AGRICULTURAL LABOR RELATIONS BOARD
CASE DIGEST SUPPLEMENT
VOLUME 44 (2018)

101.02 The Board may diverge from federal precedents if the particular problems of labor relations within the agricultural context justify such treatment.
ARNAUDO BROTHERS, LP v. ALRB (2018) 22 Cal.App.5th 1213.

101.04 The Board is required to follow applicable "precedents" of the NLRA, which may be established by the United States Supreme Court, federal appellate courts, or the NLRB; however, this does not include rules of practice or procedure.
ARNAUDO BROTHERS, LP v. ALRB (2018) 22 Cal.App.5th 1213.

101.04 The language in section 1160.8 prescribing the substantial evidence standard of review based on the record considered as a whole was taken from the corresponding section of the NLRA, and federal decisions relating to that standard are of precedential value in fleshing out its parameters.
GERAWAN FARMING, INC. v. ALRB (2018) 23 Cal.App.5th 1129.

300.03 A disclaimer involves a union expressing its unwillingness to represent the unit employees.
ARNAUDO BROTHERS, LP v. ALRB (2018) 22 Cal.App.5th 1213.

300.03 A union's disclaimer of interest in representing the unit must be clear, unequivocal, and made in good faith, and the union's conduct must not be inconsistent with the disclaimer.
ARNAUDO BROTHERS, LP v. ALRB (2018) 22 Cal.App.5th 1213.

300.03 Inconsistent conduct can render a clear and unequivocal disclaimer ineffective.
ARNAUDO BROTHERS, LP v. ALRB (2018) 22 Cal.App.5th 1213.

300.03 The party asserting a union has disclaimed interest in representing the employees bears the burden of proving the disclaimer occurred.
ARNAUDO BROTHERS, LP v. ALRB (2018) 22 Cal.App.5th 1213.

300.03 Union statement to employer that "We're through with you" was ambiguous and not unequivocal, particularly in light of surrounding circumstances.
ARNAUDO BROTHERS, LP v. ALRB (2018) 22 Cal.App.5th 1213.

300.03 Under applicable federal precedent, an unequivocal disclaimer will not be given effect if it is inconsistent with the union's conduct.
ARNAUDO BROTHERS, LP v. ALRB (2018) 22 Cal.App.5th 1213.

300.03 The Board properly applied existing precedent when it concluded that (1) subsequent inconsistent behavior renders an unequivocal disclaimer ineffective, but (2) subsequent consistent behavior does not convert an ambiguous disclaimer into an effective disclaimer.
ARNAUDO BROTHERS, LP v. ALRB (2018) 22 Cal.App.5th 1213.

309.04 An employer's refusal to bargain with a union may not be held to violate the ALRA where it occurs after a decertification election and the union is ultimately decertified.
GERAWAN FARMING, INC., 44 ALRB No. 11.

309.04 When the Board certifies the results of a decertification election and the "no union" vote prevails, the decertification of the union relates back to the date of the election, even if the tally of ballots occurred at a later date.
GERAWAN FARMING, INC., 44 ALRB No. 11.

316.03 Crew boss' facilitation of signature gathering for decertification petition aided in the proponents' efforts to obtain an adequate showing of interest to trigger an election, but in light of the size of the crew, the lapse of time between the conduct and the election, and the wide margin of victory, such conduct was not sufficient to warrant setting aside the election.
GERAWAN FARMING, INC., 44 ALRB No. 10.

316.03 While the employer's unlawful assistance to the decertification proponents' signature gathering efforts by allowing them a "virtual sabbatical" from work to perform such activities casts some doubt on the validity of the petition's showing of interest, the Board could not find that employees' free choice in the subsequent election was impacted to such a degree it affected the outcome of the election due to the passage of time and where the record contained no evidence of conduct during the signature gathering that could have that could have continued to influence workers when they cast their ballots.
GERAWAN FARMING, INC., 44 ALRB No. 10.

316.10 An employer's free speech right to communicate his views to his employees is firmly established and cannot be infringed by a union or the Board. The only exception is where the communication contains a threat of reprisal or force or promise of benefit. Thus, an employer's facially neutral statement of support for employees' right to choose was protected speech.
GERAWAN FARMING, INC. v. ALRB (2018) 23 Cal.App.5th 1129.

316.11 A one-day piece-rate increase to grape packers before the election was an unfair labor practice but, given the fact that the increase was temporary, affected only a small portion of the workforce, and in light of the large margin of the "no union" victory in the election, did not support a finding that this violation impacted free choice to such an extent that it affected the results of the election.
GERAWAN FARMING, INC., 44 ALRB No. 10.

316.11 While employer's unilateral wage increase constituted a serious violation that impacted a large portion of the bargaining unit, it occurred well before there was a campaign underway to decertify the union and more than seven months before the election. Thus, when coupled with a large margin of victory for the no-union vote in the election, the Board could not find that this unfair labor practice interfered with the employees' free choice to such an extent that it affected the results of the election.
GERAWAN FARMING, INC., 44 ALRB No. 10.

316.11 The motive of the employer is critical in determining whether the granting of a wage increase prior to an election is an unfair labor practice. An important indicator of that motive is whether there has been a change from the status quo.
GERAWAN FARMING, INC. v. ALRB (2018) 23 Cal.App.5th 1129.

316.11 The law is well established that there is a presumption of illegal motive adhering to wage increases granted prior to an election.
GERAWAN FARMING, INC. v. ALRB (2018) 23 Cal.App.5th 1129.

316.18 Merely allowing worktime signature gathering to occur is not by itself objectionable and does not constitute employer participation or assistance in a decertification campaign. However, such conduct is objectionable if the employer discriminates in favor of anti-union activity.
GERAWAN FARMING, INC. v. ALRB (2018) 23 Cal.App.5th 1129.

316.18 Employer did not discriminate where anti-union solicitations occurred during working time because the union's requests to solicit during working time were orchestrated after the employer had provided trainings to its supervisors not to allow solicitations during working time, and the anti-union soliciting that did occur was not specifically authorized by the supervisors.
GERAWAN FARMING, INC. v. ALRB (2018) 23 Cal.App.5th 1129.

316.19 The decision regarding decertification and the responsibility to prepare and file a decertification petition belongs solely to the employees. Other than to provide general information about the process on the employees' unsolicited inquiry, an employer has no legitimate role in that activity, either to instigate or to facilitate it.
GERAWAN FARMING, INC., 44 ALRB No. 10.

316.19 Employer committed unfair labor practice by allowing decertification proponents a "virtual sabbatical" from work to engage in soliciting and other decertification efforts while union supporters were not given such leeway in missing work.
GERAWAN FARMING, INC. v. ALRB (2018) 23 Cal.App.5th 1129.

316.19 The Board may set aside an election due to unlawful "taint" on the petition only in circumstances where the employer instigated the decertification process or provided pervasive or egregious assistance in procuring signatures.
GERAWAN FARMING, INC. v. ALRB (2018) 23 Cal.App.5th 1129.

316.19 Dissemination of unlawful conduct can be presumed only where a reasonable factual basis exists to prove dissemination.
GERAWAN FARMING, INC. v. ALRB (2018) 23 Cal.App.5th 1129.

316.19 After an election has been ordered, the Board may not set aside an election based on employer assistance during the signature gathering process except in cases of employer instigation or where such assistance is pervasive.
GERAWAN FARMING, INC. v. ALRB (2018) 23 Cal.App.5th 1129.

320.05 A certified union remains the employees exclusive bargaining representative until it is decertified or until it becomes defunct or disclaims interest in representing the unit.
ARNAUDO BROTHERS, LP v. ALRB (2018) 22 Cal.App.5th 1213.

324.01 The Board has consistently followed the practice of the NLRB in proscribing the litigation in unfair labor practice proceedings of matters previously resolved in representation proceedings, absent a showing of newly discovered or previously unavailable evidence or other extraordinary circumstances.
PREMIERE RASPBERRIES, LLC, 44 ALRB No. 9.

324.01 The Board will not allow parties to litigate in representation proceedings issues that were the subject of unfair labor practice allegations dismissed by the General Counsel in derogation of the General Counsel's final authority over the investigation and prosecution of charges.
PREMIERE RASPBERRIES, LLC, 44 ALRB No. 9.

324.01 The party objecting to an election bears a heavy burden of demonstrating not only that improprieties occurred, but that they were sufficiently material to have impacted the outcome of the election. The burden is not met merely by proving that misconduct did in fact occur, but rather by specific evidence demonstrating that it interfered with the employees' exercise of their free choice to such an extent that the conduct changed the results of the election.
GERAWAN FARMING, INC., 44 ALRB No. 10.

324.01 In determining whether misconduct could have affected the results of the election, relevant considerations may include, but are not limited to, the pervasiveness of the conduct, the size of the voting unit, the proximity of the conduct to the election, and the closeness of the election results.
GERAWAN FARMING, INC., 44 ALRB No. 10.

324.01 Generally speaking, the objecting party's burden is made more difficult where the margin of victory is wide. Nevertheless, the converse proposition is also true, that a wide margin of victory itself may be evidence of a party's successful efforts to undermine the employees' free choice.
GERAWAN FARMING, INC., 44 ALRB No. 10.

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GERAWAN FARMING, INC. v. ALRB (2018) 23 Cal.App.5th 1129.

324.01 One of the reasons the Board imposes a heavy burden on those who challenge elections, and rejects any requirement of "laboratory conditions" concerning petitioning activity or election campaigns, is the Board's recognition that if an election is set aside in the agricultural context, the workers will not likely have an opportunity for a rerun election as in the federal system.
GERAWAN FARMING, INC. v. ALRB (2018) 23 Cal.App.5th 1129.

324.01 Under the outcome-determinative test, misconduct is tested and evaluated under an objective standard of its reasonable impact on workers' free choice in light of all the facts and circumstances, rather than by making endless inquiries into the subjective motivations of particular employees.
GERAWAN FARMING, INC. v. ALRB (2018) 23 Cal.App.5th 1129.

324.01 The Board and the courts have recognized that one of the circumstances ordinarily relevant or helpful to a fair determination of whether particular conduct may have reasonably interfered with employee free choice in an election is the margin of the outcome reflected in the vote tally.
GERAWAN FARMING, INC. v. ALRB (2018) 23 Cal.App.5th 1129.

324.02 Notwithstanding the seriousness of the threats alleged by the employer in its election objections, the declarations submitted in support of its objections did not establish the isolated threats were disseminated amongst the workforce or that other employees knew or were aware of the threats.
PREMIERE RASPBERRIES, LLC, 44 ALRB No. 9.

409.03 An employer may relieve himself of liability for unlawful conduct by repudiating the conduct, if certain conditions are met, including that the repudiation must be timely, unambiguous, specific in nature to the unlawful conduct, and free from other proscribed illegal conduct. Further, the repudiation must be adequately publicized to the employees, there must be no further unlawful conduct after the publication, and the repudiation must give assurances to the employees that the employer will not interfere with their rights in the future.
GERAWAN FARMING, INC. v. ALRB (2018) 23 Cal.App.5th 1129.

409.03 Employer was not entitled to *Passavant* defense because unfair labor practices occurred after remedial noticing to the employees and supervisor trainings were provided.
GERAWAN FARMING, INC. v. ALRB (2018) 23 Cal.App.5th 1129.

423.01 Concerted employee efforts to oust or replace union personnel or stewards is protected by Labor Code 1152.
UNITED FARM WORKERS OF AMERICA (OLVERA), 44 ALRB No. 5.

423.01 The record contained no facts that would remove the employees' conduct from the protections of the ALRA, and thus a group of employees seeking to attend an ALRB public hearing regarding a proposed ALRB worksite access regulation were engaged in protected concerted activity.
UNITED FARM WORKERS OF AMERICA (LOPEZ), 44 ALRB No. 6.

423.01 Concerted activity is not protected where it is "unlawful, violent or in breach of contract" or is "indefensible." (See, e.g., *NLRB v. Washington Aluminum Co*. (1962) 370 U.S. 9, 17.)
UNITED FARM WORKERS OF AMERICA (LOPEZ), 44 ALRB No. 6.

432.01 Farm labor contractor workers are part of the bargaining unit represented by the union, and employer's refusal to bargain over wages, hours, or other terms and conditions of these employees constitutes a per se violation of the duty to bargain.
GERAWAN FARMING, INC., 44 ALRB No. 1.

432.02 In the absence of extraordinary circumstances, the only way an employer may obtain judicial review of the Board's order(s) in an election certification proceeding is to (1) refuse to bargain with the representative whose election it challenges; (2) be found guilty by the Board of an unfair labor practice because of such refusal to bargain; and (3) obtain review of the election and certification in the course of judicial review of the unfair labor practice decision.
GERAWAN FARMING, INC. v. ALRB (2018) 23 Cal.App.5th 1129.

432.02 Employer did not have adequate remedy of review via the technical refusal to bargain process by virtue of Board's impounding of and failure to tally the ballots.
GERAWAN FARMING, INC. v. ALRB (2018) 23 Cal.App.5th 1129.

432.02 Employer could obtain direct review of order setting aside election where representation proceeding was consolidated with unfair labor practice proceedings, the availability of indirect review via a technical refusal to bargain was foreclosed due to the impounding of ballots, and the election-related remedies were intertwined with and premised upon the unfair labor practice holdings in the Board's final decision and order, such that it may reasonably be construed as an indivisible, single final order.
GERAWAN FARMING, INC. v. ALRB (2018) 23 Cal.App.5th 1129.

433.01 A proposal to modify the scope of a bargaining unit, or to remove employees from the bargaining unit, is not a mandatory subject of bargaining.
GERAWAN FARMING, INC., 44 ALRB No. 1.

433.01 A proposal requiring "just cause" for employee discipline is a well-recognized and common term found in most collective bargaining agreements.
GERAWAN FARMING, INC., 44 ALRB No. 1.

433.01 Seniority rights are a fundamental component of any collective bargaining relationship and are common to labor agreements.
GERAWAN FARMING, INC., 44 ALRB No. 1.

433.01 Grievance-arbitration is a common feature in collective bargaining agreements. The United States Supreme Court has held that federal labor policy is to promote industrial stabilization through the collective bargaining agreement, and that a major factor in achieving industrial peace is the inclusion of a provision for arbitration of grievances in the collective bargaining agreement.
GERAWAN FARMING, INC., 44 ALRB No. 1.

433.02 Employer's union-indemnification proposal is not a mandatory subject of bargaining, as it does not relate to the employees' wages, hours, or terms and conditions of employment.
GERAWAN FARMING, INC., 44 ALRB No. 1.

435.01 The duty to bargain means more than merely demonstrating a willingness to meet and talk, but rather requires a party to enter such discussions with an open mind and sincere purpose in resolving differences and finding agreement.
GERAWAN FARMING, INC., 44 ALRB No. 1.

435.01 The NLRB and this Board apply a "totality of circumstances" test to determine whether a party's conduct, as a whole, both at and away from the bargaining table, demonstrates a violation of the duty to bargain in good faith. Thus, we look to the entire course of bargaining rather than examining individual negotiating sessions or proposals in isolation.
GERAWAN FARMING, INC., 44 ALRB No. 1.

435.01 The NLRB has identified seven factors indicative of a lack of good faith: (1) delaying tactics; (2) unreasonable bargaining demands; (3) unilateral changes in mandatory subjects of bargaining; (4) efforts to bypass the union; (5) failure to designate an agent with sufficient bargaining authority; (6) withdrawal of already agreed-upon provisions; and (7) arbitrary scheduling of meetings. A party need not engage in all of the above activities to be found to have bargained in bad faith.
GERAWAN FARMING, INC., 44 ALRB No. 1.

435.03 A party's adamant insistence on a bargaining position is not necessarily unlawful in itself. "Hard bargaining" is permitted, and a party is entitled to stand firm on a position if he reasonably believes that it is fair and proper or that he has sufficient bargaining strength to force the other party to agree.
GERAWAN FARMING, INC., 44 ALRB No. 1.

435.03 While the Board does not have the power in unfair labor practice cases to compel either side to agree to any substantive contractual provisions, the Board may examine the substantive terms of the parties' contract proposals as part of the totality of circumstances in determining whether a party has engaged in surface bargaining.
GERAWAN FARMING, INC., 44 ALRB No. 1.

435.03 Employer's rejection of union security proposal and insistence on a "Right to Work" provision evidenced bad faith.
GERAWAN FARMING, INC., 44 ALRB No. 1.

435.03 Employer's insistence upon its "Economic Action" proposal preserving the employees' ability to strike was unreasonable and not fairly maintained.
GERAWAN FARMING, INC., 44 ALRB No. 1.

435.03 While employer may have made more movement or concessions than union on a grievance-arbitration process, this did not necessarily indicate good faith bargaining conduct since the employer's opening position – that the employer decide all grievances – allowed for the most movement.
GERAWAN FARMING, INC., 44 ALRB No. 1.

435.04 Where employer rejects union security or checkoff proposal based on philosophical grounds without making any effort to assess the implementation or administration of such a proposal, the employer has violated its duty to bargain in good faith.
GERAWAN FARMING, INC., 44 ALRB No. 1.

435.08 Because a party is not likely to directly admit its bad faith intentions, the Board necessarily must draw inferences of a party's state of mind based on circumstantial evidence of the party's overall conduct both at and away from the table throughout the entire course of the parties' negotiations.
GERAWAN FARMING, INC., 44 ALRB No. 1.

435.08 The Board is not required to ignore the parties' history of labor relations, including unfair labor practice findings from earlier cases, in providing context to allegations a party engaged in surface bargaining.
GERAWAN FARMING, INC., 44 ALRB No. 1.

435.09 Direct dealing need not involve actual bargaining. The fundamental inquiry in a direct dealing case is whether the employer has chosen to deal with the Union through the employees, rather than with the employees through the Union. In other words.
GERAWAN FARMING, INC. v. ALRB (2018) 23 Cal.App.5th 1129.

435.09 The duty of an employer to deal directly with the elected representative is exclusive, implying the negative duty to treat with no other the question is whether an employer's direct solicitation of employee sentiment over working conditions is likely to erode the Union's position as exclusive representative.
GERAWAN FARMING, INC. v. ALRB (2018) 23 Cal.App.5th 1129.

435.09 Employer engaged in direct dealing by announcing pay raises to employees in flyers stating the employer made the decision on its own and hoped the union would not interfere with or delay the raises.
GERAWAN FARMING, INC. v. ALRB (2018) 23 Cal.App.5th 1129.

435.10 Employer's attempt to justify its "Right to Work" proposal based on its professed concern for the employees' choice of representative is inconsistent with basic principles underlying our Act. The Legislature's clear purpose in drafting the ALRA was to preclude the employer from active participation in choosing or decertifying a union, and this certainly overrides any paternalistic interest of the employer that the employees be represented by a union of the present employees' own choice.
GERAWAN FARMING, INC., 44 ALRB No. 1.

435.10 The ALJ appropriately termed as "ludicrous" an employer proposal requiring the union to be subject to a one-year probationary period before it could collect dues from employees.
GERAWAN FARMING, INC., 44 ALRB No. 1.

435.10 Employer's "Economic Action" proposal preserving employees' ability to strike was contrary to the purpose of a collective bargaining agreement, which is intended to bring labor peace and stability and minimize such economic disruptions.
GERAWAN FARMING, INC., 44 ALRB No. 1.

435.10 It is true an employer generally may communicate with its employees about the status of ongoing negotiations in noncoercive terms; however, it equally is true an employer exceeds such permissible bounds of communication when conducted under such conditions as to suggest to employees that the Employer rather than the Union is the true protector of the employees' interest.
GERAWAN FARMING, INC., 44 ALRB No. 1.

435.13 One aspect of the duty to bargain collectively in good faith with labor organizations requires the employer to make a reasonable and diligent effort to comply with the union's request for relevant information.
GERAWAN FARMING, INC., 44 ALRB No. 1.

435.13 Employer's eight-month delay in furnishing information responsive to union's information request evidenced bad faith bargaining conduct.
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436.01 One aspect of the duty to bargain collectively in good faith with labor organizations requires the employer to make a reasonable and diligent effort to comply with the union's request for relevant information.
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436.02 Employer's eight-month delay in furnishing information responsive to union's information request evidenced bad faith bargaining conduct.
GERAWAN FARMING, INC., 44 ALRB No. 1.

436.02 If a party presented with an information request contends that the request is overboard or burdensome, the party must assert as much in a timely response to the request, not for the first time as a defense to an unfair labor practice allegation.
GERAWAN FARMING, INC., 44 ALRB No. 11.

436.02 Party that contended that portion of information request put at issue by unfair labor practice complaint was only a discrete portion of a much broader and overly burdensome request failed to establish a defense where the party had failed to provide any response to the request.
GERAWAN FARMING, INC., 44 ALRB No. 11.

436.02 Even where a party timely raises an undue burden objection in response to an information request, the party must still make a timely offer to cooperate with the requesting party in reaching a mutually acceptable accommodation.
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436.05 If a party presented with an information request contends that the request is overboard or burdensome, the party must assert as much in a timely response to the request, not for the first time as a defense to an unfair labor practice allegation.
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436.05 Party that contended that portion of information request put at issue by unfair labor practice complaint was only a discrete portion of a much broader and overly burdensome request failed to establish a defense where the party had failed to provide any response to the request.
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436.05 Even where a party timely raises an undue burden objection in response to an information request, the party must still make a timely offer to cooperate with the requesting party in reaching a mutually acceptable accommodation.
GERAWAN FARMING, INC., 44 ALRB No. 11.

438.01 An employer violates its duty to bargain when it implements unilateral changes in terms and conditions of employment. This prohibition against the implementation of unilateral changes is even stronger when the parties actively are engaged in bargaining.
GERAWAN FARMING, INC., 44 ALRB No. 1.

438.09 The mere solicitation of employee grievances prior to an election is not a per se violation. Nor is it a violation merely to have an open door policy or to express a willingness to listen to grievances.
GERAWAN FARMING, INC. v. ALRB (2018) 23 Cal.App.5th 1129.

438.09 An employer's solicitation of grievances from its employees becomes an unfair labor practice when (i) accompanied by an express or implied promise that the grievances will be remedied, and (ii) the circumstances give rise to the inference that the remedy will only come to fruition if the union loses the election. The gist of the applicable rule may be stated as follows: During an organizing campaign or a pre-election period, an employer may not solicit employee grievances in a manner that expressly or impliedly promises that the problems will be resolved if the union is turned away, nor may it do so where the combined program of solicitation and promised correction suggests that union representation is unnecessary.
GERAWAN FARMING, INC. v. ALRB (2018) 23 Cal.App.5th 1129.

438.09 Absent a past practice of doing so, an employer's solicitation of grievances in the midst of a union campaign or pre-election period creates a rebuttable presumption of an implied promise to remedy the grievances.
GERAWAN FARMING, INC. v. ALRB (2018) 23 Cal.App.5th 1129.

438.09 The fact the employer had not previously engaged in extensive or frequent communications with its employees, or solicited employee questions or concerns, was not a reliable measure of the employer's past practice because the union's sudden reappearance after a long absence was itself highly out of the ordinary and an unprecedented development impacting both employer and employees.
GERAWAN FARMING, INC. v. ALRB (2018) 23 Cal.App.5th 1129.

439.01 By indicating its willingness to bargain with the union and respond to an information request, and ultimately doing both, employer waived any challenge to the union's certified status.
GERAWAN FARMING, INC., 44 ALRB No. 1.

439.13 The Board's precedent clearly establishes that a certified union's alleged absence has no effect on the union's status as the employees' exclusive bargaining representative.
GERAWAN FARMING, INC., 44 ALRB No. 1.

439.13 The abandonment defense is not recognized in California, and is not an exception to the certified until decertified rule.
ARNAUDO BROTHERS, LP v. ALRB (2018) 22 Cal.App.5th 1213.

440.03 Employee turnover has no effect on the incumbent union's certified status.
GERAWAN FARMING, INC., 44 ALRB No. 1.

440.05 Union's prolonged absence has no effect on its continuing status as the certified bargaining representative.
GERAWAN FARMING, INC., 44 ALRB No. 1.

441.02 An employer's refusal to bargain with a union may not be held to violate the ALRA where it occurs after a decertification election and the union is ultimately decertified.
GERAWAN FARMING, INC., 44 ALRB No. 11.

441.02 When the Board certifies the results of a decertification election and the "no union" vote prevails, the decertification of the union relates back to the date of the election, even if the tally of ballots occurred at a later date.
GERAWAN FARMING, INC., 44 ALRB No. 11.

442.03 An allegation that a union's internal discipline of a member (not involving revocation of membership or good standing) violated Labor Code 1154(a)(1) is assessed under the standard set forth in Sandia Corp. (2000) 331 NLRB 1417 under which discipline is unlawful where it affects the member's status as an employee, does not involve threats or violence, does not impair access to ALRB processes, does not impair policies imbedded in the ALRA and where the interest in the member's protected rights outweighs the union's legitimate interests .
UNITED FARM WORKERS OF AMERICA (OLVERA), 44 ALRB No. 5.

442.03 In order to be protected under the protected under the "proviso" to Labor Code 1154(a)(1) pertaining to internal union discipline, and where the discipline does not pertain to loss of membership or good standing, there is no requirement that the discipline be imposed pursuant to a "duly adopted" or "properly adopted" rule.
UNITED FARM WORKERS OF AMERICA (OLVERA), 44 ALRB No. 5.

442.04 Union steward's exclusion of dissident union members from a crew meeting did not violate Labor Code 1154(a)(1) under the test stated in Sandia Corp. (2000) 331 NLRB 1417 because exclusion from the meeting did not affect the dissidents' status as employees, was not accomplished by threats or violence, did not restrain their access to the NLRB's processes, and did not impair policies imbedded in the ALRA .
UNITED FARM WORKERS OF AMERICA (OLVERA), 44 ALRB No. 5.

442.04 Union steward's exclusion of dissident union members from a crew meeting did not affect their status as employees where the exclusion did not affect their pay, benefits, or employment opportunities, and only intraunion matters were discussed at the meeting.
UNITED FARM WORKERS OF AMERICA (OLVERA), 44 ALRB No. 5.

442.04 The fact that union discipline may have been aimed at conduct protected by Labor Code 1152 is not a sufficient basis to find that the discipline impaired a policy imbedded in the ALRA under the test stated in *Sandia Corp*. (2000) 331 NLRB 1417.
UNITED FARM WORKERS OF AMERICA (OLVERA), 44 ALRB No. 5.

442.04 Where union steward excluded dissident union members from a crew meeting, the fact that the members would not be able to engage in protected activity at the meeting did not mean that the conduct impaired a policy imbedded in the ALRA for purposes of the test stated in *Sandia Corp.* (2000) 331 NLRB 1417.
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UNITED FARM WORKERS OF AMERICA (OLVERA), 44 ALRB No. 5.

442.04 Statements made in union meetings that members should ignore or distrust another member whom the union believed to be trying to decertify the union did not violate Labor Code 1154(a)(1) because the statements were not threats or promises of benefits, and because the meeting was an intraunion matter that did not affect the member's status as an employee.
UNITED FARM WORKERS OF AMERICA (OLVERA), 44 ALRB No. 5.

442.04 The California Supreme Court's decision in *Harry Carian Sales v. ALRB* (1985) 39 Cal.3d 209 does not hold that any statement that might cause an employee to "shun and avoid" another employee violates the ALRA where the statement in question does not resemble the "slanderous" and "degrading" language at issue in that case.
UNITED FARM WORKERS OF AMERICA (OLVERA), 44 ALRB No. 5.

442.04 Where a union is alleged to have made a threat of adverse employment action against an employee, the fact that the union lacks the ability to actually carry out the threat is not dispositive. Rather, a union's threat of loss of employment is coercive where it is reasonably calculated to have an effect on the listener.
UNITED FARM WORKERS OF AMERICA (OLVERA), 44 ALRB No. 5.

442.04 Statement by union official to employee that the filing of an unfair labor practice charge could cause the employee to be placed on a "burn list" would be construed as a threat by a reasonable employee under the circumstances.
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442.09 Statements made in union meetings that members should ignore or distrust another member whom the union believed to be trying to decertify the union did not violate Labor Code 1154(a)(1) because the statements were not threats or promises of benefits, and because the meeting was an intraunion matter that did not affect the member's status as an employee.
UNITED FARM WORKERS OF AMERICA (OLVERA), 44 ALRB No. 5.

442.09 Where a union is alleged to have made a threat of adverse employment action against an employee, the fact that the union lacks the ability to actually carry out the threat is not dispositive. Rather, a union's threat of loss of employment is coercive where it is reasonably calculated to have an effect on the listener.
UNITED FARM WORKERS OF AMERICA (OLVERA), 44 ALRB No. 5.

442.09 Union violated section 1154(a)(1) by causing the temporary exclusion of a group of pro-decertification farmworkers from attending an ALRB public hearing regarding a proposed ALRB worksite access regulation. At the time the union's agent caused the exclusion of the farmworkers from the public hearing, she could not have known the content of what any of them would say at the hearing, or if they would say anything at all. Any belief the union's agent may have harbored as to what they would do at the hearing was speculative and gave her no legal justification to interfere with their concerted activity. Thus, the restraint on the workers' rights was achieved before any of them even were permitted to speak after being admitted to the hearing.
UNITED FARM WORKERS OF AMERICA (LOPEZ), 44 ALRB No. 6.

444.02 Statement by union official to employee that the filing of an unfair labor practice charge could cause the employee to be placed on a "burn list" would be construed as a threat by a reasonable employee under the circumstances.
UNITED FARM WORKERS OF AMERICA (OLVERA), 44 ALRB No. 5.

454.01 General Counsel had authority to litigate unfair labor practice charges that were the subject of a settlement agreement with respondent where the agreement stated that further unlawful conduct by respondent would void the agreement and respondent was found to have unlawfully threatened an employee after executing the agreement.
UNITED FARM WORKERS OF AMERICA (OLVERA), 44 ALRB No. 5.

455.02 The Board will reject an exception to an ALJ decision where the party provides no evidentiary support for it.
GERAWAN FARMING, INC., 44 ALRB No. 1.

457.05 There are strong policy reasons for the Board to adhere to its own long-standing precedents absent compelling reasons to reverse.
GERAWAN FARMING, INC., 44 ALRB No. 11.

458.01 Where union was found to have unlawfully interrogated and threatened employees for engaging in protected activity, threatened an employee for filing a charge, and surveilling or creating the impression of surveillance over other employees, extraordinary remedies requested by the General Counsel were unwarranted as the Board's standard remedies are designed to remedy the type of conduct at issue.
UNITED FARM WORKERS OF AMERICA (OLVERA), 44 ALRB No. 5.

459.01 In a compliance proceeding, the General Counsel has the burden of establishing gross backpay. The burden then shifts to the respondent "to prove, by a preponderance of the evidence, any mitigation of its liability, including interim earnings, withdrawal from the labor market, or failure to seek interim employment."
P & M VANDERPOEL DAIRY, INC., 44 ALRB No. 4

459.01 Backpay may be reduced where it is shown that there were substantially equivalent jobs within the relevant geographical area and the discriminatee unreasonably failed to apply for these jobs.
P & M VANDERPOEL DAIRY, INC., 44 ALRB No. 4

459.01 Uncertainties in the calculation of backpay will be resolved against the wrongdoing party, whose unlawful conduct created the uncertainties.
P & M VANDERPOEL DAIRY, INC., 44 ALRB No. 4

459.01 If the ALRB causes a delay during the administrative process of determining backpay, there is no tolling of backpay accrual. The agency is not required to place the consequences of its own delay, even if inordinate, upon wronged employees to the benefit of wrongdoing employers.
P & M VANDERPOEL DAIRY, INC., 44 ALRB No. 4

459.01 Respondent's failure to establish that it had a policy that would have denied paid sick leave necessitates that the Board include discriminatee's work time missed due to illness in the backpay period.
P & M VANDERPOEL DAIRY, INC., 44 ALRB No. 4

460.10 What constitutes a reasonable search depends upon the facts of each case, as it would be rare that such pertinent factors as occupational skill, relevant labor market, geographical setting, and the employee's personal situation would all lend themselves to direct comparison. Moreover, while the discriminatee must put forth an honest, good-faith effort to find interim work, there is no requirement that the search be successful.
P & M VANDERPOEL DAIRY, INC., 44 ALRB No. 4

460.10 Discriminatee is not required to remain in the exact labor market or continue to seek work in the same industry.
P & M VANDERPOEL DAIRY, INC., 44 ALRB No. 4

463.01 In determining whether to award bargaining makewhole relief, the Board considers on a case-by-case basis the extent to which the public interest in the employer's position weighs against the harm done to the employees by its refusal to bargain. Except in cases where the employer's position furthers the policies and purposes of the ALRA, the employer, not the employees, should ultimately bear the financial risk of its choice to litigate rather than bargain.
GERAWAN FARMING, INC., 44 ALRB No. 1.

463.01 Makewhole relief is not ordered as a penalty for unacceptable conduct but rather for the purpose of "making employees whole" for losses of pay suffered by employees. Make-whole relief is compensatory in that it reimburses employees for the losses they incur as a result of delays in the collective bargaining process.
GERAWAN FARMING, INC., 44 ALRB No. 1.

463.01 There is nothing in the MMC statue that precludes a makewhole award for an unfair labor practice violation. The mediator's authority in the MMC process is limited to resolving the final terms of a collective bargaining agreement regarding mandatory subjects of bargaining. The mediator has no authority under the MMC process to order unfair labor practice remedies; that authority remains exclusively with the Board.
GERAWAN FARMING, INC., 44 ALRB No. 1.

463.01 Complaint allegation asserting that employer paid all wages owed under an MMC contract precluded an award of bargaining makewhole that would have fallen within the effective dates of the contract.
ARNAUDO BROTHERS, LP, 44 ALRB No. 7.

463.01 The Board could not award bargaining makewhole where the makewhole period would fall entirely within the effective dates of an MMC contract because such an overlapping remedy would be punitive notwithstanding allegations that it was unlikely that the MMC contract would ever be implemented.
ARNAUDO BROTHERS, LP, 44 ALRB No. 7.

463.01 Where the record was not sufficiently developed to determine whether employees could have been economically harmed by employer's failure to bargain over the implementation of changes to a health care plan, the Board ordered the standard monetary remedy and the amount of economic harm, if any, would be determined in compliance.
ARNAUDO BROTHERS, LP, 44 ALRB No. 7.

463.01 The bargaining makewhole remedy compensates employees for the differential between their actual wages and benefits and the wages and benefits they would have earned under a contract resulting from good faith bargaining between their employer and their union.
PREMIERE RASPBERRIES, LLC, 44 ALRB No. 9.

463.02 The Board's precedent confirms that makewhole awards have been deemed appropriate in surface bargaining cases.
GERAWAN FARMING, INC., 44 ALRB No. 1.

463.03 The appropriateness of the makewhole remedy in technical refusal to bargain cases requires consideration of both the debatable merit of the employer's election challenge and the employer's motive for seeking judicial review.
PREMIERE RASPBERRIES, LLC, 44 ALRB No. 9.

463.03 Makewhole relief in a technical refusal to bargain case is appropriate when an employer adopts a litigation posture which is either unreasonable or not pursued in good faith. Thus, the employer's litigation posture must be both reasonable and in good faith.
PREMIERE RASPBERRIES, LLC, 44 ALRB No. 9.

463.03 Employer's conduct was indicative of good faith where employer notified union early on that it intended to challenge the union's certification via a technical refusal to bargain.
PREMIERE RASPBERRIES, LLC, 44 ALRB No. 9.

463.03 The Board has held that maintaining a litigation posture which conflicts with well-established precedent is generally unreasonable and warrants the imposition of makewhole relief.
PREMIERE RASPBERRIES, LLC, 44 ALRB No. 9.

463.04 In cases involving discrete unlawful unilateral changes to terms and conditions of employment, the Board does not use a "bargaining makewhole" measure of economic harm but rather compensates employees the difference between the unilaterally changed wages or benefits and the wages and benefits that pertained before the unlawful change.
ARNAUDO BROTHERS, LP, 44 ALRB No. 7.

463.06 Once evidence is produced showing that the employer unlawfully refused to bargain, a presumption is created that the parties would have consummated a collective bargaining agreement providing for higher employee pay had the employer bargained in good faith. The burden of persuasion then shifts to the employer to rebut this presumption. If the employer cannot rebut the presumption, the Board is entitled to find an agreement providing for higher pay would have been concluded.
GERAWAN FARMING, INC., 44 ALRB No. 1.

463.06 An employer may rebut the presumption that the parties would have concluded a contract providing for high wages by showing that some other legitimate cause operated to prevent agreement. However, such issues can be difficult to ascertain and the employer thus bears the burden of producing relevant and non-speculative evidence.
GERAWAN FARMING, INC., 44 ALRB No. 1.

464.02 Commencement of the MMC process does not necessarily terminate a makewhole period, which may continue into the MMC process.
GERAWAN FARMING, INC., 44 ALRB No. 1.

464.02 The makewhole period terminates when the employer commences good faith bargaining, and where the employer continues to engage in bad faith bargaining during the MMC process the makewhole period continues during such time.
GERAWAN FARMING, INC., 44 ALRB No. 1.

464.02 To avoid being punitive, a makewhole period will terminate at the time provisions in a MMC contract providing for higher wages takes effect.
GERAWAN FARMING, INC., 44 ALRB No. 1.

465.01 Where union was found to have unlawfully interrogated and threatened employees for engaging in protected activity, threatened an employee for filing a charge, and surveilling or creating the impression of surveillance over other employees, extraordinary remedies requested by the General Counsel were unwarranted as the Board's standard remedies are designed to remedy the type of conduct at issue.
UNITED FARM WORKERS OF AMERICA (OLVERA), 44 ALRB No. 5.

466.04 Board declined to find that the union's conduct in causing a temporary exclusion of employees from attending an ALRB public hearing was sufficiently egregious to warrant a notice reading via a media publication. The Board reasoned that notice publication via newspaper or other publications of broad circulation to be a remedy that, while permissible in appropriate cases, is not routinely used and has generally been reserved for egregious cases.
UNITED FARM WORKERS OF AMERICA (LOPEZ), 44 ALRB No. 6.

502.01 Under Labor Code section 1160.8, the grounds for judicial review are limited to (1) whether substantial evidence supports the Board's decision, (2) whether an error of law was made, and (3) whether the decision was procedurally sound.
ARNAUDO BROTHERS, LP v. ALRB (2018) 22 Cal.App.5th 1213.

502.02 When reviewing the sufficiency of the evidence to support factual findings, a court's review is limited to whether substantial evidence supports the finding; courts have no power to judge the effect or value of the evidence, to weigh the evidence, or to resolve conflicts in the evidence or in the reasonable inferences that may be drawn from the evidence.
ARNAUDO BROTHERS, LP v. ALRB (2018) 22 Cal.App.5th 1213.

502.02 Witness credibility is a matter particularly for the trier of fact, and a court will accept a finding that a witness's testimony was credible unless it is incredible or inherently improbable so.
ARNAUDO BROTHERS, LP v. ALRB (2018) 22 Cal.App.5th 1213.

502.02 Relevant NLRA case law has held that in reviewing board decisions, the Courts of Appeal have a responsibility for assuring that the Board keeps within reasonable grounds. Thus, a reviewing court is not barred from setting aside a Board decision when it cannot conscientiously find that the evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the Board's view.
GERAWAN FARMING, INC. v. ALRB (2018) 23 Cal.App.5th 1129.

502.02 Courts may not take a rubber stamp approach to review of the Board's factual findings. The test of substantiality must be measured on the basis of the entire record, rather than by simply isolating evidence which supports the board and ignoring other relevant facts of record which rebut or explain that evidence. Thus, the substantiality of evidence must take into account whatever in the record fairly detracts from its weight.
GERAWAN FARMING, INC. v. ALRB (2018) 23 Cal.App.5th 1129.

502.02 Substantial evidence is not established by just any evidence and is not shown by mere suspicions of unlawful motivation. The burden of proving unlawful conduct is on the ALRB, and such conduct will not lightly be inferred. The standard of review is met, however, if there is relevant evidence in the record which a reasonable mind might accept in support of the findings.
GERAWAN FARMING, INC. v. ALRB (2018) 23 Cal.App.5th 1129.

502.02 Because the evaluation of witnesses' credibility is a matter particularly for the trier of fact, the Board's findings based on the credibility of witnesses will not be disturbed unless the testimony is incredible or inherently improbable.
GERAWAN FARMING, INC. v. ALRB (2018) 23 Cal.App.5th 1129.

502.04 Questions of law are subject to independent review by a court and a Board decision that rests on an erroneous legal foundation will be set aside.
ARNAUDO BROTHERS, LP v. ALRB (2018) 22 Cal.App.5th 1213.

502.04 The Board's interpretation of the ALRA is given deference because the Board is the administrative agency entrusted with enforcement of the statute, and courts will follow the Board's interpretation unless it is clearly erroneous.
ARNAUDO BROTHERS, LP v. ALRB (2018) 22 Cal.App.5th 1213.

502.04 While an administrative agency is entitled to deference when interpreting policy in its field of expertise, the agency cannot alter or amend the statute it is interpreting, or enlarge or impair its scope.
ARNAUDO BROTHERS, LP v. ALRB (2018) 22 Cal.App.5th 1213.

502.05 Because the Board has broad discretion to fashion remedies to effectuate the purposes of the ALRA, courts take a cautious approach and will interfere only where the remedy is patently unreasonable under the statute or where the remedy seeks to achieve ends other than those which can fairly be said to effectuate the policies of the ALRA.
GERAWAN FARMING, INC. v. ALRB (2018) 23 Cal.App.5th 1129.

502.05 The Board's remedial discretion must be exercised reasonably and not punitively, and when an order of the Board is so severe in comparison to the conduct involved in the unfair labor practice that it is clearly punitive in character, the order will be annulled.
GERAWAN FARMING, INC. v. ALRB (2018) 23 Cal.App.5th 1129.

502.12 Because the Board applied the wrong legal standard, we vacate the Board's remedy of dismissing the petition and setting aside the election, and remand the matter to the Board to apply the correct standard. Such a remand comports with Supreme Court precedent stating the general rule that where the Board applies the wrong standard, the case must be returned to the Board so that it can apply the proper standard.
GERAWAN FARMING, INC. v. ALRB (2018) 23 Cal.App.5th 1129.

502.16 The Board will not stay issuance of a decision in a matter pending judicial review of a separate decision where resolution of that separate case would have no bearing on the disposition of the case presently before the Board.
GERAWAN FARMING, INC., 44 ALRB No. 1.

600.17 When a party fails to call a witness who may reasonably be assumed to be favorably disposed to the party, an adverse inference may be drawn regarding any factual question on which the witness is likely to have knowledge.
GERAWAN FARMING, INC. v. ALRB (2018) 23 Cal.App.5th 1129.

700.01 Union's request for referral to MMC must be dismissed because 90 days had not elapsed since the union's initial bargaining demand following certification.
PREMIERE RASPBERRIES, LLC, 44 ALRB No. 2.

700.01 Employer's request to stay MMC proceedings pending a technical refusal to bargain to obtain indirect review of the union's certification must be denied because Labor Code section 1158 specifically states that the filing of a petition for review in a ULP case to obtain indirect review of a Board certification in a representation proceeding (such as in the case of a technical refusal to bargain) "shall not be grounds for a stay of proceedings conducted pursuant to" the MMC statute.
PREMIERE RASPBERRIES, LLC, 44 ALRB No. 2.

700.01 Labor Code section 1158 expressly provides that MMC proceedings shall go forward regardless of the pendency of an employer's technical refusal to bargain seeking to obtain indirect judicial review of a union's certification.
PREMIERE RASPBERRIES, LLC, 44 ALRB No. 3.

700.01 Labor Code section 1158 specifies that the filing of a petition for review in furtherance of a technical refusal to bargain shall not be grounds to stay the MMC process.
PREMIERE RASPBERRIES, LLC, 44 ALRB No. 8.

700.01 Neither the Board nor a mediator have authority to declare a statute unconstitutional or otherwise refuse to enforce it.
PREMIERE RASPBERRIES, LLC, 44 ALRB No. 8.

700.01 Labor Code section 1158 contemplates MMC proceedings occurring alongside an employer's technical refusal case in circumstances where an employer challenges a prior certification order.
PREMIERE RASPBERRIES, LLC, 44 ALRB No. 8.

700.04 Where certification of union was stayed pending employer's motion for reconsideration, a demand to bargain during the time the certification was stayed did not trigger the 90-day period after which referral to MMC could be requested.
PREMIERE RASPBERRIES, LLC, 44 ALRB No. 2.

701.06 Where a party has notice of the MMC proceedings and an opportunity to participate, its failure to avail itself of that opportunity will not support a claim it has been deprived due process.
PREMIERE RASPBERRIES, LLC, 44 ALRB No. 8.

702.01 Labor Code section 1164.3 sets forth the process and grounds by which a party can seek Board review of a mediator's report, including on grounds the report: (1) includes nonmandatory subjects of bargaining; (2) is based on clearly erroneous findings of material fact; or (3) is arbitrary or capricious. If no petition for review is filed or the Board finds none of these grounds to exist, the mediator's report "shall become a final order of the Board.
PREMIERE RASPBERRIES, LLC, 44 ALRB No. 8.