STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

UNITED FARM WORKERS OF AMERICA, Respondent, and AGUSTIN GARCIA, Charging Party, and GERAWAN FARMING, INC., Intervenor.	)	Case No. 2018-CL-003-VIS 45 ALRB No. 4 (June 19, 2019)

DECISION AND ORDER

This case is before the Agricultural Labor Relations Board (ALRB or Board) on exceptions filed by intervenor Gerawan Farming, Inc. (Gerawan) to an order by administrative law judge (ALJ) Mary Miller Cracraft granting the General Counsel's motion for judgment on the pleadings. The unfair labor practice complaint alleges respondent United Farm Workers of America (UFW) violated the Agricultural Labor Relations Act (ALRA or Act)[1] when it demanded Gerawan recognize and bargain with it as the exclusive representative of Gerawan's agricultural employees and threatened to

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

picket Gerawan if it refused. The UFW admits violating the Act, asserting in the underlying proceedings it was committing a "technical" unfair labor practice for the purpose of seeking judicial review of our decision in *Gerawan Farming, Inc*. (2018) 44 ALRB No. 10. In that decision we certified the results of a representation election amongst Gerawan's agricultural employees which resulted in the UFW's decertification.

The Board has considered the ALJ's order, the unfair labor practice complaint and answer thereto, as well as the parties' briefs and filings in the record, including on Gerawan's exceptions before the Board.[2] For the reasons set forth below, we affirm the ALJ's finding the UFW violated Labor Code section 1154, subdivision (h) when it threatened to picket Gerawan if it did not recognize and bargain with the union.[3] However, we reverse the ALJ's findings that the UFW's picketing threat violated section 1154, subdivisions (a)(1) and (a)(2). On the record before us in the context of a motion for judgment on the pleadings, the undisputed allegations of the unfair labor practice complaint fail to establish as a matter of law that the UFW's threat violated either provision. Thus, we remand those causes of action to the ALJ for further proceedings consistent with this decision. (See *Hernandez v. County of San Bernardino* (2004) 117 Cal.App.4th 1055, 1057.) Finally, we reverse the ALJ's finding that notice mailing and

[2] As it has before, Gerawan objects in its exceptions to the participation of Board Member Hall due to alleged bias, conflicts of interest, and lack of impartiality. We reject these claims for reasons previously stated. (*Gerawan Farming, Inc*. (2019) 45 ALRB No. 3, p. 2, fn. 3; *Gerawan Farming, Inc*. (2018) 44 ALRB No. 11, p. 2, fn. 1.)

[3] Subsequent statutory references are to the Labor Code unless otherwise indicated.

reading remedies are not appropriate in this case. We also will order the UFW to provide a copy of the notice to agricultural employees hired at Gerawan following our final decision.

I. Decertification of the UFW

A petition to decertify the UFW as the exclusive bargaining representative of Gerawan's agricultural employees was filed on October 25, 2013. An election was held November 5, 2013, and the ballots impounded. Following a hearing on election objections consolidated with mirroring unfair labor practice complaint allegations, an ALJ issued a decision and order recommending, among other things, that the decertification petition be dismissed and the election set aside due to employer misconduct interfering with the employees' free choice. The Board upheld that recommendation in *Gerawan Farming, Inc.* (2016) 42 ALRB No. 1.

Gerawan filed a petition for writ of review. In *Gerawan Farming, Inc. v. ALRB* (2018) 23 Cal.App.5th 1129, the Fifth District Court of Appeal affirmed several of the Board's unfair labor practice findings, reversed others, and vacated the Board's order dismissing the decertification petition and setting aside the election. The court remanded the matter to the Board to reconsider its decision regarding the election. (*Id.* at pp. 1239-1241.) The impounded ballots were opened and counted after issuance of the court's remittitur, and on September 27, 2018, the Board issued its supplemental decision and order on remand certifying the results of the election and decertifying the UFW. (*Gerawan Farming, Inc., supra,* 44 ALRB No. 10.)

II. The Current Unfair Labor Proceeding

On December 10, 2018, Gerawan agricultural employee Agustin Garcia filed an unfair labor practice charge against the UFW. The charge alleges the UFW requested Gerawan recognize and bargain with it despite not being the certified representative of Gerawan's employees and threatened to picket Gerawan if it did not. The General Counsel issued an unfair labor practice complaint on December 28.

According to the complaint, the picketing threat referenced in Garcia's charge was communicated via letter dated November 13, 2018, from UFW National Vice President Armando Elenes to Gerawan's outside counsel, Ron Barsamian. Also according to the complaint, counsel for the UFW wrote to the ALRB regional director in a letter dated December 13 that the UFW had received the charge and "admits to violating the act [*sic*], including Labor Code section 1154(g) and/or (h), as a means to seek review of the ALRB decision in *Gerawan Farming, Inc*. (2018) 44 ALRB No. 10."

The unfair labor practice complaint alleges three causes of action. The first cause of action alleges the UFW violated section 1154, subdivision (h) by threatening to picket Gerawan if it did not recognize and bargain with the union. The second cause of action alleges the UFW's threat violates section 1154, subdivision (a)(1) on the basis it restrained employees in the exercise of their choice of labor representative. The third cause of action alleges the UFW violated section 1154, subdivision (a)(2) by attempting to coerce Gerawan in selecting its representative for collective bargaining.

The regional director later provided Gerawan a "courtesy copy" of the charge and complaint, of which Gerawan apparently had been unaware previously.

Gerawan then moved to intervene in the proceeding, describing the UFW's threat as a "sham" and alleging Garcia was a UFW supporter who could not properly file a charge "asserting a violation of the ALRA on behalf of an employer." No party opposed the motion, and the ALJ granted it. (Cal. Code Regs., tit. 8, § 20268.)

The UFW answered the unfair labor practice complaint, admitting all material allegations.[4] The ALJ then held a prehearing conference at which she determined the matter appropriately could be resolved on the pleadings. The ALJ cancelled the previously scheduled hearing and denied Gerawan's request to hold a hearing so it could elicit evidence of Garcia's alleged collusion with the UFW.

On March 1, 2019, the General Counsel filed a motion for judgment on the pleadings. The UFW did not oppose it. Gerawan filed an opposition, arguing Garcia is not "aggrieved" and has no "interest in the outcome" of the proceeding because section 1154, subdivision (h) is a statute only intended to protect employers. Gerawan contends a hearing on its collusion claims is necessary so it may demonstrate Garcia lacks a legitimate interest in the matter and that the complaint therefore must be dismissed.

On April 3, the ALJ issued an order granting the General Counsel's motion

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[4] The UFW in its answer cites *Union de la Construccion de Concreto y Equipo Pesado v. NLRB* (1st Cir. 1993) 10 F.3d 14, 15-16 for the proposition a union may obtain indirect review of a prior representation election it has lost via a subsequent "technical" unfair labor practice proceeding. Gerawan disputes the union's ability to obtain judicial review in this manner, citing *NLRB v. Interstate Dress Carriers, Inc.* (3d Cir. 1979) 610 F.2d 99, 107-109. The ALJ did not reach the merits of this issue based on our decision in *United Farm Workers of America (Corralitos Farms, LLC)* 40 ALRB No. 6. We also do not reach the issue because, as we stated in that decision, the issue of the availability of "judicial review is, of course, for the judiciary and not for the Board" to decide. (*Id.* at p. 3.)

and denying Gerawan's request for a hearing. The ALJ rejected Gerawan's arguments that a person must have an "interest in the outcome" of a matter and be "aggrieved" in order to file an unfair labor practice charge. The ALJ concluded under our regulations, as well as precedent under the National Labor Relations Act[5] (NLRA), that any person may file a charge for any reason. The ALJ further found there was no abuse of the Board's processes in this proceeding involving a union's test of a prior decertification decision, and thus no hearing was warranted on Gerawan's collusion claims. The ALJ then proceeded to find no disputed material issues raised by the unfair labor practice complaint and answer, and thereupon found the UFW violated section 1154, subdivision (h) when it threatened to picket Gerawan if it did not recognize and bargain with the union. She further found this conduct violated section 1154, subdivision (a)(1) by restraining employees in their choice of bargaining representative and subdivision (a)(2) by attempting to coerce Gerawan to recognize and bargain with the union.

The ALJ ordered the UFW to cease and desist its unlawful conduct, as well as a notice posting remedy. She refused to order notice mailing or reading remedies on the basis that such remedies would be punitive in light of the UFW's "technical" violation of the Act. Gerawan filed exceptions to the ALJ's order, to which the General Counsel replied. The UFW did not file exceptions or reply to Gerawan's.

III. Standard of Review

We look to the standards set forth in the Code of Civil Procedure and

[5] 29 U.S.C. § 151 et seq.

California decisional law for guidance in determining whether judgment on the pleadings is appropriate. (*Mario Saikhon, Inc*. (1989) 15 ALRB No. 3, p. 6; see *Tri-Fanucchi Farms* (2014) 40 ALRB No. 4, pp. 6-7.)

Code of Civil Procedure section 438, subdivision (c)(1)(A) provides a plaintiff may move for judgment on the pleadings on grounds "the complaint states facts sufficient to constitute a cause or causes of action against the defendant and the answer does not state facts sufficient to constitute a defense to the complaint." The motion is in effect similar to a demurrer to the defendant's answer, with the focus being whether the answer raises any material issues or sets up a valid defense to the complaint allegations. (*Engine Manufacturers Assoc. v. State Air Resources Board* (2014) 231 Cal.App.4th 1022, 1034; see *American Cargo Express, Inc. v. Superior Court* (2017) 16 Cal.App.5th 145, 152; *Felch v. Beaudry* (1871) 40 Cal. 439, 443 ["If a complaint be itself sufficient, there is no question that the plaintiff may apply for judgment on the pleadings, if the defendant has filed an answer which expressly admits the material facts stated in the complaint"].) While we may consider matters properly subject to administrative notice, our review generally is confined to the face of the challenged pleading, here the UFW's answer. (*American Cargo Express, supra*, 16 Cal.App.5th at p. 152.)

We are not bound by the ALJ's findings but rather exercise our independent judgment in determining whether judgment on the pleadings on the subject causes of action is appropriate. (*Lance Camper Manufacturing Corp. v. Republic Indemnity Co.* (1996) 44 Cal.App.4th 194, 198; *Mario Saikhon, Inc., supra*, 15 ALRB No. 3, p. 6 ["we will not abdicate our responsibility to independently scrutinize the record for the presence

of a genuine issue of material fact that would render a summary disposition improper"]; cf. *C. Mondavi & Sons* (1978) 4 ALRB No. 52, p. 2 [summary judgment appropriate where all material issues of fact admitted by respondent in its answer].)

IV. Analysis

A. Standing

Gerawan argues the ALJ disregarded the "interest" requirement of section 1140.4, subdivision (d) in finding any person may file an unfair labor practice charge for any reason. While we agree with the ALJ that Garcia has standing to file the underlying unfair labor practice charge, we do so for the following reasons.

The ALJ correctly recognized Board regulation 20201 states "[a]ny person may file a charge that any person has engaged in or is engaging in an unfair labor practice." This language closely mirrors the National Labor Relations Board's (NLRB) pertinent regulation, 29 C.F.R. § 102.9. However, the ALRA contains language not found in either the NLRA or NLRB regulations — that the person must have "an interest in the outcome of a proceeding under this part." (Lab. Code, § 1140.4, subd. (d); Cal. Code Regs., tit. 8, § 20100; cf. 29 U.S.C. § 152(1).) While we have not addressed the scope of this requirement previously, the court of appeal in *UFW v. ALRB (California Table Grape Commission)* (1995) 41 Cal.App.4th 303, 320 confirmed the ALRA's definition of "person" is broad. A broad interpretation of this provision is in keeping with well-established rules of interpretation that a remedial statute be liberally construed to achieve its protective purposes. (See *United Riggers & Erectors, Inc. v. Coast Iron & Steel Co*. (2018) 4 Cal.5th 1082, 1092; *NLRB v. Knoxville Pub. Co*. (6th Cir. 1942) 124

F.2d 875, 881 [NLRA "is remedial in character and is to be broadly and liberally construed to accomplish its purpose"]; *Daniel v. Winn-Dixie Atlanta, Inc*. (N.D.Ga. 1985) 611 F.Supp. 57, 60.)[6]

Ultimately, we need not fully define here the "interest" requirement of section 1140.4, subdivision (d) in all its potential applications because we conclude the requirement is met under the facts of this case. Garcia is an agricultural employee of Gerawan. His charge alleges the UFW, after being decertified by the Board, threatened to picket Gerawan if it did not recognize and bargain with the union. Such conduct would constitute a plain violation of section 1154, subdivision (h), which makes it unlawful for a non-certified labor organization to "threaten to picket … any employer where an object thereof is either forcing or requiring an employer to recognize or bargain with the labor organization as a representative of his employees."

Gerawan argues this section is intended to protect only employers and that individual employees may not allege violations of it. Gerawan's unduly narrow construction of the statute lacks merit. Section 1154, subdivision (h), as well as subdivision (g), is modeled after NLRA Section 8(b)(7) [29 U.S.C. § 158(b)(7)]. (See *United Farm Workers of America (California Table Grape Commission)* (1993) 19

[6] The court in *UFW v. ALRB*, *supra*, 41 Cal.App.4th at p. 321 suggests circumstances may exist where a person "otherwise entitled to file unfair labor practice charges by virtue of 'having an interest in the outcome of a proceeding' … may be barred by ethical or other restrictions from filing such charges." (Citing Rules Prof. Conduct, rules 3-300 [see current rule 1.8.1] and 3-310 [see current rule 1.7].) Gerawan relies on this language to argue Garcia does not have a proper interest in filing the unfair labor practice charge. The examples provided in that case concern attorney conflicts of interest in the representation of a client, and we do not find them applicable here.

ALRB No. 15, p. 20 [looking to federal precedent under Section 8(b)(7) for guidance in interpreting section 1154(h)], overruled on other grounds in *UFW v. ALRB, supra*, 41 Cal.App.4th 303.) Federal courts interpreting NLRA Section 8(b)(7) have found Congress intended it to protect both employees and employers from "blackmail picketing," i.e., recognitional picketing by an outside union seeking to represent the employees. (*Dallas Bldg. & Constr. Trades Council v. NLRB* (D.C. Cir. 1968) 396 F.2d 677, 680-681; *A. Terzi Prods. v. Theatrical Protective Union, Local No. One* (S.D.N.Y. 1998) 2 F.Supp.2d 485, 506, fn. 15 ["a goal of the NLRA is 'to prevent "blackmail" picketing to force recognition when a union cannot establish its majority status at an election'"], citing *Danielson v. Jt. Bd. of Coat, Suit and Allied Garment Workers' Union* (2d Cir. 1974) 494 F.2d 1230, 1237, fn. 10.) As was stated in Congress in support of the amendments which ultimately became NLRA Section 8(b)(7):

> When the Labor Board conducts an election, all the employees have a free opportunity to indicate their choice of bargaining representative. If they vote not to be represented by a union, their choice should be respected. For a union to picket their employer after losing an election is to attempt to coerce the employees into supporting the union against their express desire.

(*Cavers v. Teamsters "General" Local, etc.* (E.D.Wis. 1960) 188 F.Supp. 184, 191.)

This reasoning applies to the case before us. The ban on recognitional picketing in NLRA Section 8(b)(7) serves "as a corollary to the federal policy of ensuring employees a free choice in the selection of a bargaining representative." (*NLRB v. IBEW, Local 265* (8th Cir. 1979) 604 F.2d 1091, 1096-1097.) Our Act similarly is premised on the protection of employee free choice. (§§ 1140.2, 1152.) Under the

ALRA, the exclusive means by which a labor organization may be certified to represent employees for collective bargaining purposes is by winning a Board-conducted secret election. (§ 1156; *Gerawan Farming, Inc*. (2018) 3 Cal.5th 1118, 1153.) The Act further safeguards employee free choice by making it unlawful for a non-certified labor organization to picket, or threaten to picket, an employer for recognitional purposes, as well as for an employer to recognize and bargain with a labor organization not certified as its employees' bargaining representative. (§§ 1153, subd. (f), 1154, subds. (g), (h).)

Accordingly, we find an employee has a sufficient interest in protection from an outside union seeking to impose itself upon the employees via a threat of recognitional picketing to permit the filing of an unfair labor practice charge alleging such conduct.[7]

B. A Hearing On Gerawan's Collusion Allegations Is Unnecessary

We agree with the ALJ that a hearing on Gerawan's allegations of collusion between Garcia and the UFW is not warranted. At the outset, it is doubtful Gerawan, as a mere intervenor in this proceeding, has the ability to demand and compel a hearing on its allegations where the relevant inquiry in the context of a motion for judgment on the

[7] Like the ALJ, we reject Gerawan's parallel contention that a person must be "aggrieved" in order to file an unfair labor practice charge. Gerawan takes out of context language in section 1160.2 where it is said the six-month limitations period for filing a charge may be extended if "the person aggrieved … was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge." This language also appears verbatim in NLRA Section 10(b) [29 U.S.C. § 160(b)]. This is a tolling provision to extend the limitations period for a charging party where the individual serves in the armed forces. (*Mouradian v. John Hancock Cos*. (D.Mass. 1988) 751 F.Supp. 262, 270 [describing this language as an "armed services tolling provision"].)

pleadings is on the pleadings themselves, here the unfair labor practice complaint and answer. (See also *International Brotherhood of Teamsters, etc. v. NLRB* (2d Cir. 1964) 339 F.2d 795, 798 ["The only person to whom the [NLRA] expressly grants the right to a hearing in an unfair labor practice case is the person charged"]; 29 U.S.C. § 160(b); § 1160.2.) In any event, we find no merit in Gerawan's demands for a hearing.

Gerawan's argument largely disregards the limited role served by the filing of an unfair labor practice charge. The United States Supreme Court stated in *NLRB v. Indiana & Michigan Electric Co.* (1943) 318 U.S. 9, 18:

> The charge is not a proof. It merely sets in motion the machinery of an inquiry. When a Board complaint issues, the question is only the truth of its accusations. The charge does not even serve the purpose of a pleading.

The NLRB has adopted this ruling. (*Castle Hill Health Care* (2010) 355 NLRB 1156, 1190.) Under our Act, the General Counsel has final authority over the investigation of charges of unfair labor practices and the issuance and prosecution of unfair labor practice complaints. (§ 1149; *ALRB v. Superior Court* (2016) 4 Cal.App.5th 675, 683; *Belridge Farms v. ALRB* (1978) 21 Cal.3d 551, 557.) The ALRA, like the NLRA, thus gives the General Counsel complete and sole discretion as to whether to issue a complaint and the legal theories upon which to do so. (*International Brotherhood of Teamsters, supra*, 339 F.2d at p. 799; *JLL Restaurant, Inc.* (2006) 347 NLRB 192, 195.) In performing these functions, the General Counsel does not serve the private interests of the parties but rather acts on behalf of the public in vindicating public rights and interests. (*Sandrini Bros. v. ALRB* (1984) 156 Cal.App.3d 878, 886 ["The

boards (ALRB and NLRB) are [] for the vindication of public, not private, rights"], quoting *Nish Noroian Farms v. ALRB* (1984) 35 Cal.3d 726, 736; *NLRB v. Hiney Printing Co*. (6th Cir. 1984) 733 F.2d 1170, 1171 ["NLRB is charged with serving the public interest to enforce labor relations rights which are public, not private rights"]; *Haleston Drug Stores, Inc. v. NLRB* (9th Cir. 1951) 187 F.2d 418, 420.) Thus, while the General Counsel lacks authority to commence its own investigations or prosecutions of unfair labor practices, but may only do so upon the filing of a charge, the General Counsel's role after a charge is filed is to vindicate the public's interests in protecting employee rights under the Act and stability in agricultural labor relations. (§§ 1140.2, 1152; *ALRB v. Superior Court* (1976) 16 Cal.3d 392, 398; *Reebie Storage & Moving Co. v. NLRB* (7th Cir. 1995) 44 F.3d 605, 608.)

Garcia's charge clearly alleged a violation of the Act. Whether he may have harbored some alternative mindset or subjective desires does not affect the General Counsel's jurisdiction over the charge. As the United States Supreme Court has stated, "Dubious character, evil or unlawful motives, or bad faith of the informer cannot deprive the Board of its jurisdiction to conduct the inquiry" into the alleged unfair labor practices. (*Indiana & Michigan Electric Co*., *supra*, 318 U.S. at p. 18.)

Gerawan asserts this is a "sham" proceeding and an abuse of the Board's processes. We reject this argument. Gerawan cites *Shop-Rite Foods, Inc*. (1973) 205 NLRB 1076. The NLRB in that case found an employer violated NLRA Section 8(a)(1) [29 U.S.C. § 158(a)(1)] when it solicited a supervisor to file a charge against it alleging the employer assisted a union's organizing efforts. The union already had filed a

petition for an election, and the employer solicited the charge solely for the purpose of blocking an election. (*Id*. at p. 1080.) The ALJ found the employer thus solicited the charge "not to vindicate the rights of employees, but for the purpose of delaying Board action on the Union's petition." (*Ibid*.) The NLRB agreed with the ALJ that this conduct constituted an abuse of its processes. (*Id*. at p. 1076, fn. 1.) The current case is distinguishable from *Shop-Rite Foods* because the filing of the charge here did not have the effect of blocking any action of the Board already pending or in place, and it has not interfered with or impeded any other Board proceeding. Thus, this case does not involve the egregious conduct found in *Shop-Rite Foods*.

Gerawan also cites a NLRB General Counsel memorandum addressing a question whether the NLRB would entertain charges filed by a party against itself. (May 1, 1990 NLRB General Counsel Memorandum (GC 90-5) [1990 NLRB GCM LEXIS 118].) The General Counsel cited *Shop-Rite Foods* as an example of a "collusive attempt to thwart prompt processing of [a] representation case" as an example of an abuse of Board processes. (*Id*. at *8-9.) But the General Counsel also cited *Milk Drivers Local 546* (1961) 133 NLRB 1314 as an example of a case where it would be appropriate to process the charge. (*Id*. at *9.) In that case an employer filed a charge against a union with which it had a collective bargaining agreement alleging the contract contained unlawful "hot cargo" provisions. The union argued the employer also was guilty by virtue of signing the contract, and that it should be barred from filing the charge on the basis of its "unclean hands." (*Milk Drivers Local 546, supra,* 133 NLRB 1314, 1321-1322.) The NLRB rejected that argument, citing *Indiana & Michigan Electric*

Co., supra, 318 U.S. at pp. 17-18 and finding the employer's conduct did not estop it from filing the charge against the union or prevent "the Board from vindicating and protecting public rights inherent in the Act, which may have been infringed by Respondent." (*Milk Drivers Local 546, supra*, 133 NLRB 1314, 1322.)[8]

Similarly here, whether Garcia sympathizes with the UFW does not deprive the General Counsel of jurisdiction to investigate and, if it deems appropriate, prosecute the allegations of the charge. While Gerawan complains of the allegedly collusive appearance of this proceeding, we do not see it as too dissimilar from circumstances where an employer refuses to bargain with a certified union solely for purposes of challenging a prior election decision. In such a case, the employer effectively invites a charge to be filed against it, often stipulating to expediting the case directly to the Board without a hearing so that the matter may proceed to judicial review. (See Cal. Code Regs., tit. 8, § 20260.) Whether a union may obtain judicial review of a prior election decision via this type of unfair labor practice proceeding in the same manner as an employer engaging in a technical refusal to bargain is a question we leave to a court to

[8] Gerawan cites another NLRB General Counsel memorandum, SEIU, United Healthcare Workers - West (UHW), Case No. 20-CB-13223 et al., 2010 NLRB GCM LEXIS 23. We are not bound by the NLRB General Counsel's memoranda, and we further find this memoranda of no persuasive value here. In that matter, the General Counsel recommended dismissal of charges filed by an international union (SEIU) against one of its own trusteed locals (UHW). The memorandum did not find SEIU acted improperly or unlawfully by filing the charges, and ultimately concluded dismissal was appropriate because SEIU had taken control over the trusteed local, the unfair labor practices alleged had abated and been resolved by virtue of this, and SEIU could remedy the effects of the alleged unlawful conduct internally via direct communication with the workers. (*Id*. at *21-22, 25.)

decide. (*Corralitos Farms, supra,* 40 ALRB No. 6, p. 3.) Our focus remains on whether the respondent has committed an unfair labor practice and, if so, the appropriate remedy under our Act.

C. The UFW Violated Section 1154, Subdivision (h)

The UFW's picketing threat plainly violates section 1154, subdivision (h), and we affirm the ALJ's order to the extent it grants judgment on the pleadings on the first cause of action of the unfair labor practice complaint. Citing *California Table Grape Commission, supra*, 19 ALRB No. 15, p. 25, Gerawan asserts the UFW's threat is not unlawful because its "immediate goal" was not recognition but rather obtaining judicial review of the Board's decertification decision. We reject this argument. On its face, the threat is predicated on a demand for recognition and bargaining. That the UFW ultimately may seek to obtain judicial review of our decertification decision does not make the threat any less unlawful. Moreover, "recognition need not be the sole object of the union's picketing; it is enough if recognition is an object." (*Id*. at p. 20, emphasis in original; *Seafarers Intl. Union of N. Am. Pacific Dist*. (1980) 252 NLRB 736, 742 ["The Board has held that recognition or organization need not be the sole or principal object of the picketing; it is sufficient to make out a violation if one of the union's objects is recognitional"].)

D. The Pleadings Do Not Establish Violations of Section 1154, Subdivisions (a)(1) or (a)(2)

1. Section 1154, Subdivision (a)(1)

Section 1154, subdivision (a)(1) makes it unlawful for a labor organization

to "restrain or coerce … Agricultural employees in the exercise of the rights guaranteed in Section 1152."[9] Gerawan contends the record does not support a finding the UFW restrained or coerced employees in the exercise of any protected rights. We agree.

The unfair labor practice complaint alleges no facts to support a finding the UFW's picketing threat to Gerawan in any way restrained or coerced employees in their choice of labor representation. As the Board stated in *Sam Andrews' Sons* (1978) 4 ALRB No. 46, p. 5, "[t]here must be restraint or coercion to constitute an unfair labor practice under Section 1154(a)(1)." (See *Belridge Farms*, *supra*, 21 Cal.3d at p. 559.) Our precedent consistently has required such a showing to state a violation of this section. (See, e.g., *United Farm Workers of America (Lopez)* (2018) 44 ALRB No. 6, p. 6; *United Farm Workers of America (Olvera/Magaña)* (2018) 44 ALRB No. 5, pp. 13-14; *United Farm Workers of America (Admiral Packing Co.)* (1981) 7 ALRB No. 3, p. 3; *United Farm Workers of America (California Coastal Farms)* (1980) 6 ALRB No. 64, pp. 3-4; *United Farm Workers of America (Salinas Police Department)* (1980) 6 ALRB No. 63, p. 4; *United Farm Workers of America (Jojola)* (1980) 6 ALRB No. 58, p. 4; cf. *Salinas Lettuce Farmers Cooperative* (1979) 5 ALRB No. 21, pp. 3-4; *Northwest Protective Service, Inc.* (2004) 342 NLRB 1201, 1204 [union violated NLRA Section 8(b)(1)(A) when picketing threat successfully coerced the employer into recognizing it

[9] Section 1152 provides: "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities …."

and entering a contract].) The undisputed facts alleged in the complaint simply fail to establish that the UFW's picketing threat retrained or coerced, or tended to restrain or coerce, any employee in the exercise of rights under the Act.

Accordingly, we reverse the ALJ's order granting judgment on the pleadings on the second cause of action of the unfair labor practice complaint.

2. Section 1154, Subdivision (a)(2)

Section 1154, subdivision (a)(2) makes it unlawful for a labor organization to "restrain or coerce … An agricultural employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances." This section is modeled after NLRA Section 8(b)(1)(B) [29 U.S.C. § 158(b)(1)(B)]. Gerawan contends this section is violated when a union restrains or coerces an employer in the selection of its own representatives for collective bargaining or grievance adjustment purposes. Gerawan thus argues the record contains no evidence to support finding a violation of this statute. Gerawan is correct.

By its plain language, section 1154, subdivision (a)(2), like NLRA Section 8(b)(1)(B) upon which it is based, prohibits a union from restraining or coercing an employer "in the selection of his representatives" for collective bargaining or grievance adjustment purposes. While neither the ALRB nor any California case has interpreted this statute, cases interpreting the federal statute confirm this. The NLRB has stated: "An important interest that Congress was protecting in Section 8(b)(1)(B) was an employer's interest in having an individual of its own choosing to represent it in dealings with the union that represents its employees." (*Sheet Metal Workers Intl. Assoc*. (1990)

298 NLRB 1000, 1003; see also *NLRB v. Sheet Metal Workers Intl Assoc., Local 104* (9th Cir. 1995) 64 F.3d 465, 467; *Associated General Contractors, Inc. v. NLRB* (7th Cir. 1972) 465 F.2d 327, 333.)

The unfair labor practice complaint contains no allegations that the UFW's picketing threat in any way restrained or coerced Gerawan in the selection of its own representatives for purposes of collective bargaining or adjusting grievances. Moreover, it is doubtful a charge alleging a violation of section 1154, subdivision (a)(2) can be supported where, as here, there presently is no collective bargaining relationship between the union and employer. (See *NLRB v. International Bhd. of Elec. Workers, Local 340* (1987) 481 U.S. 573, 589-590.)

Accordingly, we reverse the ALJ's order granting judgment on the pleadings on the third cause of action of the unfair labor practice complaint.

E. Notice Remedies

The ALJ declined to order notice mailing and reading remedies based on her determination such remedies would be punitive in light of the "technical" nature of the UFW's unfair labor practice. While no party excepted to this portion of the ALJ's decision, we have authority to consider remedial issues sua sponte. (*J & R Flooring, Inc*. (2010) 356 NLRB 11, 12, fn. 5; *Care Initiatives, Inc*. (1996) 321 NLRB 144, 144, fn. 3 ["It is also firmly established that remedial matters are traditionally within the Board's province and may be addressed by the Board in the absence of exceptions"]; see *Premiere Raspberries, LLC* (2018) 44 ALRB No. 9, p. 5, fn. 3.)

The ALJ likened our notice mailing and reading remedies to bargaining

makewhole in the context of an employer's technical refusal to bargain, which she found is not "automatically assessed." However, the Board often orders the full range of notice remedies despite the so-called technical nature of an employer's conduct in engaging in an unfair labor practice to obtain judicial review of a prior election decision. (See, e.g., *Premiere Raspberries*, *supra*, 44 ALRB No. 9; *S & J Ranch, Inc*. (1986) 12 ALRB No. 32; *D. Papagni Fruit Co*. (1985) 11 ALRB No. 38.) In *Corralitos Farms, supra*, 40 ALRB No. 6 — a case very similar to this one — we likewise ordered the full range of notice remedies based on a violation of section 1154, subdivision (h).

We do not view a decertified union's so-called technical picketing threat to an employer as any less serious than an employer's technical refusal to bargain with a labor organization certified to represent its employees. Both are an offense to employee free choice rights at the core of our Act. Accordingly, we find notice mailing and reading remedies, in addition to notice posting, appropriate in this case, and also will order the UFW to provide a copy of the notice to agricultural employees hired at Gerawan during the twelve-month period after a final decision issues in this matter. (*Jasmine Vineyards, Inc. v. ALRB* (1980) 113 Cal.App.3d 968, 979-982; *M. Caratan, Inc*. (1980) 6 ALRB No. 14.)

ORDER

For the foregoing reasons, we find respondent UFW violated section 1154, subdivision (h) of the Act when it threatened to picket Gerawan if it did not recognize and bargain with it. We remand the second and third causes of action of the unfair labor practice complaint alleging violations of section 1154, subdivision (a)(1) and (a)(2),

respectively, to the ALJ for further proceedings consistent with this decision. Upon issuance of a recommended decision by the ALJ under Board regulation 20279, the parties shall again have the opportunity file exceptions with the Board pursuant to Board regulation 20282. Any such further proceedings and exceptions shall be limited to the section 1154, subdivision (a)(1) and (a)(2) violations alleged in the unfair labor practice complaint. The Board will issue its final order in this matter following the completion of the remanded proceedings and consideration of any exceptions filed.

DATED: June 19, 2019

Cathryn Rivera-Hernandez, Member

Isadore Hall III, Member

Barry D. Broad, Member

CASE SUMMARY

UNITED FARM WORKERS OF AMERICA 45 ALRB No. 4
(Agustin Garcia) Case No. 2018-CL-003-VIS

Background

Respondent United Farm Workers of America (UFW) threatened to picket Gerawan Farming, Inc. (Gerawan) if Gerawan did not recognize and bargain with the union. The UFW asserts it made this threat to commit an unfair labor practice from which it would then seek judicial review of the Agricultural Labor Relations Board's (ALRB or Board) decision in *Gerawan Farming, Inc.* (2018) 44 ALRB No. 10. The Board in that decision certified the results of an election by which the UFW was decertified as the exclusive bargaining representative of Gerawan's agricultural employees.

The UFW admitted the material allegations of the General Counsel's unfair labor practice complaint. The administrative law judge (ALJ) granted Gerawan's motion to intervene in the proceeding, and subsequently granted the General Counsel's motion for judgment on the pleadings. The ALJ rejected Gerawan's arguments that the charging party, Agustin Garcia, did not have standing to file an unfair labor practice charge alleging a violation of Labor Code section 1154, subdivision (h). The ALJ also denied Gerawan's request to hold an evidentiary hearing at which it could elicit evidence concerning its allegations of collusion between Garcia and the UFW. The ALJ thereupon granted judgment on the pleadings on each of the three causes of action alleged in the General Counsel's complaint, and concluded the UFW's picketing threat violated Labor Code section 1154, subdivision (h), as well as subdivisions (a)(1) and (a)(2).

Board Decision

On exceptions filed by Gerawan, the Board concluded Garcia had standing to file the unfair labor practice charge. The Board further found Gerawan was not entitled to a hearing on its allegations of collusion between Garcia and the UFW. With respect to the causes of action alleged in the General Counsel's complaint, the Board found the UFW's picketing threat violated Labor Code section 1154, subdivision (h). However, the Board reversed the ALJ's findings that the UFW violated section 1154, subdivisions (a)(1) and (a)(2), as the undisputed allegations unfair labor practice complaint failed to establish that the UFW's conduct violated either provision. Accordingly, the Board remanded those causes of action to the ALJ for further proceedings consistent with its decision. Finally, the Board reversed the ALJ's determination that notice mailing and reading remedies were not appropriate in this case, and the Board ordered the full range of standard notice remedies based on the UFW's violation of section 1154, subdivision (h).

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STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

UNITED FARM WORKERS OF AMERICA, Respondent, and, AUGUSTIN GARCIA, Charging Party, and, GERAWAN FARMING, INC. Intervenor,	)	CASE NO. 2018-CL-003-VIS ORDER DENYING INTERVENOR'S REQUEST FOR A HEARING ON ALLEGED COLLUSION BETWEEN THE CHARGING PARTY AND RESPONDENT ORDER GRANTING GENERAL COUNSEL'S MOTION FOR JUDGMENT ON THE PLEADINGS

Procedural Background

On September 27, 2018, the Agricultural Labor Relations Board (ALRB) issued its Supplemental Decision and Order on Remand finding that unlawful conduct of Intervenor Gerawan Farming, Inc. (Gerawan) did not interfere with employee free choice to such an extent that it affected the outcome of the decertification election conducted on November 5, 2013.[1] Accordingly, the ALRB certified the election results finding that a majority of the valid votes counted were cast for "No Union." Hence, the United Farm Workers of America (UFW), which had been Gerawan's agricultural employees' exclusive collective bargaining representative since 1991,[2] was decertified.[3]

[1] *Gerawan Farming, Inc.* (2018) 44 ALRB No. 10, p. 11.

[2] *Gerawan Farming, Inc.* (2018) 44 ALRB No. 11, p. 3.

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

About a week after this decertification, by letter dated November 13, 2018, UFW sent a letter to Gerawan asserting, in part,

> As you know, we believe the Board's decertification of UFW was made in error, is invalid as a matter of law, and has no legal force or effect. Should Gerawan refuse to meet and bargain, UFW will file charges and will also picket Gerawan at any and all public locations and retailers, in order to be recognized as the lawful representative of Gerawan's employees.

An unfair labor practice charge was filed on December 10, 2018, by agricultural worker Agustin Garcia (Garcia). The charge claimed that UFW had violated California Labor Code §1154(a) and (h)[4] by, inter alia, on November 13, 2018, requesting bargaining and threatening to picket for recognition. Following the filing of this charge, an investigation was conducted by the Visalia Regional Office of the ALRB. During the investigation, UFW wrote to the Region by letter dated December 13, 2018, stating, inter alia,

> UFW admits to violating the Act . . . as a means to seek review of the ALRB decision in *Gerawan Farming, Inc.* (2018) 44 ALRB No. 10. . . . UFW believes that decision by the ALRB was made in error and seeks to challenge that decision. UFW has no other means to seek review of that decision, other than by engaging in this technical violation of the Act.

Complaint was issued on December 28, 2018, alleging that UFW committed unfair labor practices by threatening, inter alia, to picket Gerawan without a certification. The answer filed by UFW admits that it wrote the November 13, 2018 letter to Gerawan and admits it wrote the December 13, 2018 letter to the Region. Further, the answer does not dispute the substantive allegations that it violated the ALRA by threatening to picket in order to force or require Gerawan to recognize it.

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[4] The Agricultural Labor Relations Act (ALRA), California Labor Code §§1140-1166.3, provides at §1154(h) that it shall be an unfair labor practice for a labor organization "To picket or cause to be picketed, or threaten to be picketed or cause to be picketed, any employer where an object thereof is either forcing or requiring an employer to recognize or bargain with the labor organization as a representative of his employees unless such labor organization is currently certified as the collective-bargaining representative of such employees."

On March 1, 2019, the General Counsel moved for judgment on the pleadings. On March 11, 2019, UFW filed its response to the General Counsel's motion for judgment on the pleadings reasserting that it engaged in a technical violation of the law in order to seek review of the ALRB's decertification decision. Gerawan filed its opposition to the motion for judgment on the pleadings on March 14, 2019, and on March 28, 2019, the General Counsel filed a reply brief.

Gerawan opposes entry of judgment on the pleadings. Gerawan argues that the test of certification procedure available to employers in order to obtain appellate review of a certification is not available to unions to obtain appellate review of a decertification. Second, Gerawan claims that Garcia lacks standing to file an unfair labor practice charge. Finally, Gerawan asserts that the unfair labor practice charge filed by Garcia against his union is the product of collusion. Accordingly, Gerawan requests that a hearing be held in order to demonstrate that Garcia's interest in the outcome of the litigation is collusive. Gerawan's arguments are rejected.

Garcia Had Standing to File the Unfair Labor Practice Charge

An unfair labor practice charge may be filed by any person[5] for any reason.[6] An unfair labor practice charge does not constitute proof.[7] It is not a pleading.[8] An unfair labor practice

[5] An unfair labor practice charge may be filed by any person. ALRB Regulations §20201 (8 CCR §20201). See also NLRB Rule 102.9, 29 CFR 102.9: a charge may be filed by any person.

[6] *Stationary Engineers Local 39 (Kaiser Foundation)* 268 NLRB 115, 116 (1983): "The simple fact is that anyone for any reason may file charges with the Board." enfd. (9th Cir. 1984) 746 F.2d 530.

[7] NLRB v. Indiana & Michigan Elec. Co. (1943) 318 U.S. 9, 18.

[8] Id.

charge, even if filed in bad faith or for evil intent, is not invalid.[9] The charge merely sets in motion the machinery of an inquiry.[10]

Once a charge is filed, the General Counsel alone moves forward in the interest of the public.[11] The General Counsel investigates the alleged violation and the General Counsel alone, acting on behalf of the public at large, determines whether to issue a complaint.[12] The General Counsel possesses sole discretion in this regard. [13] The charging party may not determine whether complaint will issue, the theory of law underlying the complaint, or the management or prosecution of the complaint.[14] Thus, the General Counsel has sole discretion to make these determinations.

Conflating various sections of the ALRA, Gerawan argues that Garcia is not a person entitled to file an unfair labor practice charge because he is not a "person aggrieved."[15]

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[9] Id.

[10] Id., 318 U.S. at 17-18.

[11] *NLRB v. Fant Milling Co.* (1950) 360 U.S. 301, 308 (Like the NLRB, the ALRB was created not to adjudicate private controversies but to advance the public interest).

[12] *Fant Milling Co.*, supra, 360 U.S. at 308-309 (once NLRB jurisdiction invoked, Board must be left free to make investigation in order to discharge duty of protecting public rights).

[13] The General Counsel has sole discretion regarding whether to issue a complaint, the contents of a complaint, and the management and prosecution of the complaint before the Board. Management of a case by private parties is contrary to the scheme of the Act. *Sailors' Union of the Pacific (Moore Dry Dock, Co.)* (1950) 92 NLRB 547, fn. 1; see also, *Smoke House Restaurant* (2006) 347 NLRB 192, 195 (General Counsel controls complaint; charging party may not enlarge upon or change the General Counsel's theory of the case), enfd. 325 Fed.Appx. 577 (9th Cir. 2009).

[14] *Sailors' Union of the Pacific*, supra.

[15] Opposition Brief at p. 7.

Gerawan takes the term "person aggrieved" from §1160.2 of the ALRA which grants a toll of the statute of limitations to persons who were prevented by military service from filing a timely charge. Clearly, Gerawan misreads the statute in arguing that a charging party must be a "person aggrieved."

Gerawan argues that Garcia cannot plausibly claim he personally was restrained or coerced. Gerawan avers that Garcia's only "interest in the outcome of the proceeding" within the meaning of §1140.4(d)[16] is that of a "union shill."[17] These arguments are misplaced. As fully explicated above, any "person" may file an unfair labor practice charge.

Similarly, Gerawan's reliance on *Thompson v. North American Stainless, LP,*[18] is unavailing. There the Court held that the term "aggrieved" in Title VII incorporated its "zone of interests" test in determining whether a plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statue that it cannot reasonably be assumed that Congress intended to permit the suit. It is unnecessary to determine whether Garcia might fall within the "zone of interests" test. The fact is that a Title VII lawsuit brought by a private party in federal court absolutely requires standing under federal court standards. As such, it is entirely distinguishable from an administrative charge.[19]

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[16] This section deals with the definition of "person." It provides, "The term 'person' shall mean one or more individuals . . . having an interest in the outcome of a proceeding under this part."

[17] Gerawan Opposition Brief at p. 7.

[18] (2011) 562 U.S. 170, 178.

[19] Gerawan also cites *Richards v. NLRB* (7th Cir. 2012) 702 F.3d 1010, 1015. Petitioners before the circuit court had exercised their right to opt out of paying union dues used to support political and other activities unrelated to collective bargaining, contract administration, or grievance adjustment. However, they filed charges before the NLRB claiming that they should not have to renew their opt-out objection annually. The Board agreed and struck down the requirement of annual renewal. As petitioners had complied with the annual opt-out renewal, they did not seek refunds for themselves. However, they sought refunds for other employees who have filed objections at one time but had failed to renew

Administrative proceedings before the ALRB have an appointed General Counsel to guide the investigation and research in the public interest. The ALRA requires the charging party to be a person only. Garcia satisfies that criteria. No ALRB or NLRB authority is cited which requires the charging party to be a "person aggrieved." [20] Thus, this argument is rejected. In conclusion, Garcia qualifies as a "person" who may file an unfair labor practice charge.

No Hearing Is Necessary to Consider Alleged Abuse of Process

Gerawan argues that abuse of process may occur where the accused (UFW) and the accuser (Garcia) seek the same outcome. As Gerawan notes, there is no dispute that the Board and the General Counsel may dismiss a charge if processing it would constitute an abuse of process. Of course, Gerawan is correct that a close connection between accuser and accused

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them. The NLRB refused to grant petitioners' request for refunds to other employees. The circuit court dismissed the appeal relying on §10(f) of the NLRA, 29 U.S.C. §160(f). The circuit court did not apply the "zone of interests" test. Section 10(f) deals with persons "aggrieved" by a final order of the NLRB. It does not deal with persons who may file an unfair labor practice charge. Gerawan's reliance on this case is misplaced.

[20] Similarly, *UFW v. ALRB (California Table Grape Commission)* (1995) 41 Cal.App.4th 303, 321, cited by Gerawan, does not convince that Garcia should not be considered a "person" qualified to file an unfair labor practice charge. The court held in that case that the Commission was not authorized to file an unfair labor practice charge because such action was beyond the Commission's legislative mandate to "promote the sale of fresh grapes by advertising and other similar means. . . ." Thus, the court held that the ALRA's definition of "person" cannot operate to vest the Commission with authority. Gerawan relies on a further statement by the court: "By way of analogy, a person otherwise entitled to file unfair labor practice charges . . . may be barred by ethical or other restrictions. . . ." It is unclear what the court's analogy might mean. Certainly, the actual holding in the case is not applicable to the facts in the instant case.

might be suspect in some situations. That does not, however, appear to endanger the process of the Board in a technical test of decertification.[21]

The fact of the matter is that test of certification or decertification is an artificial process set up by Congress in fashioning the NLRA. Later the same process was adopted by the California legislature in enacting the ALRA. An employer who wants to litigate the process of certification must commit a technical violation of the Act, refuse to bargain, in order to seek court review. A labor organization which wants to litigate the process of decertification must do the same, that is, commit a technical violation of the Act.

Gerawan extends the principle too far in arguing that process is abused when an individual union member[22] files an unfair labor practice charge against his labor organization for the purpose of testing a decertification holding. Cases cited by Gerawan do not support such an assertion.[23]

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[21] In this sense, filing a technical test of certification charge is similar to filing a charge to determine whether one's collective-bargaining contract violates the Act as an unlawful hot cargo clause. In *Milk Drivers Local 546 (Minnesota Milk Co.)* (1961) 133 NLRB 1314 at fn. 3, 1321-1322, enfd. (8th Cir. 1963) 314 F.2d 761, the NLRB held that the filing of such a charge did not prevent the Board from vindicating and protecting the public right which may have been infringed.

[22] It is assumed for purposes of this motion that Garcia filed the unfair labor practice charge in order to further the UFW's objective in seeking judicial review of the decertification.

[23] Gerawan's reliance on an Advice Memorandum is unavailing. Not only is such a document lacking in any decisional precedent, the memorandum cited, *SEIU, United Healthcare Workers – West* (June 16, 2010), 2010 WL 2546939, 2010 NLRB GCM LEXIS 23, found that it was not improper for the union to file charges against its trustees as "any person" may file a charge. (Memo at 13). Further, as the General Counsel points out, Gerawan's assertion the memorandum states that it is not appropriate to process a case "where the charging party and the charged party are acting in concert" omitted the rest of that sentence: "and [the parties] can address the unlawful conduct themselves."

For instance, in *Shop Rite Foods, Inc.*,[24] relied on by Gerawan, the employer solicited employees to file unfair labor practice charges against it in order to delay, manipulate, and compromise the ongoing election process. As the employer knew, filing of these unfair labor practice charges while the representation process was ongoing triggered the NLRB's "blocking charge" policy.[25] Thus, the representation process was stopped in its tracks. The Board held the employer's solicitation of employees to file unfair labor practice charges violated the Act, stating:[26]

> [W]e find no difficulty in affirming the Administrative Law Judge's finding concerning Respondent's solicitation of charges against itself. Collusive litigation has long been frowned upon by all judiciaries, and it is difficult to imagine a clearer instance of collusive litigation than that of a company instituting proceedings against itself. Like the Administrative Law Judge, we are persuaded that this devious activity was an abuse of our processes and an improper interference with employee rights.

Gerawan argues essentially that because Garcia filed the unfair labor practice charge at the behest of UFW, the holding in Shop Rite should apply here. Shop Rite involved manipulation of Board processes in order to interfere with employee rights. The employer's actions constituted an unfair labor practice. Assuming Garcia filed the instant charge for the purpose of allowing UFW to seek judicial review of the ALRB's decertification decision, it does not amount to the egregious actions in *Shop Rite*.[27] Rather, it is more akin to the actions in

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[24] (1973) 205 NLRB 1076.

[25] The current blocking charge policy is set forth in the NLRB Casehandling Manual Part Two Representation Proceedings §11730. The Regional Director is vested with discretion to block processing of a representation matter on the request of a charging party submitted with a written offer of proof in support of the charge.

[26] Id., 205 NLRB at 1076, fn. 1.

[27] Gerawan's reliance on an NLRB General Counsel memorandum responding to questions from the ABA in 1990 is similarly unavailing. In response to a hypothetical question, "Are there circumstances in which a charge filed by a party against itself would be entertained?" was answered that, yes, the Board or the General Counsel might decline to

Milk Drivers Local 46[28] in which the NLRB approved an unfair labor practice charge alleging a hot cargo clause filed by a signatory to the collective-bargaining agreement at issue. Thus, for the reasons stated above, no hearing is necessary on the allegations of collusion.

Availability of Test of Decertification is a Decision for the Courts

Gerawan argues that a test of certification is only available to employers.[29] This argument will not be addressed, as it is a matter for the courts to decide.[30]

Judgment on the Pleadings

The General Counsel has moved for judgment on the pleadings. UFW does not oppose the motion. Gerawan's objections to the motion have been overruled. Judgment on the pleadings is warranted when no factual conflicts must be resolved prior to ruling on the legal rights of the parties and the moving party is entitled to judgment as a matter of law.[31] In this case, there are no material factual conflicts.

Accordingly, the following findings of fact and conclusions of law are made:

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process a charge filed by a party against itself if the charge was deemed collusive or an abuse of Board process. Both *Shop Rite* and *Milk Drivers Local 46* (both already discussed herein) were cited. This memorandum has absolutely no decisional, precedential value.

[28] *Milk Drivers Local 46,* supra, 133 NLRB 1314.

[29] Gerawan relies on dicta in *NLRB v. Interstate Dress Carriers* (3d Cir. 1979) 610 F.2d 99, 107-108. Contrary dicta may be found in *Union de la Construccion de Concreto & Equipo Pesado v. NLRB* (1st Cir. 1993) 10 F.3d 14, 15-16; *United Federation of College Teachers, Local 1460 v. Miller* (2d Cir. 1973) 479 F.2d 1074, 1078-1079; *Lawrence Typographical Union v. McCulloch* (D.C. Cir. 1965) 349 F.2d 704, 708.

[30] *United Farm Workers of America (Corralitos Farms, LLC)* (2014) 40 ALRB No. 6, p. 3 (issue of judicial review is for judiciary and not for the Board).

[31] *Bacchus Farms* (1978) 4 ALRB No. 26, p. 3 (judgment on the pleadings), cited by the General Counsel; see also *Mario Saikhon, Inc.* (1989) 15 ALRB No. 8, p.6 (summary judgment); *F&P Growers Assoc.* (1983) 9 ALRB No. 22, p. 2-3 (summary judgment). These authorities are cited with approval in *Tri-Fanucchi Farms* (2014) 40 ALRB No. 4, pp. 8-9.

Findings of Fact

1. On December 10, 2018, agricultural worker Garcia properly filed and served unfair labor practice charge (Charge) 2018-CL-003-VIS. The Charge alleges that on November 13, 2018, the UFW violated the Act when it threatened to picket Gerawan if it should refuse to recognize and bargain with the UFW. The Charge was filed within the statute of limitations contained in Labor Code §1160.2 and was served on the UFW by certified mail return receipt requested on December 10, 2018.
2. At all material times, UFW was a labor organization within the meaning of Labor Code §1140.4(f). However, on December 10, 2018, UFW was not the certified representative of Gerawan agricultural employees, as defined by Labor Code §1140.4(b), where the worker was employed.
3. At all material times, Garcia was an agricultural worker as defined in §1140.4(b) of the Act, and employed by Gerawan.
4. On October 25, 2013, Silvia Lopez filed a petition to decertify UFW as the bargaining representative of the agricultural employees of Gerawan. The ALRB ordered that an election be held and the ballots case in the election be impounded. The election took place on November 5, 2013.
5. Following a hearing on election objections and related unfair labor practice allegations, an administrative law judge (ALJ) determined that Gerawan committed multiple unfair labor practices and engaged in other objectionable conduct by providing unlawful assistance to the efforts to decertify the UFW. Due to the pervasive nature of the misconduct found, the ALJ recommended dismissing the decertification petition and setting aside the election. The ALRB affirmed and reversed various of the ALJ findings holding that Gerawan's unlawful and/or objectionable conduct tainted the entire decertification process, thus dismissing the petition and setting aside the election. *(Gerawan Farming, Inc.* (2016) 42 ALRB No. 1.)
6. On May 30, 2018, the California Court of Appeal for the Fifth Appellate District issue an opinion reversing certain portions of the ALRB's unfair labor practice findings in *Gerawan Farming*, supra, and vacating the ALRB's order dismissing the decertification petition and setting aside the election. *(Gerawan Farming, Inc. v. ALRB* (2018) 23

Cal.App.5th 1129.) The appellate court remanded the matter to the ALRB to open and count the ballots cast in the 2013 election and to reconsider the ALRB decision in light of its opinion.

7. On September 14, 2018, the ALRB issued an intervening administrative order directing the vote count and pursuant to that order, Regional Director Chris Schneider directed that the votes be opened and counted on September 18, 2018, yielding the following results:

    - 197 for the UFW
    - 1098 for the "No Union" choice
    - 660 unresolved challenged ballots
    - 18 voided ballots

8. After the vote count, the ALRB evaluated the record on remand and found that the unlawful and/or objectionable conduct committed by Gerawan did not interfere with the employees' free choice to such an extent that it affected the outcome of the election. Therefore, the ALRB certified that a majority of the valid ballots indicated "No Union" in the representation election and decertified the UFW as the exclusive bargaining representative of the Gerawan agricultural employees.
9. On September 27, 2018, the ALRB issued its supplemental decision and order in *Gerawan Farming, Inc.* (2018) 44 ALRB No. 10 wherein it attested to the decertification vote count and totals cited above.
10. On November 13, 2018, Armando Elenes, National Vice President of the UFW sent a letter to Gerawan's counsel Ron Barsamian in which Mr. Elenes stated:

    > Pursuant to the UFW's role as a collective bargaining representative of Gerawan's employees, we request to meet and bargain in an attempt to finalize a collective bargaining agreement between UFW and Gerawan Farming. As you know, we believe the Board's decertification of UFW was made in error, is invalid as a matter of law, and has no legal force or effect. Should Gerawan refuse to meet and bargain, UFW will file charges and will also picket Gerawan at any and all public locations and retailers, in order to be recognized as the lawful representative of Gerawan's employees.

11. On December 10, 2018, charging party Garcia filed charge 2018-CL-003-VIS alleging that the UFW committed an unfair labor practice in threatening to picket Gerawan absent a certification as the employees' collective bargaining representative.

12. In a letter dated December 13, 2018, and addressed to Chris Schneider, Regional Director of the ALRB in the Visalia region, UFW counsel Mario Martinez stated:

> UFW is in receipt of the . . . charge that UFW has violated the ALRA by requesting that Gerawan recognize and bargain with UFW and threatening to picket Gerawan. . . . UFW admits to violating the Act, including Labor Code sections 1154(g) and/or (h) as a means to seek review of the ALRB decision in *Gerawan Farming, Inc.* (2018) 44 ALRB No. 10. . . . UFW believes that decision by the ALRB was made in error and seeks to challenge that decision. UFW has no other means to seek review of that decision, other than by engaging in this technical violation of the Act.

Conclusions of Law

By the actions set forth in findings of fact 5-12, UFW committed an unfair labor practice in violation of Section 1154(h) of the Act when it threatened to picket at Gerawan thus threatening Gerawan with picketing to force or require Gerawan to recognize UFW as the bargaining representative of Gerawan employees despite its decertification pursuant to the 2013 election.

By the actions set forth in findings of fact 5-12, UFW committed an unfair labor practice in violation of Section 1154(a) by threatening to picket Gerawan if, despite its decertification, it should not recognize UFW as its employees' collective bargaining representative thus unlawfully restraining the right of agricultural workers to select their own representation or exercise their right to select no labor organization to represent them and in attempting to force Gerawan to recognize and bargain with UFW despite its decertification thus unlawfully attempting to coerce the employer.[32]

[32] UFW argues that the remedy for this technical test of decertification should not include mailing or reading of the Notice. In agreement, it is found that this remedy would be punitive. Like a technical refusal to bargain where no makewhole backpay is automatically assessed (*J.R. Norton Co. v. ALRB* (1979) 26 Cal.3d 1, 39), where the threat to picket was not the result of any general animus but made solely to obtain judicial review by the only means available, it would not serve the public interest to require mailing or reading. See, e.g., *Retail, Wholesale, & Dept. Store Union v. NLRB* (D.C. Cir. 1967) 385 F.2d 301, 307-308 (espousing a thoughtful approach in determining which remedies most effectively effectuate the purposes of the Act).

ORDER

Pursuant to Labor Code section 1160.3, Respondent United Farm Workers of America, its officer, agents, successors, and assigns shall:

1. Cease and desist from:
   (a) Demanding that Gerawan Farming, Inc. or any other agricultural employer recognize or bargain with a labor organization that is not currently certified as the bargaining representative of its agricultural employees.
   (b) Threatening to picket or cause to be picketed Gerawan Farming, Inc. or any other agricultural employer where the object thereof is to force or require the employer to recognize or bargain with a labor organization that is not currently certified as the bargaining representative of its agricultural employees.
   (c) In any like or related manner restrain or coerce employees in the exercise of their rights guaranteed by section 1152 of the Agricultural Labor Relations Act.
2. Take the following affirmative actions that are deemed necessary to effectuate the purposes of the Act:
   (a) Within 30 days after this Order becomes final, sign the attached Notice to Agricultural Employees and after its translation by an ALRB agent into appropriate languages, reproduce sufficient copies in each language for the purposes set forth below.
   (b) Within 30 days after this Order becomes final, post copies of the attached Notice, in all appropriate languages, in conspicuous places at UFW's business offices, meeting halls, and bulletin boards, as well as at locations provided to UFW by Gerawan Farming, Inc., such places to be determined by the Regional Director, and exercise due care to replace any Notice which has been altered, defaced, covered, or removed. Pursuant to Labor Code section 1151(a), agents of the ALRB shall have access to confirm the posting of the Notices.

(c) Notify the Regional Director in writing, within 30 days after the date this Order becomes final, of the steps UFW has taken to comply with its terms. Upon request of the Regional Director, UFW shall notify the Regional Director periodically thereafter in writing of further actions to comply with the terms of this Order.

Dated: April 3, 2019

SO ORDERED.

Mary Miller Cracraft
Administrative Law Judge
Agricultural Labor Relations Board

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating charges that were filed by Augustin Garcia with the Visalia office of the Agricultural Labor Relations Board (ALRB), the General Counsel of the ALRB issued a complaint that we had violated the law. Based on the admitted facts and record, the ALRB found that we violated that Agricultural Labor Relations Act (ALRA) by threatening to picket if Gerawan Farming, Inc. refused to bargain even though we were not certified by the ALRB as your bargaining representative.

The ALRB has told us to post and publish this Notice.

The ALRA is a law that gives you and all other farm workers in California these rights:

1. To organize yourselves;
2. To form, join, or help a union or bargaining representative;
3. To vote in a secret ballot election to decide whether you want a union to represent you;
4. To bargain with your employer about your wages and working conditions through a union chosen by a majority of the employees and certified by the ALRB;
5. To act together with other workers to help and protect one another; and
6. To decide not to do any of these things.

Because you have these rights, we promise that:

WE WILL NOT demand to bargain or threaten to picket if an agricultural employer refuses to bargain if we have not been certified by the ALRB as the bargaining representative.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in their exercise of rights guaranteed under the ALRA.

DATED:

UNITED FARM WORKERS OF AMERICA

By _____
Representative Title

If you have any questions about your rights as farm workers or about this Notice, you may contact any office of the Agricultural Labor Relations Board. One office is located at 1642 West Walnut Avenue, Visalia, California. The telephone number is 559-627-0995.

This is an official notice of the Agricultural Labor Relations Board, an agency of the State of California.

DO NOT REMOVE OR MUTILATE