the "at the employer's peril" doctrine. If a rival union is certified, the employer's duty to bargain

[49] (1979) 5 ALRB No. 54, p. 5; "at its peril" doctrine specifically approved on appeal to California Supreme Court in *Highland Ranch v. ALRB* (1981) 29 Cal. 3d 848, 851-852; see also *Gerawan Ranches* (1992) 18 ALRB No. 16, ALJD, p. 37;

[50] (1982) 8 ALRB No. 25, p. 14.

> switches from the incumbent to the rival on the date of certification. In all other cases, the employer's duty to bargain with the incumbent union continues uninterrupted.

Here Respondent acted at its peril in refusing to provide information in 2014 between the date employees chose not to be represented by the UFW in 2013 and the date of certification of the election results in 2018. Pursuant to *Nish Noroian,* however, Respondent's bargaining obligation ceased on November 5, 2013. Thus, in May 2014, it had no duty to bargain with the UFW and therefore no duty to provide information to UFW.

Of course, when the instant proceeding was tried and briefed, the tally of ballots and certification of results had not been conducted. Thus, the parties did not brief "acting at one's peril" or "relation back." On October 12, 2018, after the tally of ballots and certification of results in *Gerawan Farming, Inc.* (2018) 44 ALRB No. 10, the General Counsel requested further briefing on application of *Nish Noroian.* Specifically, the General Counsel sought a finding that the *Nish Noroian* relation back-doctrine does not actualize on the date of the vote but rather on the date of the tally of ballots, thus after the refusal to provide information in this case. However, the General Counsel acknowledges that *Nish Noroian* was recently cited in an Administrative Order of the Board.[51]

The General Counsel's argument is based on *UFW (Egg City)*[52] holding that in the context of a secondary boycott analysis, the "at your peril" doctrine properly extends to a union that engages in secondary activities after a decertification election but "relation back" is properly applied at the time of tally of ballots rather than at the date of election. Further, the General Counsel notes that the NLRB held in *W.A. Krueger Co.,*[53] that the "at its peril" doctrine does not apply to shield unilateral changes made by an employer during pendency of its ultimately

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[51] Administrative Order 2018 No. 13 *Gerawan Farming, Inc.* 2013-RD-003-VIS, p. 1, as follows: "(See *Nish Noroian Farms* (1982) 8 ALRB No. 25, p. 14 ["Under the Agricultural Labor Relations Act], the rule is as follows . . . If a 'no union' vote prevails in a decertification election . . . the certification of results dates back to the day of the election. . . .")

[52] (1989) 15 ALRB No. 10, p. 27.

[53] (1990) 299 NLRB 914, 916-917 (rebuttable presumption of majority status not altered during period when election results are contested by objections or determinative challenges).

successful election objections. Based on these arguments, the General Counsel asserts that a violation should be found for failure to furnish information.

The General Counsel's arguments present questions regarding the extent, if at all, to which *UFW (Egg City)* altered *Nish Noroian's* holding, the extent to which reliance on or citation of *Nish Noroian* in an Administrative Order might indicate it was not altered by *UFW (Egg City),* and whether the Board might consider the holding in *W.A. Kruger* sufficiently analogous for its adoption given the differences in the ALRA and NLRA. These arguments can best be addressed by the Board after full briefing by the parties. Accordingly, following *Nish Noroian,* the ALRB case most closely analogous to the facts in this case, no violation is found. Moreover, the General Counsel's motion to supplement briefing is denied.

E. Orders of June 19, 2018

Three pre-hearing orders were issued on June 19, 2018. The first was an order dismissing a cause of action set forth in the complaint alleging that Respondent violated Sections 1153 (e) and (a) of the Act by discharging four employees without first notifying UFW and bargaining regarding the discretionary aspects of their discipline.[54] The allegation was based upon *Total Security,*[55] which held that in the absence of a collective-bargaining agreement, "discretionary discipline is a mandatory subject of bargaining and that employers may not unilaterally impose serious discipline."[56] *Total Security* further held, however, that retroactive application of the holding would constitute a manifest injustice.[57]

Total Security issued on August 26, 2016. The discharges set forth in the complaint occurred in 2014 and 2015, prior to issuance of *Total Security.* Thus, the portion of the complaint based on *Total Security* was dismissed.[58]

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[54] This allegation was supported by underlying unfair labor practice charges 2015-CE-023-VIS, 2014-CE-015-VIS, 2014-CE-021-VIS, and 2014-CE-025-VIS filed July 2, 2015, July 28, 2014, September 3, 2014, and September 16, 2014, respectively.

[55] *Total Security 1, LLC* (2016) 364 NLRB No. 106.

[56] *Total Security,* 364 NLRB No. 106, pp. 8-9.

[57] *Total Security,* 364 NLRB No. 106, p. 12.

[58] To the extent this Order dismisses the first cause of action in its entirety, it is corrected to dismiss the first cause of action only to the extent it alleges retroactive application of *Total Security.*

These 2014 and 2015 alleged refusals to bargain also took place during the hiatus between the November 2013 decertification election and the September 2018 certification of results of the election. Because the June 19, 2018 order issued prior to the tally of ballots and certification of the election results, it did not discuss the decertification results. Assuming without deciding that Respondent may have acted at its peril during the hiatus by imposing serious discipline without first providing notice and an opportunity to bargain to the UFW, ultimately no bargaining was required due to the *Nish Noroian* relation back of the decertification. In any event, the order granting Respondent's motion for judgment on the pleadings regarding the complaint allegation based on *Total Security* is incorporated by reference and follows the Notice to Employees as Attachment A.

Also incorporated by reference is a second order of June 19, 2018, granting the General Counsel's motion in limine to exclude proposed Respondent exhibits relating to the complaint's first cause of action. For ease of reference, this document is attached following the Notice to Employees as Attachment B.

Finally, a third order of June 19, 2018, granted General Counsel's petition to revoke Respondent's subpoena ad testificandum for the appearance of Deputy General Counsel Silas Shawver to testify regarding a conversation he may have had with Rafael Marquez in April 2015, after Marquez' suspension and before his discharge.[59] This Order is incorporated herein by reference and is attached following the Notice to Employees as Attachment C.

F. Conclusions of Law

1. By adopting a ban on photographs and videos in reaction to Union activity and maintaining and enforcing that ban on photographs and videos, Respondent interfered

[59] Respondent requests administrative notice of statements made on September 11, 2013, by Silas Shawver to Judge Jeffrey Y. Hamilton in *State of California, Agricultural Labor Relations Bd v. Gerawan Farming, Inc.* (Super. Ct. Fresno County, 2013, No. 13CECG02594). The administrative law judge order regarding the subpoena ad testificandum relating to Silas Shawver was made prior to hearing in this matter and prior to the request for administrative notice. At the hearing, the parties requested that the order be incorporated in the administrative law judge's decision for review by the Board. The order has been incorporated in this decision. Thus, the request for administrative notice is more properly before the Board.

with and restrained employees in the exercise of their rights under Section 1153 (a) of the Act.

2. By discharging Pablo (Arreola) Gutierrez pursuant to the unlawful ban on photographs and videos, Respondent violated Section 1153 (a) of the Act.

G. Remedy

Having found that Respondent violated the ALRA by implementing a rule due to Union activity and enforcing that rule by discharging Union advocate Gutierrez, it is recommended that Respondent

- rescind the unlawful rule and inform all employees that it has been rescinded,
- offer immediate reinstatement to Gutierrez as well as full backpay with interest, and
- implement all standard remedies regarding preservation of records, posting and mailing Notices, and Board agent distribution and reading of the Notice.

Based on these findings of fact and conclusions of law and the record as a whole, it is recommended that the following Order be issued.

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ORDER

Pursuant to section 1160.3 of the Act, the Agricultural Labor Relations Board hereby ORDERS that Respondent Gerawan Farming, Inc., a California corporation, its officers, agents, labor contractors, successors and assigns shall:

1. Cease and desist from:
   (a) Maintaining and enforcing a policy prohibiting photography and video;
   (b) Discharging Pablo (Arreola) Gutierrez or any agricultural employee because the employee violated the unlawful ban on photography and videos; and
   (c) Otherwise interfering with or restraining any employee in the exercise of the rights guaranteed under section 1152 of the Act.
2. Take the following affirmative steps which are deemed necessary to effectuate the purposes of the Act:
   (a) Offer employment to Pablo (Arreola) Gutierrez to his former position or if that position no longer exists, to a substantially equivalent position.
   (b) Make whole Pablo (Arreola) Gutierrez, who was suspended and discharged for unlawful reasons, for all wages or other economic losses that he suffered as a result of Gerawan's unlawful suspension and discharge of him. The award shall include interest to be determined in accordance with *Kentucky River Medical Center* (2010) 356 NLRB 6 (daily compound interest adopted).
   (c) Rescind the No Photography – No Video rule and inform all employees that it has been rescinded.
   (d) Preserve and, upon request, make available to the Board or its agents for examination and copying, all payroll records, time cards, personnel records, and all other records relevant and necessary for a determination by the Regional Director of the losses due under this Order. Upon request of the Regional Director, records shall be provided in electronic form if they are customarily maintained in that form.

(e) Upon request of the Regional Director, sign the Notice to Agricultural Employees attached hereto, and after its translation by a Board agent into appropriate languages, reproduce sufficient copies in each language for the purposes set forth below.

(f) Post copies of the Notice, in all appropriate languages, at conspicuous places on Respondent's property, including places where notices to employees are usually posted, for sixty (60) days, the times and places of posting to be determined by the Regional Director. Respondent shall exercise due care to replace any copies of the Notice which may be altered, defaced, covered or removed. Pursuant to the authority granted under section 1151(a) of the Act, give agents of the Board access to its premises to confirm the posting of the Notice.

(g) Mail signed copies of the attached Notice in all appropriate languages within 30 days after the date this Order becomes final or thereafter if directed by the Regional Director to the last known address of all agricultural employees it employed, including those employed by farm labor contractors, during the planting and harvesting periods or other relevant periods of employment from November 2013 to date.

(h) Grant ALRB agents access to work sites where the agricultural employees in the bargaining unit work at mutually arranged times in order to distribute and read the attached Notice to them and to answer questions employees may have about their rights under the Act outside the presence of supervisory personnel.

(i) Compensate employees for the time spent during the Notice reading and the following question and answer period at the employees' regular hourly rates, or each employee's average hourly rate based on their piece-rate production during the prior pay period.

(j) Provide access during the notice-posting period to ALRB agents to ensure compliance with the notice-posting requirements of this ORDER.

(k) Provide a signed copy of the Notice to each person it hired for work as an agricultural employee during the 12-month period following the issuance of the ALRB's Order in this case.

(l) Notify the Regional Director in writing within thirty (30) days after the date of issuance of this Order of the steps Respondents have taken to comply with the terms and, on request, notify the Regional Director periodically in writing of further actions taken to comply with the terms of this Order until notified that full compliance has been achieved.

SO ORDERED.

Dated: October 18, 2018

Mary Miller Cracraft
Administrative Law Judge
Agricultural Labor Relations Board

ATTACHMENT A

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

GERAWAN FARMING, INC. **Respondent,** **and,** **UNITED FARM WORKERS OF AMERICA,** **Charging Party.**	**Case Nos.: 2015-CE-023-VIS** **2014-CE-015-VIS** **2014-CE-021-VIS** **2014-CE-025-VIS** **ORDER GRANTING MOTION FOR JUDGMENT ON THE PLEADINGS REGARDING FIRST CAUSE OF ACTION**

The consolidated complaint in this proceeding issued on June 29, 2017. Respondent duly answered on July 12, 2017, admitting and denying certain allegations and asserting various affirmative defenses. Hearing will commence on June 20, 2018.

The first cause of action alleges that Respondent Gerawan Farming, Inc. (Gerawan or Respondent) violated Section 1153(a) and (e) of the Agricultural Labor Relations Act (ALRB)[1] by failing to bargain with the United Farm

[1] California Labor Code Section 1140-1166.3.

Workers of America (the Union or UFW).[2] Specifically, the complaint alleges Gerawan had an obligation to bargain about the level of discipline to be imposed before utilizing its sole discretion to suspend and then discharge three agricultural employees and before discharging a fourth agricultural employee. The dates for these actions were in May,[3] July,[4] and August[5] 2014 and in April[6] 2015. For purposes of this motion, Gerawan does not dispute that it took these actions without notice to UFW or affording an opportunity to bargain.

On June 8, 2018, Respondent moved for judgment on the pleadings regarding the first cause of action. Respondent asserts that even if the allegations of the complaint are true, the allegations fail to state a cause of action because the underlying authority for this allegation was issued in 2016 and by its terms cannot be applied retroactively. The General Counsel and the Charging Party filed briefs in opposition to this motion.

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[2] The UFW was certified as the exclusive bargaining representative of Gerawan's employees on July 8, 1992. Although the parties met and bargained in 2013, no collective-bargaining agreement was reached. The parties agree that during the relevant time, there was no collective-bargaining agreement in effect.

[3] The complaint alleges that Jorge Aguirre (Aguirre) was suspended on May 30, 2014, and discharged on May 31, 2014. The answer admits that Aguirre was suspended and discharged on May 30 and 31, 2015. The discrepancy in dates is repeated in the parties' briefs regarding this motion for judgment on the pleadings. It is unnecessary to resolve this ambiguity.

[4] The complaint alleges that Pablo Gutierrez (Gutierrez) was terminated on July 24, 2014.

[5] The complaint alleges that Jose Chavez (Chavez) was suspended on August 22, 2014, and discharged on August 25, 2014.

[6] The complaint alleges that Rafael Marquez (Marquez) was suspended and discharged on April 27, 2015.

Judgment on the pleadings is appropriate when the moving party clearly establishes on the face of the pleadings that no material issue of fact remains to be resolved and that it is entitled to judgment as a matter of law.[7] Judgment may be entered in favor of Respondent if the motion shows that even if the complaint allegations were proven, they would not establish a cause of action.[8]

The ALRA provides that the ALRB "shall follow applicable precedents of the National Labor Relations Act, as amended."[9] Indeed, all parties agree that the relevant authority is *Total Security Management Illinois 1, LLC,* 364 NLRB No. 106, issued on August 26, 2016. In *Total Security,* the Board reexamined de novo a prior decision in *Alan Ritchey, Inc.* (2012) 359 NLRB 396, which was issued by a constitutionally infirm Board.[10]

In *Total Security,* the NLRB held in general that in the absence of a collective-bargaining agreement, "discretionary discipline is a mandatory subject of bargaining and that employers may not unilaterally impose serious discipline."

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[7] CCP § 438(c)(1)(B)(ii); *Coshow v. City of Escondido* (2005) 132 CalApp4th 687, 702; See also, Fed. Rule Civil Procedure 12(c); *Hal Roach Studios, Inc. v. Richard Feiner & Co.* (9th Cir. 1989) 896 F.2d 1542, 1546.

[8] See, e.g., *Mechanical Contractors Assn. v. Greater Bay Area Assn.* (1998) 66 Cal.App.4th 672, 767-677; *Lucas v. County of Los Angeles* (1996) 47 Cal.App.4th 277, 285.

[9] Cal. Labor Code § 1148.

[10] The *Alan Ritchey* decision is void as constitutionally infirm due to composition of the Board deciding the case. Two of the three members were serving as recess appointees to the Board. In *NLRB v. Noel Canning* (2014) 134 S.Ct. 2550, the Court held that appointment of these two recess-appointed Board members who decided *Alan Ritchey* was constitutionally invalid.

[11] Serious discipline includes "suspension, demotion, discharge, or analogous sanction"]."[12] The NLRB further held that it would apply its holding prospectively only.[13]

For purposes of this motion, there is no dispute that, utilizing its sole discretion, in 2014 and 2015 Gerawan imposed the serious disciplines of suspension and discharge regarding four employees. There is further no dispute that UFW was afforded no notice and no opportunity to bargain about these discretionary actions. Finally, the parties agree that no collective-bargaining agreement was in effect at the time of these actions.[14]

Thus, for purposes of this motion, the facts fit squarely within the holding of *Total Security*. This motion rests firmly on the NLRB's decision not to apply *Total Security* retroactively. Because all of the serious discipline involved in this case occurred prior to the issuance of *Total Security* on August 26, 2016, Respondent argues that *Total Security* does not apply and the first cause of action should be dismissed.

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[11] *Total Security*, slip op. at 1. Imposition of non-discretionary discipline, such as a uniformly enforced disciplinary policy or a serious threat to the work place may excuse the duty to bargain. *Total Security*, slip op. at 8-9.

[12] *Total Security*, slip op. at 5.

[13] *Total Security*, slip op. at 1, 11-12.

[14] Although a mediated contract was approved by the ALRB on November 19, 2013, the parties agree that the contract has not been enforced for the stated reason that the ALRB has no legal mechanism to enforce the order until it is affirmed by a reviewing court. That review is ongoing.

The Board held in *Total Security* that retrospective application of its holding would create a particular injustice: "[A]pplying the rule adopted here (albeit first announced in *Alan Richey*) to cases preceding today's decision would create a particular injustice . . . and thus such application would constitute manifest injustice."[15] Respondent asserts that because all of the serious discipline at issue in the first cause of action pre-dated issuance of *Total Security*, the ban on retrospective application insulates it from the holding.

The General Counsel and the Charging Party assert that retrospective application of *Total Security* should be examined on a case by case basis. Thus, they assert, retrospective application of *Total Security* would not cause a manifest injustice in this instance. These arguments are rejected.

As the parties recognize, normally decisions of the Board (whether ALRB or NLRB) are applied retroactively to all pending cases. However, new rules or changes in substantive law are sometimes applied prospectively when retroactive application would cause "manifest injustice."

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[15] *Total Security*, supra, slip op. at 12. Additionally, administrative notice is taken of NLRB Case Processing Guidelines for Cases Arising under *Total Security Management*, OM Memo 17-14 (Feb. 14, 2017).

Prior to the issuance of *Alan Ritchey* in December 2012, the duty to bargain before imposing serious discipline had not been clearly articulated.[16] As in *Total Security,* the discharges in the instant case took place after *Alan Ritchey* issued. The NLRB noted in *Total Security*[17] that the holding in *Alan Ritchey* was immediately suspect when the District of Columbia Circuit issued its decision on January 24, 2013, holding invalid appointments of two NLRB members who formed the majority in *Alan Ritchey.*[18] On June 25, 2014, the Supreme Court agreed and ruled that the appointments of two of the three Board members who authored that *Alan Ritchey* decision were not valid. This holding retroactively nullified *Alan Ritchey* on procedural grounds.[19]

In determining whether to apply the holding in *Total Security* retroactively, the NLRB balanced any ill effects of retroactivity against three factors:[20] reliance of the parties on prior precedent (prong one), the effect of retroactivity on achieving the purposes of the NLRA (prong two), and any particular injustice arising from retroactive application (prong three). Referring to the unusual

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[16] "Other than in *Alan Ritchey* . . . the Board has never clearly and adequately explained how (and to what extent) this established doctrine [that an employer may not act unilaterally with respect to terms and conditions of employment] applies to the discipline of individual employees."

[17] See 364 NLRB No. 106, slip op. at 11 (Yet *Alan Ritchey's* validity already was questionable in light of the Federal court proceedings in *Noel Canning.* . . ."

[18] *Noel Canning v. NLRB,* 705 F.3d 490

[19] See *Total Security,* 364 NLRB No. 106, slip op. at 11-12.

[20] This three-pronged analysis is set forth in *SNE Enterprises* (2005) 344 NLRB 673, 673.

circumstances surrounding announcement and clarification pre-discipline duty to bargain, the NLRB stated:[21]

> In light of those circumstances, we find that applying the rule adopted here (albeit first announced in *Alan Ritchey*) to cases preceding today's decision would create a particular injustice under the third prong of our test, and thus such application would constitute manifest injustice.

Thus, the NLRB recognized that prior to *Alan Ritchey*, legal authority was unclear regarding whether employers who had a bargaining obligation but no collective-bargaining agreement were required to provide notice and an opportunity to bargain prior to imposing serious discretionary discipline. *Alan Ritchey* clarified this duty but *Alan Ritchey* was immediately suspect due to constitutional infirmities litigated in *Noel Canning*. Given this backdrop, the NLRB decided in *Total Security* that manifest injustice would occur with retrospective application of the duty to bargain as clarified in *Alan Ritchey* and later in *Total Security*. The same conclusion must be drawn on the facts of this case.

The facts on this record cannot be distinguished from those in *Total Security*. Respondent has proven that it is entitled to judgment on the pleadings as

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[21] *Total Security*, slip op. at 12.

a matter of law. Thus, having fully considered the pleadings, Respondent's motion for judgment on the pleadings regarding the first cause of action in its entirety is granted. The first cause of action set forth in the complaint of June 29, 2017, is hereby dismissed.

SO ORDERED
June 19, 2018

Mary Miller Cracraft
Administrative Law Judge
Agricultural Labor Relations Board

STATE OF CALIFORNIA
AGRICULTURAL LABOR RELATIONS BOARD

PROOF OF SERVICE
(1013a, 2015.5 C.C.P.)

Case Name: GERAWAN FARMING, INC., Respondent, and,
UNITED FARM WORKERS OF AMERICA, Charging Party

Case Numbers: 2015-CE-023-VIS, 2014-CE-015-VIS, 2014-CE-021-VIS, and 2014-CE-025-VIS

I am a citizen of the United States and a resident of the County of Sacramento. I am over the age of eighteen years and not a party to the within entitled action. My business address is: 1325 "J" Street, Suite 1900-B, Sacramento, California 95814.

On **June 19, 2018,** I served the within **ORDER GRANTING MOTION FOR JUDGMENT ON THE PLEADINGS REGARDING FIRST CAUSE OF ACTION** on the parties in said action, by **EMAIL and CERTIFIED U.S. MAIL or HAND DELIVERED** and placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail, at Sacramento, California addressed as follow:

Ronald H. Barsamian, Esq. Barsamian and Moody 1141 W. Shaw Avenue, Suite 104 Fresno, CA 93711-3704	**Email/Certified Mail** Laborlaw@theemployerslawfirm.com ronbarsamian@aol.com 9414-7266-9904-2964-1967-63
Mario Martinez, Esq. Edgar Aguilasocho, Esq. Brenda Rizo, Paralegal Martinez, Aguilasocho & Lynch P.O. Box 1998 Bakersfield, CA 93303	**Email/Certified Mail** mmartinez@farmworkerlaw.com eaguilasocho@farmworkerlaw.com brizo@farmworkerlaw.com 9414-7266-9904-2964-1967-70
David A. Schwarz, Esq. Irella and Manella, LLP 1800 Avenue of the Stars, Suite 900 Los Angeles, CA 90067-4276	**Email/Certified Mail** dschwarz@irell.com 9414-7266-9904-2964-1967-87

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Michael P. Mallery, Esq. General Counsel Gerawan Farming, Inc. 7108 N. Fresno Street, Suite 450 Fresno, CA 93720	**Email/Certified Mail** m.mallery@gerawan.com 9414-7266-9904-2964-1967-94
Chris A. Schneider, Regional Director Merced Barrera, Graduate Legal Assistant Agricultural Labor Relations Board Visalia Regional Office 1642 W. Walnut Avenue Visalia, CA 93277	**Email/Certified Mail** Chris.Schneider@alrb.ca.gov Merced.Barrera@alrb.ca.gov 9414-7266-9904-2964-1968-00
Julia L. Montgomery, General Counsel Silas Shawver, Deputy General Counsel Audrey Hsia, AGPA Agricultural Labor Relations Board 1325 "J" Street, Suite 1900-A Sacramento, CA 95814	**Email/Hand Delivered** jmontgomery@alrb.ca.gov sshawver@alrb.ca.gov Audrey.Hsia@alrb.ca.gov

Executed on **June 19, 2018**, at Sacramento, California. I certify under penalty of perjury that the foregoing is true and correct.

Annamarie Argumedo
Senior Legal Typist

ATTACHMENT B

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

GERAWAN FARMING, INC. **Respondent,** **and** **UNITED FARM WORKERS OF AMERICA,** **Charging Party**	**Case Nos.: 2015-CE-023-VIS** **2014-CE-015-VIS** **2014-CE-021-VIS** **2014-CE-025-VIS** **ORDER GRANTING GENERAL COUNSEL'S MOTION IN LIMINE**

The consolidated complaint in this proceeding issued on June 29, 2017. Respondent duly answered on July 12, 2017, admitting and denying certain allegations and asserting various affirmative defenses. Hearing will commence in Fresno on June 20, 2018.

Four causes of action are set forth for litigation. Pursuant to an Order issued today, the first cause of action was dismissed. The three remaining causes of action include

- Alleged retaliatory discharge of Pablo Gutierrez in violation of California Labor Code Section 1153 (c) and (a) (second cause of action);
- Alleged failure to provide information to bargaining agent in violation of Section 1153 (e) and (a) (third cause of action); and
- Alleged maintaining and enforcing policies that interfere with and restrain employees in the exercise of their rights under the ALRA in violation of Section 1153 (a).

In light of dismissal of the first cause of action, the alleged unilateral action in suspending and discharging Rafael Marquez will not be litigated. The alleged failure to provide the bargaining agent with information regarding the Marquez

suspension and discharge (the third cause of action) will be litigated. The information requested included disciplinary action notice and letters given to Marquez on either April 24 or 27, 2015, copies of any reports and investigation summary regarding incidents on April 24 and 27, 2015; and copies of disciplinary actions that involved any suspension of 3 days or more given to any other worker during 2012, 2013, or 2015.

According to the General Counsel's motion in limine, although the legality of the Marquez suspension and discharge are not at issue in this proceeding, Respondent has advised the General Counsel that it intends to offer numerous documents in evidence which relate to the Marquez suspension and discharge. Specifically, these proposed exhibits include pleadings and transcripts related to *ALRB v. Gerawan Farming, Inc.* (Filed June 1, 2015) Fresno Co. Case No. 15-CECG-01718. In the Fresno Superior Court action, the General Counsel sought an order directing Gerawan to reinstate Marquez to employment. Respondent's exhibit list in the current litigation also includes a Public Records Act Request and the personnel records of Marquez and other employees. None of the documents appear to have any relevance to the information request at issue in this case.

Respondent opposes this motion arguing it is relevant to the third cause of action which alleges that Respondent failed to provide information regarding an employee discharge at the request of the UFW. Specifically, Respondent explains that the exhibit list documents include evidence of "the General Counsel's conduct related to Mr. Marquez's termination." Respondent believes this evidence will prove that the General Counsel was involved in the termination underlying the information request. Respondent further asserts, "Gerawan believes that the evidence will show that the General Counsel played a significant role in causing a course of actions that ultimately led Gerawan to terminate Mr. Marquez." Thus, in essence, Respondent claims the General Counsel caused it to terminate Marquez.

Due to this chain of events, Respondent avers that it had no duty to respond to the UFW's request for information because the request was not made in good faith due to involvement of the ALRB in setting a course of action leading to the discharge of Marquez. However, the discharge of Marquez is not at issue here. Moreover, there is a conflation of entities in Respondent's argument. Even were it true that the ALRB was somehow involved in actions which led to

Marquez's discharge, such evidence would not be tantamount to bad faith in a UFW request for information.

Under these circumstances, the motion in limine is granted. This ruling as well as the General Counsel's Motion in Limine and Respondent's Opposition to the Motion including the declaration of Ronald H. Barsamian in Support of Respondent's Opposition shall be made a part of the record. At hearing, if Respondent so desires, the documents listed on its exhibit list will be placed in the rejected exhibit file.

SO ORDERED
June 19, 2018

Mary Miller Cracraft
Administrative Law Judge
Agricultural Labor Relations Board

STATE OF CALIFORNIA
AGRICULTURAL LABOR RELATIONS BOARD

PROOF OF SERVICE
(1013a, 2015.5 C.C.P.)

Case Name: GERAWAN FARMING, INC., Respondent, and,
UNITED FARM WORKERS OF AMERICA, Charging Party

Case Numbers: 2015-CE-023-VIS, 2014-CE-015-VIS, 2014-CE-021-VIS, and 2014-CE-025-VIS

I am a citizen of the United States and a resident of the County of Sacramento. I am over the age of eighteen years and not a party to the within entitled action. My business address is: 1325 "J" Street, Suite 1900-B, Sacramento, California 95814.

On **June 19, 2018**, I served the within **ORDER GRANTING GENERAL COUNSEL'S MOTION IN LIMINE** on the parties in said action, by **EMAIL and CERTIFIED U.S. MAIL or HAND DELIVERED** and placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail, at Sacramento, California addressed as follow:

Ronald H. Barsamian, Esq. Barsamian and Moody 1141 W. Shaw Avenue, Suite 104 Fresno, CA 93711-3704	**Email/Certified Mail** Laborlaw@theemployerslawfirm.com ronbarsamian@aol.com 9414-7266-9904-2964-1967-32
Mario Martinez, Esq. Edgar Aguilasocho, Esq. Brenda Rizo, Paralegal Martinez, Aguilasocho & Lynch P.O. Box 1998 Bakersfield, CA 93303	**Email/Certified Mail** mmartinez@farmworkerlaw.com eaguilasocho@farmworkerlaw.com brizo@farmworkerlaw.com 9414-7266-9904-2964-1967-49
David A. Schwarz, Esq. Irella and Manella, LLP 1800 Avenue of the Stars, Suite 900 Los Angeles, CA 90067-4276	**Email/Certified Mail** dschwarz@irell.com 9414-7266-9904-2964-1967-56

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Michael P. Mallery, Esq. General Counsel Gerawan Farming, Inc. 7108 N. Fresno Street, Suite 450 Fresno, CA 93720	**Email/Certified Mail** m.mallery@gerawan.com 9414-7266-9904-2964-1967-01
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Julia L. Montgomery, General Counsel Silas Shawver, Deputy General Counsel Audrey Hsia, AGPA Agricultural Labor Relations Board 1325 "J" Street, Suite 1900-A Sacramento, CA 95814	**Email/Hand Delivered** jmontgomery@alrb.ca.gov sshawver@alrb.ca.gov Audrey.Hsia@alrb.ca.gov

Executed on **June 19, 2018**, at Sacramento, California. I certify under penalty of perjury that the foregoing is true and correct.

Annamarie Argumedo
Senior Legal Typist

ATTACHMENT C

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

GERAWAN FARMING, INC. **Respondent,** **and,** **UNITED FARM WORKERS OF AMERICA,** **Charging Party.**	**Case Nos.: 2015-CE-023-VIS** **2014-CE-015-VIS** **2014-CE-021-VIS** **2014-CE-025-VIS** **ORDER GRANTING GENERAL COUNSEL'S PETITION TO REVOKE THE NOTICE IN LIEU OF SUBPOENA FOR THE APPEARANCE OF SILAS SHAWVER AT HEARING**

The consolidated complaint in this proceeding issued on June 29, 2017. Respondent duly answered on July 12, 2017, admitting and denying certain allegations and asserting various affirmative defenses. Hearing will commence in Fresno on June 20, 2018.

Four causes of action are set forth for litigation. Pursuant to an Order issued today, the first cause of action was dismissed. The three remaining causes of action include:

- Alleged retaliatory discharge of Pablo Gutierrez in violation of California Labor Code Section 1153 (c) and (a) (second cause of action);
- Alleged failure to provide information to bargaining agent in violation of Section 1153 (e) and (a) (third cause of action); and
- Alleged maintaining and enforcing policies that interfere with and restrain employees in the exercise of their rights under the ALRA in violation of Section 1153 (a) (fourth cause of action).

On June 8, 2018, Deputy General Counsel Silas Shawver received notice in lieu of subpoena from Respondent to attend the hearing in this matter and testify on June 21, 2018. General Counsel avers an understanding based on conversation with Respondent's counsel that Deputy General Counsel Shawver's testimony is sought as to a conversation between him and Rafael Marquez in April 2015, after the time of Marquez' suspension and before his termination. The General Counsel seeks to revoke the subpoena to Deputy General Counsel Silas Shawver because he assertedly has no knowledge relevant to this proceeding.

In fact, unilateral imposition of Marquez' suspension and discharge were at issue in the first cause of action, dismissed by separate order today. And even were it not dismissed, Respondent has been on notice since June 13, 2018, that the General Counsel did not intend to pursue the first cause of action with regard to Marquez. In any event, the only further involvement of Marquez in this proceeding is the allegation in the third cause of action which alleges failure or refusal to respond to a May 4, 2015 request for information regarding Marquez' suspension and termination of employment.

Deputy General Counsel Shawver's declaration under oath states that he has no personal knowledge of the information request at issue in the third cause of action. Further under oath, he states he has no personal knowledge of any communications between Gerawan and the UFW related to the request for information.

As the General Counsel notes, requiring the presence of Deputy General Counsel Shawver under these circumstances would impose an unnecessary burden and expense. For purposes of judicial economy and streamlining the litigation, the General Counsel seeks revocation of the notice in lieu of subpoena.

Respondent opposes revocation of the notice in lieu of subpoena averring that Deputy General Counsel Shawver, acting as Visalia Regional Director, played a part in Gerawan's discharge of Marquez by directing Marquez to return to work after he had been suspended by Gerawan. In an action to obtain a temporary restraining order to return Marquez to work, Respondent avers that Shawver, acting as Regional Director, became aware of Respondent's opposing documents concerning the suspension and discharge. Thus, Respondent asserts that Shawver, acting as Regional Director, has information relating to the suspension and discharge of Marquez which gave rise to the information request. Respondent assumes, consistent with Shawver's testimony in another injunction action against Gerawan, that the temporary restraining order information was shared with the UFW pursuant to a practice of "comparing notes" with the charging party during investigation of unfair labor practice charges. Thus, Respondent asserts it has a right to adduce testimony as to what was shared with the UFW about information provided by Respondent and by Marquez.

Assuming without deciding that Respondent's argument is correct, such evidence has no bearing on whether Gerawan responded to the information request. If Respondent is now asserting bad faith on the part of UFW in making the request, the assertion is late and should have been put forward in response to the request in May 2015.

Moreover, if at least one reason for making a demand for information can be justified, the good faith requirement is met.[1] At this point, the General Counsel has satisfied its burden of showing relevance and necessity in that the complaint

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[1] See, e.g., *Ormet Aluminum Mill Products Corp.*, (2001) 335 NLRB 788, 805; *A K Steel Corp.*, (1997) 324 NLRB 173, 184; see also, *ACF Industrial, LLC* (2006) 347 NLRB 1040, 1046 (timing of information request indicated it was purely tactical attempt to forestall impasse made in bad faith but legitimate reasons also existed to find good faith request).

allegation itself requests documents that are presumptively relevant.[2] This good faith reason for the information request requires a finding that the request was made in good faith.

After thorough consideration of the pleadings and arguments, it is concluded that any conversation between Deputy General Counsel Shawver and Marquez in April 2015, prior to the UFW's request for information, would be irrelevant to the allegation of failure to provide information. Deputy General Counsel Shawver has stated under oath that he has no knowledge of what information the UFW may have requested of Gerawan in the instant case. More importantly, there is a legitimate good faith reason which fully supports the information request. Under these circumstances, the notice in lieu of subpoena is revoked.

SO ORDERED
June 19, 2018

Mary Miller Cracraft
Administrative Law Judge
Agricultural Labor Relations Board

[2] See, e.g., *Fleming Cos.* (2000) 332 NLRB 1086 (information regarding suspension and discharge of unit employee "intrinsic to the core of the employer-employee relationship.")

STATE OF CALIFORNIA
AGRICULTURAL LABOR RELATIONS BOARD

PROOF OF SERVICE
(1013a, 2015.5 C.C.P.)

Case Name: GERAWAN FARMING, INC., Respondent, and,
UNITED FARM WORKERS OF AMERICA, Charging Party

Case Numbers: 2015-CE-023-VIS, 2014-CE-015-VIS, 2014-CE-021-VIS, and 2014-CE-025-VIS

I am a citizen of the United States and a resident of the County of Sacramento. I am over the age of eighteen years and not a party to the within entitled action. My business address is: 1325 "J" Street, Suite 1900-B, Sacramento, California 95814.

On **June 19, 2018**, I served the within **ORDER GRANTING GENERAL COUNSEL'S PETITION TO REVOKE THE NOTICE IN LIEU OF SUBPOENA FOR THE APPEARANCE OF SILAS SHAWVER AT HEARING** on the parties in said action, by **EMAIL and CERTIFIED U.S. MAIL or HAND DELIVERED** and placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail, at Sacramento, California addressed as follow:

Ronald H. Barsamian, Esq. Barsamian and Moody 1141 W. Shaw Avenue, Suite 104 Fresno, CA 93711-3704	**Email/Certified Mail** Laborlaw@theemployerslawfirm.com ronbarsamian@aol.com 9414-7266-9904-2964-1968-24
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Michael P. Mallery, Esq. General Counsel Gerawan Farming, Inc. 7108 N. Fresno Street, Suite 450 Fresno, CA 93720	**Email/Certified Mail** m.mallery@gerawan.com 9414-7266-9904-2964-1968-17
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Executed on **June 19, 2018**, at Sacramento, California. I certify under penalty of perjury that the foregoing is true and correct.

Annamarie Argumedo
Senior Legal Typist

STATE OF CALIFORNIA
AGRICULTURAL LABOR RELATIONS BOARD

PROOF OF SERVICE BY MAIL
(1013a, 2015.5 C.C.P.)

CASE NAME: GERAWAN FARMING, INC., Respondent, and UNITED FARM WORKERS OF AMERICA, Charging Party.

CASE NO's.: 2015-CE-023-VIS
2014-CE-015-VIS
2014-CE-021-VIS
2014-CE-025-VIS

I am a citizen of the United States and a resident of the County of Sacramento. I am over the age of eighteen years and not a party to the within entitled action. My business address is: 1325 J Street, Suite 1900-B, Sacramento, California 95814-2944.

On **October 18, 2018**, I served the within **DECISION AND ORDER** on parties in said action by **EMAIL and/or CERTIFIED MAIL** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Sacramento, California addressed as follow:

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Executed on **October 18, 2018**, at Sacramento California. I certify under penalty of perjury that the foregoing is true and correct.

Caroline Molumby
Legal Secretary