STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

UNITED FARM WORKERS OF AMERICA, Petitioner, and, DMB PACKING CORP. dba THE DIMARE COMPANY, Employer.	)	Case No. 2023-RM-001-VIS 50 ALRB No. 2 (October 4, 2024)

DECISION AND ORDER

On September 12, 2023, the United Farm Workers of America (UFW) sought certification as the bargaining representative of a unit of agricultural employees employed by DMB Packing Corp dba The DiMare Company (DiMare). Certification was sought pursuant to Labor Code section 1156.37, a provision of the Agricultural Labor Relations Act (ALRA or Act) setting forth a process for certification based upon a majority support petition supported by authorization cards signed by a majority of bargaining unit employees.[1] The Regional Director of the ALRB's Visalia Region (Regional Director and Region), based upon an investigation of the majority support petition, issued a tally on October 20, 2023, finding that the conditions for certification were established and the UFW had demonstrated majority

[1] The ALRA is codified at Labor Code section 1140 et seq. All further statutory references are to the California Labor Code unless otherwise indicated. The Board's regulations are codified at California Code of Regulations, title 8, section 20100 et seq.

support. The Executive Secretary of the ALRB issued the certification on October 23, 2023.

On October 30, 2023, DiMare timely filed 14 objections to the certification. On November 3, 2023, the ALRB issued an administrative order setting five of DiMare's objections for hearing before an Investigative Hearing Examiner (IHE). After the hearing, the IHE issued a decision and recommended order in which the IHE recommended dismissing each of DiMare's objections to the certification. On April 8, 2024, DiMare filed 23 exceptions to the IHE's decision along with a supporting brief. The UFW filed a reply to the exceptions on April 29, 2024.

The Board has considered the IHE's decision, the record, and the exceptions and briefs filed in the case and has decided to affirm the IHE's rulings, findings, and conclusions to the extent consistent with this decision and order.[2]

BACKGROUND

The petition at issue herein was the first petition filed under the Act's majority support petition statute. Accordingly, the Board begins with an overview of the majority support petition statute and the process it sets forth.

1. THE MAJORITY SUPPORT PROCESS

Under the majority support petition statute, a labor organization may seek certification as the bargaining representative of an employer's agricultural employees by filing

[2] DiMare argues that the IHE's decision fails to comply with Board regulation 20370, subdivision (i), which requires that decisions include "a statement of the reasons in support of the conclusions . . .." The Board's review of the record and the legal issues is de novo and the Board's decision herein sets forth its own analysis of the legal and factual issues raised by the exceptions. (*Rincon Pacific, LLC* (2020) 46 ALRB No. 4.)

a petition with the region.[3] (§ 1156.37, subd. (a).) The petition must contain certain factual allegations and must be supported by proof of majority support, which may take the form of authorization cards, petitions, or other proof of majority support of the currently employed employees. (§ 1156.37, subds. (b)-(c).) Employees eligible to be counted towards the establishment of majority support must be employed during the employer's payroll period immediately preceding the filing of the petition (the eligibility period). (§ 1156.37, subd. (c).) Within 48 hours of the filing of the petition, the employer is required to submit to the region and serve on the union a response to the petition, which must include a complete and accurate list of the names, addresses, telephone numbers, job classifications, and crew or department of all employees employed during the eligibility period.[4] (§ 1156.37, subd. (c).)

The filing of the petition triggers an investigation by the region into the petition and the showing of majority support. (§ 1156.37, subd. (e)(1).) Within five days of the filing of the petition, the region must investigate and make determinations as to whether the petition meets statutory requirements and whether majority support is established. (*Ibid*.) If the region determines the statutory requirements are met and majority support is established, the union is

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[3] Although the statute assigns responsibility to receive and process majority support petitions to the Board, consistent with its long-standing practice in representation cases and as authorized by section 1142, subdivision (b), the Board has delegated that function to its regional directors.

[4] The obligation to supply an accurate list of employees within 48 hours tracks the equivalent requirement that exists under the Board's secret ballot election process. (See Board reg. 20310, subd. (d) [requiring submission of employee list within 48 hours of filing of secret ballot election petition].) From the inception of the Act, the Board has emphasized that an employer's production of a timely and accurate employee list is essential to the proper functioning of the Board's election processes, including establishing the list of eligible voters. (*Yoder Bros., Inc*. (1976) 2 ALRB No. 4, pp. 3-4.)

immediately certified. (§ 1156.37, subd. (e)(2).) If, however, the region determines majority support is not established, the union is notified and the region must allow the union 30 days from the date of the notification to submit additional support (cure period). (§ 1156.37, subd. (e)(4).) If the union submits sufficient additional support to establish majority support by the end of the 30-day period, the union is certified.

Once the certification issues, the employer has five days to file objections to the certification. (§ 1156.37, subd. (f).) The employer may object to the certification on grounds the allegations in the petition were false, the bargaining unit determined by the board is improper, the majority support procedure was conducted improperly, or improper conduct affected the results of the majority support procedure. (§ 1156.37, subd. (f)(1).) Upon receiving the employer's objections, the Board may administratively rule on the objections or conduct a hearing within 14 days of the filing of the objections. (§ 1156.37, subd. (f)(2).) If the employer's objections are sustained, the Board will revoke the certification. (*Ibid*.)[5]

2. FACTUAL AND PROCEDURAL BACKGROUND

The UFW filed a majority support petition on September 12, 2023, seeking certification as the bargaining representative of DiMare's agricultural employees. The relevant payroll period for eligibility purposes was September 4 through September 10, 2023. DiMare

[5] The Board has commenced a rulemaking process to implement the majority support statute, but that process remains pending and no regulations have been adopted. The Board notes the IHE's analysis relied in part on the content of the Board's then-current proposed regulations. The proposed regulations have no legal force or effect. (*Wonderful Nurseries, LLC* (Mar. 18, 2024) ALRB Admin. Order No. 2024-04, p. 22.)

provided its response and an employee list on September 14, 2023.[6]

a. The Initial Investigation and Determination

Pursuant to section 1156.37, subdivision (e)(1), under the direction of Regional Director Yessenia De Luna, the Region initiated an investigation of the petition and the showing of majority support. On September 15, 2023, the UFW provided information to the Region that four individuals whom the UFW claimed worked for DiMare during the eligibility period, were missing from DiMare's list. The Region notified DiMare on September 17, 2023, that it was investigating allegations that eligible employees were omitted from DiMare's list and requested information from DiMare. Upon investigation, the Region determined that two of these four individuals were eligible. The Region also determined that some individuals should be removed from the list because they did not work during the relevant period or due to supervisory status.

On September 19, 2023, the Region issued a letter to the parties reporting the results of its investigation. The Region found the petition met the requirements of section 1156.37, subdivision (b) because DiMare was at peak employment, no election had been conducted in the previous 12 months, and there was no existing collective bargaining agreement. The Region also determined the appropriate unit was one encompassing DiMare's

[6] DiMare does not employ its tomato harvest workforce directly but procures all its workers through various farm labor contractors. Under section 1140.4, subdivision (c), workers supplied to a grower by a farm labor contractor are deemed to be employees of the grower. The employer has a duty to "maintain accurate and current payroll lists containing the names and addresses of all their employees" and to provide such list to the Board upon request, a duty that is not diminished due to the employer's decision to obtain its workers from a farm labor contractor. (§ 1157.3; *Yoder Bros., Inc., supra*, 2 ALRB No. 4, p. 6, fn. 3.)

operations in seven northern/central California counties (the Newman unit) and excluding DiMare's Indio operations. Simultaneously, the Region sent the parties an eligibility list that reflected the additions and removals as described above. The September 19, 2023 eligibility list includes the names of 268 individuals.[7] The Region found the UFW had failed to provide proof of majority support within the Newman unit. Accordingly, the UFW was afforded a 30-day period to submit additional support pursuant to section 1156.37, subdivision (e)(4).

b. Proceedings During the Cure Period

The cure period commenced upon the Regional Director's September 19, 2023 determination and was set to conclude 30 days later on October 19, 2023. Over the course of the cure period, the UFW asserted a total of 49 claims of individuals whom it alleged worked during the eligibility period but who were not included on DiMare's employee list. The UFW submitted the bulk of these claims on October 6, 2023, although it continued to submit additional names after that date. In support of its claims, the UFW submitted declarations from 14 individuals who claimed they worked for DiMare during the eligibility period and were paid with a check or in cash ("con cheque/en efectivo"). Each declaration was accompanied by a witness declaration by another employee stating that the witness also worked during the eligibility period and saw the declarant working on the same crew. The UFW also provided some documentary evidence such as electronic "QuickPick" receipts for some individuals.

On October 9, 2023, the Region notified DiMare the Region had evidence there

[7] Although there are 269 names on the September 19, 2023 eligibility list, the Region found one individual's name was listed twice and the duplicate name was disregarded. Thus, the list contains 268 unique names.

were workers not on DiMare's employee list who worked during the eligibility period and were paid in cash and the Region requested information from DiMare. DiMare provided information in response to this request and stated it had "confirmed that no workers were being paid in cash."

The Region investigated the UFW's claims. The Region sought to interview every allegedly eligible worker. The only workers who were not interviewed were those who could not be contacted.[8] The bulk of these interviews occurred between October 8 and October 17, 2023, although some occurred later. The Region conducted interviews with other employees already on the eligibility list to ask them about the workers claimed to be eligible. Interviews with crew forepersons were also conducted. On October 17, 2023, the Region requested DiMare provide an explanation of an apparent discrepancy the Region had identified between a DiMare farm labor contractor's electronic "QuickPick" report and its harvest report. Although DiMare stated it would respond, it never provided an explanation.

On October 18, 2023, the Region emailed a letter to the parties notifying them the Region had found evidence that 24 workers identified by name in the letter worked for DiMare during the eligibility period and "[t]hus, we are adding the . . . workers to the eligibility list." That same day, DiMare emailed a letter to the Region objecting to the addition of the 24 individuals, arguing the Regional Director lacked authority to add names to the eligibility list and any claims workers should be added to the list are required to be addressed through the Board's existing process for challenged ballots in secret ballot elections.

[8] Of the 29 employees added to the eligibility list during the cure period, there was only one worker whom the Region had been unable to interview.

The UFW continued to submit claims of additional eligible workers not included on DiMare's list. The UFW submitted two such claims on October 18, 2023, which the Region investigated. After interviewing both individuals, the Region concluded they were eligible and, on the morning of October 19, 2023, notified the parties of the addition of the two individuals. DiMare again objected to the addition of names to the eligibility list.

On October 19, 2023, shortly after the 5:00 p.m. close of the cure period, DiMare emailed the Region a document it characterized as "challenges" to the authorization cards submitted by the UFW. DiMare stated that it challenged the 26 names the Region had added to the eligibility list and stated it had "proof that these individuals either never worked at DiMare or did not work during the eligibility period."[9] The Region responded that same evening stating that if DiMare had any additional evidence not already provided concerning its challenge, DiMare could submit it no later than noon the following day.

The next morning, DiMare emailed the Region inquiring whether the Region was withdrawing its determination to add the 26 workers to the eligibility list. The Region responded it was giving DiMare an opportunity to provide any additional evidence it wanted the Region to consider before the Region reached a decision in the matter. DiMare responded reiterating its request to know whether the Region's decision to add the names was being rescinded. However, ultimately, DiMare emailed the Region stating it "will simply reserve its right to present evidence – at a proper hearing before a hearing officer – in support of its challenges to the UFW's authorization cards and/or petitions."

[9] The 26 employees included the 24 employees added to the eligibility list on October 18, 2023, plus the additional two added to the list on October 19, 2023.

On October 20, 2023, the Region notified the parties it was adding a final three names to the eligibility list based upon additional claims submitted by the UFW.[10] DiMare responded that same day by asserting continuing objections to the addition of names, inquiring when the list would be considered final, and asking whether DiMare would be afforded additional time to challenge the three added names. The Region responded there would be no further additions to the list, and that DiMare would have until 4:00 p.m. that day to respond to the addition of the three names. DiMare replied by reiterating its prior statement that it continued to reserve its right to present evidence at a hearing in support of its challenges.

Ultimately, DiMare did not submit any additional evidence in response to the Region's October 18-20 addition of names to the eligibility list. At the hearing, the Regional Director testified that, had she received such evidence, she would have considered it and, if it showed that any of the added individuals did not work for DiMare during the eligibility period, those individuals would have been removed. DiMare also did not request any extensions of the times set by the Region for DiMare to respond to the addition of names to the eligibility list. The Regional Director testified at hearing that, had she received such a request, she would have considered it. However, having received no further evidence from DiMare, and having received DiMare's communications that it would reserve the submission of evidence for an eventual hearing, the Regional Director closed her investigation.

c. The Tally

The Regional Director issued a report and final tally of her investigation on

[10] While the names were added the day after the close of the cure period, the UFW's claims were submitted prior to the end of the period.

October 20, 2023. In the tally, the Regional Director addressed the issue of employees alleged to have been omitted from the eligibility list, stating the issue was not addressed in the statute or the Board's proposed regulations. The Regional Director acknowledged that, in the secret ballot context, such workers would vote subject to challenge under the challenged ballot process outlined in the Board's regulations.[11] However, section 1156.37does not contemplate the use of that process in majority support cases. Additionally, the Regional Director found an important distinction insofar as, unlike in secret ballot elections where challenges are asserted prior to the casting of votes, in majority support cases at the time a challenge would be asserted the parties would know how the challenged individual "voted."

Thus, the Regional Director rejected the use of the challenged ballot procedure in this case. Conversely, however, rejecting votes based upon the employer-provided list alone would undermine the purposes of the Act, interfere with workers' right to vote, and lead to employer suppression or manipulation of the vote. In order to preserve the right of workers to vote, the Regional Director "opted to investigate the claims made by the union and make determinations based on the evidence available to [her]." The "main inquiry for those workers who signed cards and whose names did not appear on the eligibility list was whether the evidence showed that they worked [during the eligibility period]." The Regional Director stated that, based upon her investigation, 31 agricultural employees who did not appear on the employer-provided list worked during the eligibility period and were, accordingly, added to the

[11] See Board regs. 20355, 20363.

eligibility list. This brought the total number of eligible employees to 297.[12] The Region received 151 valid authorization cards supporting the UFW. Thus, the Regional Director found that majority support was established.

The Regional Director acknowledged that DiMare had objected to the process used to handle the allegations of excluded eligible employees but stated that "the employer can challenge the Regional Director's review of the petition and whether poof of support was conducted improperly" in accordance with section 1156.37, subdivision (f)(1).

d. The Certification and DiMare's Objections to the Certification

On October 23, 2023, the Board's Executive Secretary issued a Certification of Investigation of Validity of Majority Support Petition and Proof of Support based on the Regional Director's determination majority support was established. On October 30, 2023, DiMare filed 14 objections to the certification.[13] Pursuant to section 1156.37, subdivision (f)(2), the Board reviewed the objections and issued an order dismissing nine of the objections and setting five for hearing. (*DMB Packing Corp*., *supra*, ALRB Admin. Order No. 2023-11.)

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[12] This number was derived from the October 18, 2023 list, which included the two individuals added during the five-day investigation. That list has 269 names on it, one of which was excluded as a duplicate. Based upon the cure period investigation, the Region added an additional 29 names to that list for a total of 297.

[13] Prior to filing the objections, on October 24, 2023, DiMare filed an "Interim Appeal of Regional Director's Tally and Request for Stay of Certification Pending Board Review of Challenged Authorization Cards." DiMare argued the Region acted improperly by adding any employees to the eligibility list during the cure period. DiMare requested that the Board issue a stay of the certification and reverse the Region's improper addition of employees to the eligibility list. In its order disposing of DiMare's objections, the Board also denied the interim appeal, finding that the appeal was procedurally improper and the Board was without authority to stay the certification. (*DMB Packing Corp*. (Nov. 3, 2023) ALRB Admin Order No. 2023-11, pp. 3-4.)

The objections set for hearing were the following:

- Objection 1: The Regional Director "failed to follow proper procedure for challenged ballots."
- Objection 2: The Regional Director "violated DiMare's due process rights by not providing adequate time for DiMare to present evidence disputing eligibility and the UFW's proffered evidence."
- Objection 5: The Regional Director "exceeded her authority under the Act by unilaterally expanding the eligibility list in direct contravention of DiMare's right to due process."
- Objection 6: The Regional Director "exceeded her authority under the Act by unilaterally accepting additional names for the eligibility list proffered by the UFW after the initial tally had taken place."
- Objection 8: The Regional Director "acted improperly when she deprived DiMare of the opportunity to review alleged evidence of additional employees that allegedly belonged on the eligibility list."[14]

[14] In setting the above objections for hearing, the Board clarified that it was not setting for hearing DiMare's contention encompassed within Objections 5 and 6 that the Region was entirely precluded from adding eligible employees to the eligibility and that only employees included on the employer's own list could be considered eligible. (*DMB Packing Corp., supra*, ALRB Admin Order No. 2023-11, pp. 5-6.) The contrary conclusion would condone the arbitrary disenfranchisement of employees inadvertently or deliberately omitted from the employer's list. (*Ibid*.) Thus, the Board concluded, "to the extent that DiMare asserts that the Regional Director lacked any authority to consider whether eligible but excluded employees should be added to the eligibility list (as opposed to the process used to determine such issues), that issue is dismissed and not included within the scope of matters set for hearing." (*Id*. at p. 6.)

With respect to the matters set for hearing, the Board emphasized that, given that many of the issues raised were matters of first impression, the hearing of the objections would "provide the Board's Investigative Hearing Examiner and the Board an opportunity to review the Regional Director's process under the law in handling these matters, including evidence related to the Regional Director's actions." (*DMB Packing Corp*, *supra*, ALRB Admin. Order No. 2023-11, p 6.)

e. The Hearing

The objections hearing was assigned to IHE Hermine Honavar-Rule. Prior to the hearing, the parties and the Region filed various pre-hearing motions, including petitions to revoke subpoenas and motions in limine. The motions relevant to DiMare's exceptions are (1) a motion in limine filed by the Region seeking to limit the testimony of the Regional Director, who was anticipated to be a witness at the hearing, (2) a pair of motions in limine filed by the Region and the UFW seeking to exclude the testimony of the 31 employees who had been added to the eligibility list by the Region (sometimes referred to as the "31 employees"), (3) a motion in limine filed by DiMare seeking to preclude the Region from claiming work product protection over investigation materials, and (4) the Region's petition to revoke DiMare's subpoena duces tecum to the Region. The parties and the Region appeared before the IHE on November 28, 2023, and presented arguments on the various motions. Later that day, the IHE issued an order which, among other things, granted the three motions in limine, and granted the Region's petition to revoke DiMare's subpoena seeking documents from the Region relating to the 31 employees.

Through her rulings on the pre-hearing motions, particularly the motions in

limine excluding the testimony of the 31 employees, in combination with her evidentiary rulings at the hearing, the IHE confirmed the objections hearing ordered by the Board included the procedural issues stated in DiMare's objections and did not include the substantive issue regarding the eligibility of the 31 employees.

The evidentiary hearing was held on November 30 and December 1, 2023. DiMare called only one witness: Regional Director De Luna. DiMare and the UFW filed post-hearing briefs and, on March 18, 2024, the IHE's decision issued. The IHE dismissed each of DiMare's objections. On April 8, 2024, DiMare filed with the Board 23 exceptions to the IHE's decision along with a brief in support of the exceptions. On April 29, 2024, the UFW filed a reply brief responding to DiMare's exceptions.

DiMare's exceptions may be categorized into three principal groups: (1) Exception nos. 1 and 3-17 generally relate to the IHE's rulings dismissing DiMare's objections to the processes used by the Region to investigate the petition and reach determinations; (2) Exception nos. 18-23 relate to the IHE's rulings on pre-hearing motions; and (3) Exception nos. 2 and 20 relate to the Region's participation in the hearing.

DISCUSSION

1. THE PROPER SCOPE OF THE OBJECTIONS HEARING

We begin by addressing a threshold issue: whether the IHE correctly ruled that the hearing on DiMare's objections was limited to what have been termed "process" issues, i.e., issues relating to the procedures used by the Regional Director to investigate and reach determinations on the majority support petition. The objections set for hearing by the Board (see pages 12-13, *supra*) each raise issues of procedure, focusing on various aspects of the

Regional Director's handling of the petition. [15] The Board's order setting these objections for hearing stated the Board was directing a hearing in order to "review the Regional Director's process under the law in handling these matters, including evidence related to the Regional Director's actions." (*DMB Packing Corp., supra*, ALRB Admin. Order No. 2023-11, p. 6.) The Board ordered the IHE to "evaluate legal arguments and take evidence" on the five objections set for hearing. (*Id*. at p. 18.)

Despite the procedural nature of the objections filed, DiMare argued before the IHE it should have been permitted to litigate an issue *not* raised by its objections: whether specific individuals performed no agricultural work for DiMare during the eligibility period and were therefore not eligible to be counted towards the majority support petition. The IHE properly limited the hearing to issues of process raised by DiMare's objections and set for hearing by the Board's order. (*Civil Service Employees Insurance Co. v. Superior Court* (1978) 22 Cal.3d 362, 371 [substantive merits of lower court's order were not at issue where party's challenge was limited to procedural due process issues]; *Kern County Farm Bureau v. Allen* (9th Cir. 2006) 450 F.3d 1072, 1080 [where party asserted only a procedural challenge to

[15] See Objection 1: "The Interim Regional Director failed to follow proper procedure for challenged ballots;" Objection 2: "The Interim Regional Director violated DiMare's due process rights by not providing adequate time for DiMare to present evidence disputing eligibility and the UFW's proffered evidence;" Objection 5: "The Interim Regional Director exceeded her authority under the Act by unilaterally expanding the eligibility list direct contravention of DiMare's right to due process;" Objection 6: "DiMare objects on the grounds that the Interim Regional Director exceeded her authority under the Act by unilaterally accepting additional names for the eligibility list proffered by the UFW after the initial tally had taken place;" Objection 8 "DiMare objects on the grounds that the IRD acted improperly when she deprived DiMare of the opportunity to review alleged evidence of additional employees that allegedly belonged on the eligibility list."

agency's consideration of reports during rulemaking, substantive issues of whether the agency correctly interpreted the reports were not at issue]; *In re Commercial Western Finance Corp*. (9th Cir. 1985) 761 F.2d 1329, 1336 [appeal raised only procedural and not substantive issues].)

DiMare places much emphasis on references in the Board's order to the taking of evidence at the hearing, arguing the Board would not have directed the taking of evidence if eligibility claims were not at issue. But DiMare's process objections did implicate factual issues, including the specifics of the processes used by the Regional Director and issues such as the timing and nature of the communications between DiMare and the Region concerning the submission of evidence. Indeed, despite the hearing being limited to process issues, there were two days of testimony by the Regional Director concerning such matters.[16]

Under the majority support petition process, an employer who believes a regional director made erroneous determinations on the eligibility of one or more employees is entitled to challenge those eligibility determinations through the objections process. (§ 1156.37, subd. (f)(1)(C).) To do so, however, it must support its objection by presenting proper evidence specifically challenging the eligibility determinations the party disputes. (*Vieira Agricultural Enterprises, LLC* (July 15, 2024) ALRB Admin. Order No. 2024-25, pp. 10-11.) DiMare failed to file objections challenging any of the Region's eligibility determinations. The IHE properly rejected DiMare's attempt to belatedly assert issues neither raised in its objections nor set for

[16] At the hearing, DiMare examined the Regional Director on factual issues including the means the Region used to investigate claims that eligible employees were left off DiMare's list, the Region's practices for interviewing witnesses, and the timing of when the Region made determinations and notified DiMare of those determinations.

hearing by the Board.

2. EXCEPTIONS RELATING TO THE PARTICIPATION OF THE REGION IN THE OBJECTIONS HEARING (EXCEPTION NOS. 2 AND 20)

DiMare excepts to the IHE's decision on grounds the IHE permitted the Region to participate in the objections hearing to an impermissible degree. DiMare contends the Region should not have been permitted to file pre-hearing evidentiary motions or to participate in the hearing itself, and further challenges the Region's representation by ALRB General Counsel attorneys during the hearing.

Pursuant to section 1142, subdivision (b), the Board has delegated authority over the processing and investigation of majority support petitions to the regional directors. Regional directors have broad authority over representation petitions, elections, and majority support petition investigations. However, once majority support cases reach the objection stage, the regional director's role becomes more limited.[17] Under the Board's regulations governing hearings on election objections, the parties to the hearing are the petitioner, the employer, and any other labor organization that has intervened. (Board reg. 20370, subd. (c).) Parties have the right to appear, call and examine witnesses, and introduce evidence into the record. (*Id*. at subd. (b).) The regional director is not designated a party but "may participate in an investigative hearing to the extent necessary to ensure that the evidentiary record is fully developed and that the basis for the Board's action is fully substantiated." (*Id*. at subd. (c).)

[17] The majority support process is not necessarily governed by existing law applicable to the secret ballot election process. However, the Board finds its regulations and precedent concerning participation of regions in traditional election objections hearings generally applicable to hearings on objections to majority support certifications.

The Board's decisions have emphasized that, through its participation in objections hearings, the region must not veer into the realm of advocacy but must maintain its proper role of developing the record and substantiating the basis of the Board's action. Thus, the Board has found improper advocacy where a region sought sanctions against a party for pursuing an objections the region deemed frivolous despite the fact the Board already set them for hearing (*Kubota Nurseries, Inc*. (1989) 15 ALRB No. 12, pp. 7-9) and where a region sought to file exceptions to an IHE's decision (*GH & G Zysling Dairy* (2006) 32 ALRB No. 2, p. 2, fn. 2).

a. The Motions in Limine to Exclude Testimony of the Regional Director and the 31 Farmworker Witnesses**.**

Turning first to the Region's motion in limine to exclude certain testimony of Regional Director De Luna, the Board finds the filing of the motion was not inconsistent with the requirements of Board regulation 20370, subdivision (c). The Board rejects DiMare's argument that the regulation imposes an absolute prohibition on the filing of motions in limine by the Region. Rather, the circumstances and nature of the motion must be considered. Here, DiMare sought to call Regional Director De Luna as a witness and the Region's motion argued that the Regional Director should not have been required to testify absent compelling justification or, alternatively, that her testimony should have been limited to relevant matters. Irrespective of the merits of those particular arguments in this case, when regional staff are called to testify, the region has a legitimate interest in ensuring such testimony is limited to matters that are relevant and admissible and that the testimony is not sought for vexatious or otherwise improper reasons.

The Board turns next to the Region's motion in limine to exclude the testimony of the 31 employees. While the IHE granted the Region's motion, she also granted a motion in limine filed by the UFW seeking the identical relief. Thus, even if the Region's filing of this motion was inconsistent with its proper role under Board regulation 20370, subdivision (c), the granting of the motion did not have any impact on the outcome of any issue in the case and did not prejudice DiMare. Accordingly, the filing of this motion is not a basis for reversing the IHE's decision. (*United Farm Workers of America* (*Olvera*) (2018) 44 ALRB No. 5, p. 10, fn. 4 [ALJ's error "would not impact the outcome of any material issue in the case"]; *Certified Egg Farms* (1993) 19 ALRB No. 9, p. 2, fn. 2 [ALJ's error did not require reversal where there was no prejudice to the objecting party].)

b. The General Counsel's Representation of the Regional Director During the Objections Proceeding.

DiMare also argues the participation of general counsel attorneys as representatives of the Region was improper. The General Counsel has authority over investigations, issuance of complaints and litigation in unfair labor practice cases, but does not participate in representation cases. (§ 1149.) Attorneys in the Board's regional offices are under the general supervision of the General Counsel and may be assigned to staff unfair labor practice cases or representation cases as needed. The Region was represented at hearing by Deputy General Counsel Franchesca Herrera and Senior Assistant General Counsel Michael Marsh. Each of these attorneys stated they were appearing on behalf of the Regional Director. They made arguments in support of the Region's motions, opposed other motions, and represented the Regional Director during the hearing.

The Board does not find the Region's representation by these attorneys objectionable and it did not prejudice DiMare. Counsel for the Region asserted objections during Regional Director De Luna's testimony. For the same reasons discussed above with respect to the motion in limine concerning the Regional Director's testimony, when regional staff are called to testify in a hearing, counsel for the region is entitled to appear and represent such staff, including by asserting evidentiary objections. Likewise, the Board finds nothing objectionable about counsel for the Region negotiating the redaction and production of exhibits from the Region's records. DiMare cites no authority prohibiting attorneys Marsh and Herrera from representing the Regional Director at the hearing. The Regional Director appeared as a witness and was entitled to be represented at the hearing. DiMare does not articulate how it was prejudiced here. (*United Farm Workers of America, AFL-CIO* (*Sun Harvest, Inc*.) (1987) 13 ALRB No. 24, pp. 2-6 [noting that former ALRB employee participated in an ALRB proceeding in violation of Board regulations but finding that the violation did not prejudice any party]; *Alumbaugh Coal Corp. v. NLRB* (8th Cir. 1980) 635 F.2d 1380, 1383-1384 [where former NLRB attorney inappropriately appeared as an attorney for a party, NLRB properly refused to dismiss cases where it found that the moving party was not prejudiced by the violation].)

Exception No. 2 is dismissed. Exception No. 20 is dismissed to the extent that it raises issues relating to the participation of the Region in the objections hearing. The remainder of the issues raised by Exception No. 20, which relate to the IHE's orders on pre-hearing motions, are discussed below.

3. EXCEPTIONS RELATING TO THE IHE'S RULINGS ON PRE-HEARING MOTIONS (EXCEPTION NOS. 18-23)

DiMare argues the IHE erred in her rulings on pre-hearing motions filed by DiMare and the Region. The common thread running through all the motions at issue is that they involve the production or introduction of evidence relating to the eligibility of the 31 employees the Region added to the eligibility list (individualized eligibility evidence). Thus, as DiMare states in its brief, the question of whether the IHE's rulings on these motions were correct is generally coextensive with the issue of whether the IHE's ruling on the scope of the hearing was correct. As discussed above, the IHE correctly construed the scope of DiMare's objections and the Board's order and, thus, the Board concludes the IHE did not err by excluding this evidence.

Nevertheless, the IHE's November 28, 2023 order on the prehearing motions failed to articulate the rationale for the IHE's rulings on the various motions and, in some cases, left in doubt the scope of the rulings.[18] The Board acknowledges that the IHE in this case was presented with multiple motions filed by both parties and the Region and, due to the need to conduct an expedited hearing, was required to rule on these motions in a short amount of time. The Board's regulations require judges to issue rulings in writing with the reasons set forth. (Board regs. 20240, subd. (b), 20241, subd. (c).) For the benefit of the parties and the

[18] For example, the Region's motion in limine concerning Regional Director De Luna's testimony argued that the Regional Director should not be required to testify at all and, alternatively, that her testimony should be limited to relevant issues. The IHE's order merely stated that the motion was "granted" without stating which of the Region's alternative positions was being sustained. The actual scope of the ruling later became clear when the Regional Director did, in fact, appear and testify.

Board on review, the order must describe the scope of the rulings accurately and set forth a rationale sufficient to explain the basis for the order. Notwithstanding the need for such clarity, because the effect of the IHE's orders on the relevant motions was to exclude individualized eligibility evidence and the Board agrees, given the scope of DiMare's objections, that evidence was properly excluded, the Board affirms the IHE's order for the reasons set forth below.

There are five motions put at issue by DiMare's exceptions: 1) the Region's motion in limine to limit the testimony of Regional Director De Luna; 2) the Region's motion in limine to exclude the testimony of the 31 employees; 3) the UFW's motion in limine to exclude the testimony of the 31 employees; 4) DiMare's motion in limine to preclude the Region from claiming work product protection over investigation materials; and 5) the Region's petition to revoke DiMare's subpoena to the Region seeking investigation materials, specifically, notes or summaries of employee interviews. The issue common to all these motions is whether the individualized eligibility evidence excluded from the hearing was relevant to the procedural issues raised by DiMare's objections.

DiMare is largely silent on what specific individualized eligibility evidence it would have offered that would have been relevant to its procedural objections. It argues it should have been allowed to ask about the dates on which the Region received evidence concerning particular employees. The Board finds the record adequately discloses the general timing of the assertion of eligibility claims. More importantly, as discussed below, the Board concludes the specific amount of time that elapsed between the assertion of claims and the disclosure of the employees in question is not relevant to the disposition of DiMare's

objections.

Likewise, the Board finds that evidence concerning the specific eligibility of individual employees or evidence of what employees said to the Region concerning their eligibility is not relevant to determining whether the processes used by the Region to investigate and make determinations on the petition constituted an abuse of discretion. Thus, the Board finds no error in the IHE's order excluding such evidence from the hearing.

Exception Nos. 18-23 are dismissed.

4. EXCEPTIONS RELATING TO THE PROCEDURAL DECISIONS OF THE REGIONAL DIRECTOR

The Board turns now to DiMare's objections to the processes utilized by the Region to investigate the majority support petition and reach determinations. While certain aspects of the processing of a majority support petition are set forth in the statute, the statute is silent concerning other important aspects, including most aspects pertaining to the regional director's handling of claims by a party that eligible employees were left off the employer's list. The Regional Director had available to her the Board's regulations governing secret ballot elections, but those provisions are not directly applicable to the majority support petition process.

The Act mandates that the regional director conduct an investigation into the petition and the showing of support and make a determination. (§ 1156.37, subd. (e)(1).) California courts have held that "where power is given to perform an act, the authority to employ all necessary means to accomplish the end is always one of the implications of the law." (*Manteca Union High School v. Stockton* (1961) 197 Cal.App.2d 750, 755; *Bateman v.*

Colgan (1896) 111 Cal. 580, 587.) The California Supreme Court has stated that, where the ALRA is silent, the Board may exercise its discretion to carry out its functions through ad hoc adjudication even if the Board could, and in the future might, develop regulations governing these issues. (*ALRB v. Superior Court* (1976) 16 Cal.3d 392, 413 ["in the absence of an express statutory directive to the contrary the [ALRB] could . . . reasonably presume that the Legislature intended to abide by the well-settled principle of administrative law that in discharging its delegated responsibilities the choice between proceeding by general rule or by ad hoc adjudication 'lies primarily in the informed discretion of the administrative agency'"] quoting *SEC v. Chenery Corp*. (1947) 332 U.S. 194, 203; *SEC v. Chenery Corp., supra*, 332 U.S. 194, 203; *Patchogue Nursing Center v. Bowen* (2nd Cir. 1986) 797 F.2d 1137, 1143.) Thus, the statutory mandate placed on the regional director to conduct an investigation and make a determination carries with it the authority for the regional director and the Board to develop procedural rules and processes on an ad hoc basis in order to carry out that statutory mandate. (See *National Van Lines* (1958) 120 NLRB 1243, 1346 [due to the varying circumstances in which elections are held, "the [NLRB] has invested Regional Directors with broad discretion in determining the method by which elections shall be conducted"].)

Given that the development of ad hoc procedural rules in the absence of statutory or regulatory guidance is a matter of agency discretion, it follows that the regional director's procedural decisions in this case are subject to an abuse of discretion standard. (*Center for Biological Diversity v. Esper* (9th Cir. 2020) 958 F.3d 895, 906 [although statute and regulations required agencies to consult with various historic preservation authorities concerning federal property projects, "the absence of regulations governing which specific

parties, individuals, and/or entities to consult demonstrates that those decisions should be left to the discretion of the agency" and are upheld unless "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law"].) This is consistent with precedent, as this Board previously has held it would review a regional director's actions under an abuse of discretion standard where the Board's regulations were silent concerning the procedure to be followed in an election case when a party attempted to withdraw ballot challenges after a tally. (*CAPCO Management Group, Inc*. (1989) 15 ALRB No. 13 p. 3.) It is also consistent with NLRB precedent reviewing procedural decisions taken by its own regional directors in election cases for abuse of discretion. (*Keweenaw* (2020) 370 NLRB No. 45, p. 3; *Mark Burnett Productions* (2007) 349 NLRB 706, 707; *Nouveau Elevator Industries, Inc*. (1998) 326 NLRB 470, 471; *National Van Lines, supra*, 120 NLRB 1343, 1346.) In applying this standard, an objecting party must show the procedures used by the regional director constituted an abuse of discretion and resulted in prejudice to the party. (*Harry Singh & Sons* (1978) 4 ALRB No. 63, p. 4, fn. 5.)

An action that constitutes an abuse of discretion "has been described as one that is 'so irrational or arbitrary that no reasonable person could agree with it.'" (*Sargon Enterprises, Inc. v. University of Southern California* (2012) 55 Cal.4th 747, 773, quoting *People v. Carmony* (2004) 33 Cal.4th 367, 377.) However, the abuse of discretion standard "cannot be boiled down to simply calling for reversal only if a ruling appears to be arbitrary, capricious or utterly irrational." (*People v. Williams* (2021) 63 Cal.App.5th 990, 1000-1001; *City of Sacramento v. Drew* (1989) 207 Cal.App.3d 1287, 1297 ["Although irrationality is beyond the legal pale it does not mark the legal boundaries which fence in discretion"].)

Rather, legal discretion is "subject to the limitations of legal principles governing the subject of [the] action" and is subject to reversal "where no reasonable basis for the action is shown." (*Sargon Enterprises, Inc. v. University of Southern California, supra*, 55 Cal.4th 747, 773; *City of Sacramento v. Drew, supra*, 207 Cal.App.3d 1287, 1298 ["The legal principles that govern the subject of discretionary action vary greatly with context [and] are derived from the common law or statutes under which discretion is conferred"].)

Some of DiMare's exceptions raise a particular type of claim: that the methods the Regional Director used to investigate the petition were inadequate. In applying the abuse of discretion standard to these objections, the Board must accord proper respect to the Regional Director's responsibility in determining the manner in which to conduct an investigation in a majority support proceeding. There may be exceptional situations where the region's investigatory methods are so irrational or arbitrary as to fall outside the bounds of acceptable procedure so as to warrant the Board in sustaining objections to a certification where those deficiencies are shown to have materially affected the outcome of the majority support process. However, under ordinary circumstances, the methods used by the region to investigate the majority support petition are assigned to the discretion of the region and will not be disturbed by the Board. (*Sam Andrews' Sons* (1976) 2 ALRB No. 28, pp. 5-6 [dismissing party's objection that region failed to solicit evidence on an eligibility issue during the investigation where party failed to file an objection challenging the correctness of the eligibility determination]; *Coachella Imperial Distributers* (1979) 5 ALRB No. 18, p 10 ["an alleged inadequacy in the Regional Director's report, which does not raise a material factual issue, is not itself grounds for exception"]; *Roberts Farms, Inc*. (1979) 5 ALRB No. 22, pp. 9-10;

D'Arrigo Bros. of California (1977) 3 ALRB No. 34, pp. 5-6 [dismissing exception alleging the possible existence of facts other than those found by the regional director without a showing that such facts existed and holding that "to the extent that the exception claims only that the regional director's investigation was inadequate, it does not, by itself, set forth a ground for exception"]; *cf. Redway Carriers, Inc*. (1985) 274 NLRB 1359, 1371 [adequacy of the investigation of an unfair labor practice charge is tested by litigation of the merits of the complaint, not by "an investigation of the investigation"].)

The Board emphasizes that the objections process exists for an employer to challenge the region's allegedly erroneous eligibility determinations on their merits. Where an employer's objections to eligibility determinations raise material factual issues, the Board does not rely on the results of the investigation but resolves material factual issues through a hearing at which the employer is entitled to present its evidence and arguments on the merits of disputed eligibility determinations. (*NLRB v. Howard Johnson Motor Lodge* (7th Cir. 1983) 705 F.2d 932, 934 [Board "may not rely on the results of such an ex parte investigation to overcome substantial allegations that, if true, would warrant setting aside the election"]; *Wells Fargo Guard Services v. NLRB* (3rd Cir. 1981) 659 F.2d 363, 371 ["material concerning disputed facts gleaned from an ex parte administrative investigation cannot take the place of an analysis of whether, if true, the allegations of an objecting party would warrant setting an election aside"].) The Board may also review through the objections process claims that a region applied an erroneous process, such as the claim in this case that the Region should have utilized a "challenged ballot" process. (*CAPCO Management Group, Inc., supra*, 15 ALRB No. 13, p. 3.) However, the Board generally will not intrude on the appropriate zone of the

region's investigatory discretion by second-guessing the methods used by the region to gather and evaluate evidence. (*Redway Carriers, Inc*., *supra*, 274 NLRB 1359, 1371.)

a. DiMare's Exception to the Regional Director's Decision to Resolve Eligibility Claims Through Investigation Rather than Applying a Challenged Ballot Process (Exception No. 17)

DiMare contends the Regional Director was required to resolve claims that eligible employees were omitted from DiMare's list by utilizing a process modeled on the challenged ballot process that applies in the Board's secret ballot elections. Rather than utilizing that process, the Regional Director resolved such issues through a process of investigation followed by the issuance of eligibility determinations which DiMare was entitled to challenge through the objections process. The Board finds the Regional Director did not abuse her discretion by proceeding in this manner.

The Board's challenged ballot process is set forth in its regulations governing secret ballot elections. Under that process, a party or Board agent may assert a challenge to a voter's eligibility before the prospective voter receives a ballot. (Board reg. 20355, subd. (a).) The voter may then vote subject to challenge. After the closing of the polls, the Board agent prepares a tally of the non-challenged ballots along with a list of challenged ballots. (Board reg. 20360, subd. (a).) If the number of challenged ballots is sufficient to affect the outcome of the election, the regional director must forward to the Board and serve on the parties all challenged ballot declarations and other evidence in the regional director's possession relevant to the eligibility of the challenged voters within two business days. (*Ibid*.) The parties may then file declarations, documentary evidence, and arguments in support of their positions on challenged ballots. After considering the evidence and the parties' arguments, the Board

determines which challenges require an evidentiary hearing for the resolution of material factual disputes. (Board reg. 20363, subd. (b).)

Section 1156.37 does not prescribe any specific procedure by which the Board is to resolve eligibility disputes in majority support cases. As discussed above, where the statute is silent concerning the process to be applied, the regional director's procedural decisions are reviewed for abuse of discretion.[19] (*Center for Biological Diversity v. Esper, supra*, F.3d 895, 906; *CAPCO Management Group, Inc., supra*, 15 ALRB No. 13 p. 3; *Keweenaw, supra*, 370 NLRB No. 45, p. 3.)

Rather than attempt to transplant the election challenge procedures into this majority support proceeding, the Regional Director adopted a process in which eligibility claims are investigated and resolved and then any disputes concerning the resolution of those claims may be raised and fully litigated through post-certification objections. The Board finds the process used by the Regional Director to investigate and resolve eligibility disputes to be reasonable and consistent with the statutory scheme. The Regional Director's process is consistent with the provisions of the statute requiring the region to conduct an investigation of the petition and reach resolutions within a specified time period. (§ 1156.37, subd. (e).) It is also consistent with the statutory provisions that provide that objections are to be litigated post-certification. (§ 1156.37, subd. (f).) Conversely, DiMare's insistence that eligibility issues must

[19] The IHE stated that the absence of statutory authorizing language prohibited the Regional Director from applying a challenged ballot process. The Board declines to reach this issue and does not rely on the IHE's conclusion in this regard. The issue presented is not whether a hypothetical "challenged ballot" process could have been devised and applied but whether the process the Regional Director actually did apply was an abuse of her discretion.

be resolved according to the challenged procedures applicable in the context of secret ballot elections lacks merit and finds no support under the procedures set forth in section 1156.37. Such a process would not allow the regional director to make determinations within the timeframes contemplated by the statute but would require substantial extensions of those timeframes to allow for a hearing and for post-hearing proceedings on the employer's challenges. Furthermore, litigation of the employer's challenges would occur prior to the certification rather than post-certification as the statute mandates.[20]

The Board further notes the process used by the Regional Director fully protects the employer's due process rights through the objections process. All the material procedural components of the challenged ballot process are present in the investigation/objection process used by the Regional Director. Under the statute, the employer has the right to "challenge" a worker's eligibility by filing objections to the certification of the union and can litigate those issues in a full evidentiary hearing.

In sum, the Board concludes the Regional Director did not abuse her discretion in the manner by which she investigated and resolved allegations that eligible employees were omitted from DiMare's list. Exception No. 17 is dismissed.

b. DiMare's Exception to the Regional Director's Decision to Close the Investigation (Exception No. 14)

[20] The Regional Director also concluded that a challenged ballot process that allowed an employer to assert challenges after knowing that the challenged workers had signed cards would be inconsistent with the spirit and policies of the ALRA. While the Board does not conclude that this factor necessarily rules out some form of a "challenged ballot" process, the Regional Director's concerns are not without merit, and further support the conclusion that her decision to resolve eligibility claims by making determinations after an investigation was not an abuse of her discretion,

DiMare asserts in Exception No. 14 the Regional Director conceded there was no explicit time after the expiration of the 30-day period within which she had to conclude the investigation. Despite this, DiMare argues, the Regional Director prematurely closed the investigation without giving DiMare a full opportunity to present evidence.

DiMare is correct that, unlike the initial investigation period, which must be concluded with a determination after five days (§ 1156.37, subd. (e)(1)) there is no corresponding requirement for the Regional Director to issue a determination within a specified time after the end of the 30-day period (§ 1156.37, subd. (e)(4)). Nevertheless, the Regional Director correctly perceived that, given the statute's clear emphasis on speedy resolution, she should conclude her investigation as quickly as practicable under the circumstances. In this case, the Regional Director only closed the investigation after DiMare informed her it would not be submitting additional evidence and instead was reserving its right to present such evidence at hearing.

The Board concludes that the Regional Director did not abuse her discretion by closing the investigation at the time that she did. Exception No. 14 is dismissed.

c. DiMare's Exception Concerning the Legal Standard Applied by the Regional Director (Exception No. 13)

DiMare argues the Regional Director failed to articulate or apply a legal standard to the eligibility issues, leaving no way to guard against arbitrary and capricious decision-making and calling into question the consistency, reliability, and validity of the Regional Director's conclusions. DiMare contends the Regional Director's testimony revealed she simply looked at the evidence and if it felt right to her in her subjective opinion, then she found

employees eligible.

The majority support statute does not specify the evidentiary standard or quantum of proof to be applied to the issue of eligibility. However, the default burden of proof in California civil cases is preponderance of the evidence. (Evid. Code, § 115 ["Except as otherwise provided by law, the burden of proof requires proof by a preponderance of the evidence"]; *San Benito Foods v. Veneman* (1989) 50 Cal.App.4th 1889, 1894-1895 [applying Evidence Code section 115 presumption of preponderance standard to administrative proceeding where evidentiary burden was unspecified].) In the absence of any authority requiring a different standard, the Board concludes that a preponderance standard was the appropriate standard to be applied to eligibility issues.[21]

The record reflects that the Regional Director applied a preponderance standard, or the functional equivalent of that standard, to her investigation of eligibility issues. The tally states the Regional Director made determinations "based on the evidence available" and that employees were found eligible when "sufficient evidence existed." The Regional Director denied that she applied other standards, such as reasonable suspicion or probable cause. She repeatedly described her review as taking account of all the evidence available to her and based on the "totality of the evidence."

The Board concludes that the Regional Director did not abuse her discretion concerning the legal standard applied to eligibility determinations. Exception No. 13 is

[21] This conclusion is bolstered by the fact that the statute does state that the Regional Director's evaluation of discrepancies between names on authorization cards and names on the employer's list are evaluated under a preponderance of the evidence standard. (§ 1156.37, subd. (e)(1).)

dismissed.

d. DiMare's Exception to the Regional Director's Decision to Add Individuals to the Eligibility List While Knowing How Such Determinations Would Affect the Outcome (Exception No. 4 and 5)

DiMare argues the Regional Director improperly made determinations concerning the eligibility of workers while knowing how these determinations would affect the outcome of the majority support petition. However, DiMare fails to present any authority suggesting the Regional Director was prohibited from evaluating eligibility claims after the initial tally due to her knowledge of how those determinations could affect the outcome. The single case cited by DiMare, *United Celery Growers, Inc.* (1976) 2 ALRB No. 46, does not stand for that proposition. In *United Celery Growers*, the Board did not order the amended tally to be rescinded because the Board agent was aware of how the resolution of the challenges would affect the outcome of the election. Rather, the Board found the agent resolved the challenges at the wrong time and failed to issue a report. Notably, the Board dealt with the issue by ordering the regional director to investigate and resolve the challenged ballots and issue a report that could be challenged by the parties. The Board did this even though the regional director would have been just as aware as the Board agent had been of how the resolution of the challenges would affect the outcome of the election.

Nowhere does the Board in *United Celery Growers* state that challenged ballots cannot be resolved under circumstances where the fact-finder knows how the resolution will affect the outcome of the election. Indeed, the Board's long-standing policy is to resolve challenged ballots *only* where the resolution could affect the outcome. Furthermore, in this case, unlike in *United Celery Growers*, the Regional Director issued a written report setting

forth procedures used and determinations made during the course of her investigation, which DiMare could, and did in several respects, challenge through the objections process.

The Board concludes that the Regional Director did not abuse her discretion by investigating and making determinations on eligibility claims despite knowing how such determinations could affect the outcome of the majority support petition. Exception Nos. 4 and 5 are dismissed.

e. DiMare's Exception Relating to the Claim the Regional Director Allowed the UFW to Control the Investigation (Exception No. 8)

DiMare argues the IHE overlooked evidence in the record that "the UFW dictated the entire investigation." DiMare asserts the Region relied "blindly" on information provided by the UFW, despite the UFW's status as an interested party. DiMare cites the fact that one employee was added to the eligibility list despite not having been interviewed by the Region. The Board finds DiMare failed to substantiate these allegations.

With respect to the employee added to the eligibility list without an interview, there is no dispute that the Region was unable to interview him, although it attempted to do so. The fact that the Region was unable to interview this individual does not establish that the investigation was controlled by the UFW, as the Region could have relied on evidence obtained from other sources. DiMare's claim the UFW "dictated" or controlled the region's investigation is belied by the fact that the Region declined to add many employees that the UFW claimed were eligible. Over the course of the cure period, the UFW presented claims to the Region that 49 additional eligible employees had been left off the eligibility list but the Region only added 29 of these employees. Thus, not only does DiMare fail to provide any

evidence that the Regional Director allowed the UFW to dictate the results of the investigation, the Region's rejection of over forty percent of the UFW's cure period claims is inconsistent with an investigative process allegedly controlled by the UFW.

Exception No. 8 is dismissed.

f. DiMare's Exception Pertaining to the Amount of Time Given to DiMare to Provide Evidence in the Investigation (Exception Nos. 3 and 16)

DiMare argues it was not given an adequate opportunity during the investigation to present evidence concerning the eligibility of individuals added to the eligibility list by the Regional Director.

The due process rights of the employer in a majority support case are principally effectuated through the objections process, not through the investigation. (See e.g., *Marlin Bros*. (1977) 3 ALRB No. 17, p. 6 [describing the investigation in a representation proceeding as "ex parte" in nature]; *George Lucas & Sons* (1977) 3 ALRB No. 5, p. 5.) Although it declined to file objections raising the substantive eligibility of the 31 employees, DiMare had a full opportunity to do so and, through such objections, obtain a hearing at which it could have submitted its evidence concerning eligibility. (*Sam Andrews' Sons, supra,* 2 ALRB No. 28, pp. 5-6 [dismissing objection alleging region failed to solicit evidence during the investigation where the party did not file objections challenging the region's eligibility determination].) Instead of challenging the Region's determinations, DiMare attacks the investigatory methods used to arrive at those determinations. However, the choice of methods used for gathering evidence in the investigation lies within the Region's investigatory discretion and the Board does not lightly disturb them. (*Ibid*.) DiMare has not shown the Regional Director abused her

discretion concerning the opportunity afforded DiMare for the submission of evidence. The record reflects the Region notified DiMare of the nature of the eligibility claims being asserted and repeatedly sought evidence from DiMare. As early as September 17, 2023, during the initial five-day investigation, the Region informed DiMare that it was investigating claims of eligible employees having been left off DiMare's list and requested information from DiMare. On October 9, 2023, during the cure period, the Region informed DiMare that individuals were claiming they were paid in cash and requested further evidence from DiMare, including interviews with supervisors. On October 17, 2023, the Region requested an explanation from DiMare of a discrepancy the Region had found in the records of one of DiMare's farm labor contractors, an explanation that DiMare failed to provide despite representing that it would.

Once the Region disclosed the names of the 26 employees added to the eligibility list on October 18 and 19, DiMare represented it had "proof" that these individuals did not work for DiMare during the eligibility period. DiMare was afforded an opportunity to submit that evidence, but it chose not to do so. DiMare complains it was not provided sufficient time to present its evidence, but it never asked for any additional time. The Regional Director testified at the hearing that, had she received such a request, she would have considered it. In fact, DiMare declared to the Region it was declining the opportunity afforded it to produce evidence and instead asserted it was reserving its right to present its alleged evidence at a hearing at some future date. DiMare's deliberate choice not to submit evidence to the Region is at odds with its later position that it was deprived of the opportunity to submit evidence.

DiMare argues that its decision not to submit evidence was justified because the Region would not have considered the evidence even had it been submitted. This argument

finds no support in the record. DiMare cites the fact that the Region would not state that it was "withdrawing" its decision to add the individuals to the eligibility list. However, the Region stated that it was allowing DiMare an opportunity to submit evidence "before the Regional Director reaches a decision in this matter" and the Regional Director testified that, had she received additional evidence from DiMare, she would have considered it and, if justified, removed names from the list. If the actions the Region would have taken are speculative, it was because DiMare chose not to submit any evidence.

Exception Nos. 3 and 16 are dismissed.

g. DiMare's Exception Pertaining to the Timing of the Regional Director's Disclosure of Evidence (Exception No. 6)

DiMare filed an exception claiming the Regional Director failed to disclose evidence in a timely manner. DiMare does not cite any authority holding that it was entitled to disclosure of evidence collected in the Region's investigation while the investigation was ongoing and, even if it was so entitled, that such disclosure was due at any particular time during the investigation. No such requirement is set forth in the statute. The Board's challenged ballot regulations applicable to secret ballot elections do contain a process wherein the region is required to forward to the Board and serve on the parties all challenged ballot declarations and other evidence in its possession relating to the eligibility of challenged voters. (Board reg. 20363, subd. (a).) However, such disclosure is only required after the tally of ballots is issued. Furthermore, as discussed, the challenged ballot process in election proceedings is not applicable in majority support cases. There is no equivalent evidence disclosure requirement in the Board's regulation on election objections in secret ballot cases.

(Board reg. 20365.) The Region did, however, attach declarations and other evidence to the Tally.

DiMare does not state what evidence it contends should have been released to it during the investigation. However, it cites the fact that, although the Region was interviewing employees as early as October 8, 2023, DiMare was not told the names of any employees under consideration until October 18, 2023, the day before the expiration of the cure period. In her testimony, the Regional Director testified that decisions on the eligibility of the initial group of 24 employees were not made all at once but that the list of employees to be added was created when "we exhausted our investigation of the . . . home visits and the phone calls." Ultimately, the names of the employees added to the eligibility list were released and DiMare was given an opportunity to submit evidence concerning those individuals. The sufficiency of DiMare's opportunity to respond is discussed above. However, DiMare has not established that the Regional Director's decision to release the names on October 18, 2023, rather than some earlier date was an abuse of her discretion.

Exception No. 6 is dismissed.

h. DiMare's Exception Relating to Identity Verification of Workers Interviewed by the Region (Exception No. 9)

DiMare contends the IHE failed to properly analyze whether the Regional Director was required to follow a process for verifying the identity of individuals not on the eligibility list but alleged to be eligible. DiMare asserts the Region's practice of verbally verifying the names and contact information provided by the UFW was insufficient.

DiMare fails to show an abuse of the Region's discretion over the investigatory

methods used in its witness interviews. DiMare relies on Board regulation 20355, subdivision (c), which governs voter identification in secret ballot elections. That regulation is inapplicable to majority support petitions. Even if it were applicable, under that regulation, the Board agent is entitled to accept any identification "which the Board agent, in the Board agent's discretion deems adequate." (Board reg. 20355, subd. (c); *Coastal Berry Co., LLC* (2000) 26 ALRB No. 1, p. 61 ["the sufficiency of voter identification is a matter within the sole authority and discretion of Board agents"]; *Oceanview Produce Co.* (1994) 20 ALRB No. 16, p. 3, fn. 5 ["the adequacy of voter identification is a matter reserved to the sole discretion of Board agents"]; *D'Arrigo Brothers of California* (1978) 4 ALRB No. 92, IHE Dec. p. 27 [objection that Board agent failed to disclose the type of identification used to verify voters did not raise material factual issue]; *Kawano Farms, Inc*. (1977) 3 ALRB No. 25, pp. 11-12.) The record reflects the questionnaire regional staff used to conduct interviews requested various forms of documentary evidence that would tend to verify the identity of the interviewees. For example, interviewees were asked for their badges or badge numbers, paystubs, employee numbers, or for any other identification that would show employment by DiMare. Thus, the record reflects that interviewees were asked to provide documents or information that would verify their identity.

DiMare's attempt to rely on principles applicable to voter identification is also unavailing because, when the Region conducted witness interviews in this matter, it was not engaged in the counting or verification of authorization cards. It was conducting an investigation into employee eligibility. The issue was whether particular employees performed agricultural work for DiMare during the eligibility period. The manner in which the Region

conducted and evaluated witness interviews concerning this issue lies within the Region's core investigatory discretion. If interviewees were unable to supply the kinds of documents requested in the interviews, the Region had the discretion to factor that into its assessment of the credibility of the witnesses. However, the Board rejects the proposition that the Region was required to obtain identity documentation in order to interview witnesses in an eligibility investigation or that it was required to find an employee ineligible solely on the basis that the employee could not supply such documentation. Such matters are left to the discretion of the Region and the Region's conclusions are subject to challenge through objections to the certification.

Exception No. 9 is dismissed.

i. DiMare's Remaining Exceptions Challenging the Adequacy of the Investigation (Exception Nos. 7, and 10-12)

DiMare's exception numbers 7 and 10-12 challenge other aspects of the Region's investigation of the majority support petition. DiMare contends that the Region's investigation was inadequate because the investigatory methods used were deficient in themselves or applied in a deficient manner. Thus, DiMare argues that the Regional Director failed to adequately train and direct her staff to conduct the investigation, utilized an interview questionnaire the content of which was allegedly flawed and biased, and failed to personally conduct worker interviews to assess credibility. DiMare further argues that the Region did not properly assess witness credibility during the investigation. The evidence presented by DiMare in support of these allegations falls far short of what would be required to show an abuse of the Region's very broad discretion over the information gathering methods used in its investigation. Beyond

this, DiMare fails to demonstrate how any of the alleged deficiencies about which it complains had an impact on the outcome of the majority support petition process.

DiMare argues that the regional staff who were tasked with carrying out the investigation were inadequately trained on implementing the majority support petition process.[22] However, the record reflects that the actual investigatory roles of regional staff centered on tasks such as gathering documentary evidence and conducting witness interviews, tasks that are typical for regional staff in any representation case and would not require specialized training unique to the majority support process. DiMare alleges the Regional Director failed to direct her staff to gather information during interviews about whether the UFW engaged in any improper behavior surrounding the collection of cards but does not allege there was any allegation or evidence presented to the region during the investigation of any such behavior. DiMare has shown no abuse of discretion concerning the training of regional staff. Furthermore, DiMare has not established the highly attenuated proposition that the allegedly deficient training of staff had a specific impact on the investigation, much less that such impact affected the outcome of the majority support petition process.

Likewise, DiMare's exceptions concerning the questionnaire used to interview witnesses are without merit. DiMare's arguments that one of the questions was drafted in a leading manner and that other questions would not elicit information conclusively proving whether individuals were eligible fail to demonstrate an abuse of discretion within this core

[22] DiMare also argues that it was improper for the Regional Director to rely on staff to carry out the investigation but was required to conduct the investigation personally, an argument that is plainly unmeritorious, if not outright frivolous.

area of the Region's investigatory authority. With respect to DiMare's contention that the questionnaire demonstrated bias on the part of the Regional Director in favor of finding employees eligible, the Board does not find that the questions demonstrate bias. (See § 1145; *DMB Packing Corp*., *supra*, ALRB Admin. Order No. 2023-11, p. 10.) The questions are plainly designed to elicit information that would help establish whether the individuals in question worked for DiMare during the eligibility period, including multiple questions seeking evidence that would test or corroborate any claims made by the individuals.

DiMare argues the Regional Director failed to formally require field examiners to assess the credibility of witnesses during their interviews and that some of the interview summaries prepared by field examiners did not include credibility assessments. While it is undisputed some interview summaries did not include credibility notes, DiMare cites no authority holding the Region was legally required to include credibility notes in its witness summaries. Similarly, without authority is DiMare's contention the Region was required to observe witness credibility and demeanor in person and, therefore, could not utilize telephonic interviews.[23] The manner in which the Region gathers and evaluates evidence during its investigation lies within its core discretion as an investigator. DiMare has not shown an abuse of discretion, nor how the matters about which it complains affected the outcome of the majority support process.

[23] DiMare also argues that the Regional Director was required to personally conduct all witness interviews so she could personally assess the credibility of the witnesses. As noted above, the Board finds the contention that the Regional Director could not rely on staff to carry out the investigation to be wholly without merit.

In sum, as the Board's precedent reflects, the remedy for an employer who believes inadequacies in the investigation of a majority support petition produced erroneous results is to file objections to the certification under section 1156.37, subdivision (f) and challenge those allegedly erroneous results, a step that DiMare did not take in this case. Outside of exceptional circumstances not shown here, including demonstrated impact on the outcome, contentions by an employer that the particular investigatory methods utilized by the region to investigate the petition and showing of support were inadequate will not establish a basis to sustain objections to a certification. (*Sam Andrews' Sons, supra*, 2 ALRB No. 28, pp. 5-6; *Redway Carriers, Inc., supra*, 274 NLRB 1359, 1371; *Laborers Local No. 135* (*Bechtel Power Corp*.) (1991) 301 NLRB 1066, 1086, fn. 19 [allegations of investigating compliance officer's bias dismissed because such bias, even if shown, would not prejudice the respondent given the NLRB's independent review of the officer's backpay methodology and evidence.]) These matters lie within the core investigatory discretion delegated by the Board to the regions.

Exception Nos. 7 and 10-12 are dismissed.[24]

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[24] DiMare's Exception Nos. 1 and 15 are broad exceptions that generally raise the procedures used by the Regional Director during the investigation. Because the Board is dismissing DiMare's more specific objections, these objections are also dismissed.

ORDER

DiMare's exceptions to the IHE's recommended decision and order are dismissed and its objections to the UFW's certification hereby are OVERRULED.

DATED: October 4, 2024

Victoria Hassid, Chair

Isadore Hall, III, Member

Barry D. Broad, Member

Ralph Lightstone, Member

Cinthia N. Flores, Member

CASE SUMMARY

DMB PACKING CORP.,
DBA THE DIMARE COMPANY
(United Farm Workers of America)

50 ALRB No. 2

Case No. 2023-RM-001-VIS

Background

The United Farm Workers of America (UFW) sought certification as the bargaining representative of the employer, DMB Packing Corp, dba The DiMare Company (DiMare) pursuant to the majority support provisions of the Agricultural Labor Relations Act (ALRA or Act). The Regional Director conducted an investigation into the majority support petition and the showing of majority support. During the investigation, the UFW alleged that there were individuals who were eligible to vote but were not included on the employee list submitted by DiMare. The Regional Director conducted an investigation into these allegations and added 31 omitted individuals to the eligibility list. The Regional Director determined that the UFW had demonstrated majority support and the UFW was duly certified as the bargaining representative. DiMare filed objections to the certification, and the Board set five of these objections for hearing. After the conclusion of the hearing, the Investigative Hearing Officer (IHE) issued a recommended decision and order in which she recommended overruling each of DiMare's objections. DiMare filed exceptions with the Agricultural Labor Relations Board (ALRB or Board).

Board Decision

The Board affirmed the IHE's dismissal of DiMare's objections. The Board rejected DiMare's argument that the hearing was improperly limited to issues concerning the processes used by the Regional Director. Because DiMare's objections raised only process issues and did not raise the substantive eligibility of the 31 employees, the IHE properly limited the hearing to the process issues DiMare raised. The Board also rejected DiMare's argument that the Regional Director acted improperly by filing pre-hearing motions, having counsel participate in the hearing, and by utilizing general counsel attorneys. The Board held that the IHE did not err in her rulings on various pre-hearing motions filed by the parties and the Region, which had the effect of excluding evidence relating to the eligibility of the 31 employees, as such evidence was not relevant to DiMare's process objections.

The Board also denied DiMare's exceptions concerning its process objections. The Board found that, given the absence of statutory provisions requiring particular processes, the Regional Director's procedural decisions are reviewed for abuse of discretion. Additionally, the Regional Director has very broad discretion concerning the methods used to conduct the investigation, which will not be disturbed by the Board absent exceptional circumstances accompanied by a showing of an effect on the outcome of the majority support process. The Board found that the Regional Director's decision to resolve eligibility issues through investigation rather than by importing the challenged

ballot process from the Board's secret ballot regulations was reasonable and consistent with the statute. The Board also found that the Regional Director's decision to close the investigation when she did was not an abuse of discretion, given that DiMare had stated that it would be submitting no additional evidence. The Board found that the Regional Director properly applied a preponderance of the evidence standard to eligibility issues. The Board found that there was no evidence to support DiMare's contention that the Regional Director allowed the UFW to control the investigation nor did the fact that the Regional Director was aware of how her eligibility determinations might affect the outcome invalidate those determinations.

The remainder of DiMare's exceptions related to the adequacy of the investigation and the investigatory methods used by the Region to conduct the investigation. The Board found that DiMare had not shown an abuse of the broad discretion applicable to these matters, nor had it shown how the matters alleged affected the outcome. Thus, the Board rejected DiMare's argument that it was not given sufficient time to submit evidence in the investigation, that the Regional Director waited too long to disclose evidence to DiMare, that the Regional Director failed to adequately verify the identity of individuals it interviewed, that the Regional Director failed to adequately train and direct her staff, that the questionnaire used to interview witnesses was defective, and that the Region did not properly assess the credibility of witnesses.

The Board dismissed DiMare's exceptions to the IHE's decision and overruled its objections to the certification.

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STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

UNITED FARMWORKERS OF AMERICA, Petitioner Labor Organization, and **DMB PACKING CORP. dba THE DIMARE COMPANY,** Employer.	Case Nos.: 2023-RM-001-VIS **DECISION AND RECOMMENDED ORDER**

Appearances:

For Petitioner Labor Organization:

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For the Employer:

Seth Mehrten, Esq.
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DECISION AND ORDER

Hermine Honarvar Rule, Administrative Law Judge: This case was heard pursuant to the direction of the Agricultural Labor Relations Board (ALRB or Board) in *DMB Packing Corp. dba The DiMare Company* (Nov. 3, 2023) Admin. Order No. 2023-11 (Admin. Order). The hearing was held on November 28, 2023, November 30, 2023, and December 1, 2023, in Fresno, California at the Hugh Burns State Building. The parties had a full opportunity to examine and cross-examine the sole witness and present documentary evidence. The parties submitted post-hearing briefs and reply briefs which have been reviewed. A motion was filed on behalf of the Regional Director seeking Leave to File a Post-Hearing Brief Addressing Evidentiary Issues which was denied. I have made the following findings of fact and conclusions of law based on the entire record.

FINDINGS OF FACT

A. Procedural History

The United Farm Workers of America (UFW) filed a majority support petition (MSP) under the recently enacted *Labor* Code §1156.37 seeking certification to become the bargaining representative of a unit of agricultural employees employed by DMB Packing Corp dba the DiMare Company (DiMare or Employer) on September 12, 2023.

The ALRB, Visalia Regional Office Interim Regional Director (IRD) initiated an investigation of the MSP and proof of majority support under Labor Code §1156.37(e)(1). The IRD issued a letter on September 19, 2023, notifying DiMare and the UFW that the UFW had *failed* to provide proof of majority support. In accordance with Labor Code §1156.37(e)(4), the UFW was given 30 days to submit additional support (cure period).

The IRD issued a Regional Director's Tally (Tally) on October 20, 2023, after the conclusion of the cure period. The Tally reflected that during the cure period, the UFW contended that there were additional eligible employees who were not included on the initial September *19*, 2023, eligibility list. The IRD lead an investigation into the eligibility of these individuals and determined that thirty-one additional eligible employees should be added to the eligibility list. Ultimately, the IRD concluded that the Region received 151 authorization cards in favor of the majority support petition out of a total of 297 eligible employees; proof of majority support was established.

The ALRB Executive Secretary issued the Certification of Investigation of Validity of Majority Support Petition and Proof of Majority Support (Certification) on October 24, 2023. DiMare *filed* an Interim Appeal of Regional Director's Tally and Request for Stay of Certification Pending Board Review of Challenged Authorization Cards (Interim Appeal) prior to the issuance of the Certification alleging that the IRD exceeded her authority by adding names to the eligibility list and requested the Board stay the Certification pending Board review of the contested authorization cards. On the same day, the UFW filed an objection to the Interim Appeal.

DiMare filed objections to the Certification under Labor Code §1156.37(f)(1) on October 30, 2023. The UFW filed conditional objections pending the outcome of DiMare's objections.

The Board issued the *Administrative* Order denying DiMare's Interim Appeal and request for stay; the Board set DiMare's Objections 1, 2, 5, 6, and 8 for hearing and dismissed the remaining nine Objections.

The Board held that the "Regional Director does have authority under section 1156.37 to add to an eligibility list *employees* demonstrated to have been improperly omitted from an employer's list." (Admin. Order at 6)

The Board noted in footnote 4 of its Admin. Order as follows:

> "[t]he Board recognizes that the Regional Director and regional staff were required to apply this new statutory process without the benefit of established precedents to guide them. In setting these objections for hearing, the Board has deemed it appropriate, particularly in light of the fact that these are matters of first impression, to allow the parties to develop the record and be heard on the factual and legal issues." (Admin. Order at 6)

B. Objections Set for Hearing

The Board identified the 5 Employer Objections set for hearing in its Administrative Order as follows:

Employer Objection 1:

> This objection alleges that the Regional Director "failed to follow proper procedure for challenged ballots." DiMare argues that the Regional Director improperly failed to treat the additional employees the UFW sought to add as challenged ballots subject to the challenged ballot process set forth in the Board's regulations governing in-person secret ballot elections (Board regulations 20355 and 20363). Here, the Regional Director was required to apply a newly enacted statute that lacks explicit guidance on how to handle the type of situation this case presented. Given that this objection raises issues of first impression, the Board has concluded that this objection should be set for hearing. (Admin. Order at 7)

Employer Objection 2:

> This objection asserts that the Regional Director "violated DiMare's due process rights by not providing adequate time for DiMare to present evidence disputing eligibility and the UFW's proffered evidence." DiMare argues that it was not afforded the opportunity to see the evidence relied upon by the Regional Director to determine that there were additional eligible employees that should have been added to the eligibility list, and further that it was not afforded a "reasonable and fair opportunity" to present its own "indisputable

evidence" that the employee list produced by DiMare was accurate and no eligible employees were left off the list or paid in cash. As stated with respect to Employer Objection 1, given that this issue raises issues of first impression under this statute, the Board has concluded that this objection should be set for hearing. (Admin. Order at 7 and 8)

Employer Objection 5:

This objection asserts that the Regional Director "exceeded her authority under the Act by unilaterally expanding the eligibility list in direct contravention of DiMare's right to due process." DiMare argues that the Regional Director had no authority to add any additional employees to the eligibility list and that she failed to resolve issues of eligibility in a manner that afforded all parties due process. To the extent that this objection raises issues concerning whether the Regional Director's handling of claims that eligible employees were omitted from the eligibility list was inconsistent with the requirements of the statute or otherwise erroneous, the Board has determined that this objection should be set for hearing. (Admin. Order at 8)

Employer Objection 6:

This objection asserts that the Regional Director "exceeded her authority under the Act by unilaterally accepting additional names for the eligibility list proffered by the UFW after the initial tally had taken place." This objection is set for hearing for the same reasons stated with respect to Employer Objection 5 and subject to the limitation discussed therein concerning DiMare's contention that the Regional Director lacked authority to consider claims that eligible but excluded employees should be added to the eligibility list. (Admin. Order at 8)

Employer Objection 8:

This objection asserts that the Regional Director "acted improperly when she deprived DiMare of the opportunity to review alleged evidence of additional employees that allegedly belonged on the eligibility list." DiMare argues that it was not provided with any information concerning the eligibility issues raised by the UFW until October 18-20. DiMare asserts that it was deprived of the opportunity to review the additional evidence used to determine the issues of eligibility and was not given an opportunity to present its own information countering the UFW's proffered evidence regarding the eligibility of employees not included on the employer's list. The issues raised by this objection largely mirror those raised by Employer Objection 2 and

the Boad has determined that this objection should be set for hearing. (Admin. Order at 8 and 9)

C. The Facts

1. Employer's Witness

a. Yessenia De Luna, Interim Regional Director

The sole witness for this hearing was the IRD. The IRD testified that the initial list provided by the employer consisted of 271 names. (Transcript at 11: 14). She indicated that the Employer's counsel informed her office that the list contained the name of a foreman, two individuals who did not work for the employer and one individual who was listed twice; as a result four names were removed from the list. (Transcript at 11: 24; 12: 1-3) The IRD further indicated that the UFW alleged that four individuals were excluded from the list (Transcript at 15: 17-18) and that two out of those four alleged individuals were added to the list; she explained that the reason the other two were not added to the list because "[t]here was no evidence that they should be added to the list." (Transcript at 21: 14, 19) The IRD confirmed that only one of the added individuals was interviewed and opined that the most likely reason that the other added individual was not interviewed was because he could not be reached. (Transcript at 25: 16, 19) She stated that there was sufficient information and documentary evidence to add those two individuals to the list. (Transcript at 25: 24-25; 26: 1)

The IRD further elaborated that the document used to evaluate the un-interviewed individual's eligibility was the "quick-pick logs for the unit harvested during the eligibility period". (Transcript at 26: 5-6) The IRD noted that a copy of the quick-pick log was

provided to the employer's counsel on October 20, 2023, which was Employer's Exhibit 8 (Exhibit I to the declaration). (Transcript at 42: 25; 43: 2-6)

The IRD indicated that while she did not ask the Employer for specific documentation for the worker who was not interviewed, the Employer was notified that names were added to the list and that names were disclosed to the Employer; she confirmed that the Employer objected to the addition of the names to the list. (Transcript at 44: 6-12)

The IRD also confirmed that she sent a letter to the Employer's counsel and the UFW counsel on October 18, 2023, informing them names were being added to the eligibility list. (Transcript at 44: 21-25) (DiMare Exhibit 4)

The IRD indicated that her office interviewed the workers that they were able to interview, who the UFW had alleged were not included on the eligibility list during the cure period, and, concluded that some workers had been left off of the list. (Transcript at 49: 2-9, 15-19) The IRD noted that the UFW had alleged that 49 workers had been left off of the eligibility list. (Transcript at 50: 20) The IRD explained that all 49 workers were not interviewed because her office was unable to reach them. (Transcript at 51: 18-19) The IRD also stated that many telephone numbers were missing from the Employer provided list but that they attempted to contact the workers whose numbers were on the list. (Transcript at 52: 16-19)

The IRD declared that there "was an allegation that foremen informed workers that they did not have to provide their contact information, and [they] attempted to investigate that allegation . . . [they] also asked about the allegation that there were cash workers." (Transcript at 53: 2-6)

The IRD indicated that in trying to confirm the eligibility of the 49 individuals, they interviewed workers identified on the Employer's eligibility list either via telephone or through home visits. (Transcript at 53: 15-16, 19-20) The IRD expressed that the interviewed individuals were identified by asking their name and that it was not their practice to ask for any other information. (Transcript at 54: 21)

The IRD confirmed that she developed a questionnaire which was used to interview the workers. (Transcript at 57: 3, 5) (UFW Exhibit 1) The IRD testified that the questionnaire sought information such as "[e]mployment, employment dates, employer names … foreman, supervisor names, other coworker names, commodities, locations, …how production is tracked, and how payment -- how they're paid." (Transcript at 58: 13-17)

The IRD confirmed that during the interviews, some workers disclosed the names of their coworkers and that her staff tried to confirm that the coworkers worked for the Employer "[b]y trying to contact them and asking, and then interviewing them, looking for their names on the eligibility list, corroborating with other interviewees' response to that same question", but denied disclosing the names of the coworkers to the Employer. (Transcript at 60: 16-20; 61: 1-2)

The IRD testified that "[i]nvestigators will sometimes ask follow-up questions or clarify if a . . . question isn't being understood, rephrasing the question, but, since this was such a -- the time constraint to get this done -- we had a pretty clear questionnaire that I drafted, sent out for them to follow and do this as efficiently as possible." (Transcript at 61: 12-17)

The IRD explained that for telephone interviews, one investigator would conduct the interview, however, for home interviews, two investigators would conduct the interview.

(Transcript at 62: 1-2) The IRD elaborated "[f]or the home visits, we had teams of two people. When we do home visits, we generally, in all of our investigations, try to have two people present, especially … when we're doing them late hours in the evening." (Transcript at 66: 23-25; 67: 1)

The IRD testified that she "conducted one follow-up. It was after hours. There were no field examiners available, and with time constraints, I needed to get a quick follow-up question answered, and I conducted that quick call to a worker." (Transcript at 62: 7-10) The IRD further testified that she identified the individual by dialing the telephone number and asking for the individual. (Transcript at 64: 8)

The IRD noted that she was responsible for making the determination as to the sufficiency of the evidence to add individuals to the eligibility list and that she looked at all the available evidence which also included the investigators' interview notes to make that determination. (Transcript at 67: 11, 14-15, 19)

The IRD clarified "[i]t is our policy that everybody that takes notes review their notes and . . . clean them up, and make sure that the information is legible and
there as it was stated." (Transcript at 68: 17-20)

The IRD denied that the interviewees were paid for the interviews. (Transcript at 70: 3-4) She clarified that the policy for confirming the identity of the interviewees is to "either call the phone number and ask for the person, or . . . go to the address and ask to speak to the person." (Transcript at 70: 22-24) She noted "that [it] has never been our policy, to ask workers for identification." (Transcript at 71: 2-3)

The IRD testified that out of the 31 workers added to the eligibility list, there was only one individual who was not interviewed because they were unable to reach him. (Transcript at 71: 12) With regards to credibility determination, the IRD stated "I don't recall specifically giving [field examiners] instructions. [I]t's their practice to assess credibility to the best of their ability and, insert their assessment into their interview notes." (Transcript at 71: 21-24)

The IRD explained that field examiners receive credibility determination trainings through their supervisors, more experienced field examiners and potentially Regional Directors but she denied that she had personally provided such trainings to the field examiners. (Transcript at 73: 13-16) The IRD further explained that she had received credibility determination training when she first joined the ALRB. (Transcript at 73: 24)

The IRD denied that the questionnaire included questions that would gauge the interviewees' motives, biases, whether they had family members who worked for the UFW, whether they were UFW employees or potential conflict of interest. (Transcript at 74: 15, 18, 21; 75: 7)

The IRD stated "I had all the evidence before me, and looked at all of it, and made my determination based on that . . . I was looking for evidence that supported that the worker in question had worked for DiMare during the eligibility period." (Transcript at 76: 9-11)

The IRD further elaborated "I looked for evidence that supported that the worker worked for DiMare during the statutory period . . . If there was evidence, whether it was testimony or whether it was documents, or both, that supported a finding that they worked during the statutory period, that's what I used to make my determination . . . Some workers

had both documentary evidence and testimony. Some workers only had one." (Transcript at 77: 14-16; 78: 8-12; 79: 4-5)

With regards to whether the IRD discussed the evidence she was going to use to add individuals to the list with the Employer, the IRD stated "[i]t's not our practice to divulge information that we receive from workers during interviews with them. The statute also does not -- did not direct me to present that or to consult with DiMare." (Transcript at 78: 23-25; 79: 1)

With regards to whether the IRD contacted the Employer to request records to validate the interviewees claims that they worked for the Employer during the statutory period, the IRD stated "It is not our practice to divulge information that we get in interviews." (Transcript at 80: 16-17)

The IRD noted that if there was documentary evidence, it was likely that there was contact with the individual and/or there was testimony. (Transcript at 82: 6-8) She indicated that the same criteria was used in evaluating the claim that the individuals worked for the Employer during the statutory period. (Transcript at 82: 20-23)

The IRD conceded that some but not all of the interview notes contained credibility determinations. (Transcript at 83: 3)

The IRD explained that she understood the statute to require her to make the majority support determination at the end of the 30-day cure period and that she did so as soon as she was able to do so. (Transcript at 86: 10-11; 87: 1-2)

The IRD further explained:

> "I made the determination once I was ready to. I gave notice to [the employer's counsel and to the employer] after [the employer's counsel] presented allegations that [they] have in evidence that workers added should not be added, and I asked for [employer's counsel] to provide that evidence twice, gave [employer's counsel] until -- I believe the last time was 4:00 o'clock on October 20th. It became clear with [employer's counsel's] response that [they] were not going to provide any evidence, and so I made the determination at that point. Had [employer's counsel] said [they] needed more time, then maybe I would have -- then I would have gone back to the statute, and like [employer's counsel is] trying to, I think, state here, you know, there's nothing there saying that I had to do it on the 20th, but at that point, when it was clear to me that there was no more evidence coming my way for me to look at to make this determination, I made the determination, and filed the final tally." (Transcript at 90: 20-25; 91: 1-12)

The IRD expanded that she did not "find it necessary" to ask the ALRB Board for an extension of time to make the majority support decision because she "didn't find it necessary . . . it was clear to [her] from [employer's counsel's] response that there was no other evidence coming. [She] had everything [she] needed to make the determination at that time, and so [she] did, and . . . there was no need for [her] to seek an extension or anything like that from the Board." (Transcript at 92: 18-23)

The IRD testified that the list was sent to the parties at 12:14 p.m. on October 20, 2023, and that it was re-sent once a typographical error was corrected at 12:46 p.m. and that the employer was given until 4:00 p.m. that day to respond to the addition of 3 more individuals. (Transcript at 93: 22-25; 94: 1) (DiMare Exhibit 16)

The IRD confirmed that the UFW had submitted fourteen declarations to her office. She confirmed that the format of the declarations consisted of a top portion of the page where an individual stated that they worked for the Employer during the eligibility period

and the bottom of the page was for another individual to confirm that they saw the individual who completed the top portion of the declaration work for the Employer during the eligibility period. (Transcript at 101: 14) (DiMare Exhibit 8, Bates number 003080 – 003093)

The IRD noted that someone in her office compared the fourteen declarations against the Employer's eligibility list. (Transcript at 105: 8-9)

The IRD verified that for each of the thirty-one workers who were added to the eligibility list, there was supporting documentation that was used to determine they worked during the eligibility time period. (Transcript at 113: 22) The IRD indicated that to verify the information on the fourteen declarations, her office attempted to contact the individuals for whom they had contact information either via telephone or home visits. (Transcript at 114: 14-16)

The IRD testified that as she "gathered evidence, and [she] was able to look at it and make determinations, [the list] was being built, was growing, and on October 18th, … we exhausted our investigation of the … home visits and the phone calls, and that is when … the list of the 24 was produced." (Transcript at 122: 8-14) She further clarified that the list was "built over a few days". (Transcript at 122: 18)

When questioned by the Employer's counsel if the Employer had presented additional evidence was the IRD willing to withdraw her decision to add the workers on the list, the IRD stated "I would have looked at the evidence and made a determination based on that." (Transcript at 125: 11-12)

The IRD testified that when Labor Code §1156.37 was enacted, the statute was discussed in a staff meeting but she could not recall whether an internal memorandum or other documents were circulated within the ALRB about how to facilitate the process. (Transcript at 131: 1-4, 17)

The IRD explained that after the Majority Support Petition was filed, she discussed the filing with the other Regional Director at the ALRB. She stated "[w]e didn't have regulations to follow. We had the statute to follow, and it was the first ever being filed. So, of course I sought the guidance of my colleagues, of the regional director, Jessica Arciniega. We talked about it. We discussed it." (Transcript at 133: 19-24) She also stated "[w]e discussed the situation, and . . . went to the statute to try and find a way to process this all." (Transcript at 135: 5-6) The IRD denied that she spoke about the specifics of this Majority Support Petition with her colleague. (Transcript at 135: 3)

The IRD also explained that she also reviewed the secret ballot process. (Transcript at 135: 21-24)

The IRD described that she did not use the challenged ballot election process in the Majority Support Petition:

> "Because the statute does not call for the challenged ballot, and a challenged ballot is used in a secret ballot prior to a worker voting, and in a secret -- once they do vote, it's a secret ballot. You don't know how they're voting. There's declarations taken. They get called to be witnesses at hearings like this, and that is not what the purpose of the act that it is my duty to enforce, to make workers give declarations, when we know how they're voting, and then potentially having them come to trial and defend their vote. So, it did not -- you know, I didn't see – the statute was silent on that, and I did not see it as an option, and, taking into account the purpose of the act and my duty, I decided not to do the challenged ballot option." (Transcript at 139: 12-25)

The IRD stated that to the best of her knowledge, the Employer had not seen any authorization cards. (Transcript at 141: 4-5)

The IRD explained that she verified that accuracy of documents presented to her "[b]y comparing them to other documents, reading what's on there, names, badge numbers, . . . Employer names, FLC names, any of the above, dates." (Transcript at 143: 14-17)

The IRD testified that she spoke with the General Counsel in relation to the Majority Support Petition only on the issue of staffing, however, she did speak to the Deputy General Counsel and the other Regional Director when considering whether to add the 31 workers to the list. (Transcript at 5: 14, 16, 18)

The IRD stated that she sought guidance from the Deputy General Counsel and the other Regional Director and other staff in disclosing the fourteen declarations as part of the tally and that she weighed the pros and cons of the disclosure. (Transcript at 7: 12-15, 22-23; 8: 1-4) She further stated "there was no regulations for this majority support petition process, weighing everything to the best of my ability at the time, I decided to include them. Were, I to do this again, I would -- I may do differently." (Transcript at 9: 11-16)

The IRD testified that there were 9 field examiners who conducted the interviews and that they "were working long hours and on the weekends, and having meetings prior to gathering the group that was going to work either that weekend or that evening, not all the times, but specifically . . . on weekends having a quick check-in, just to advise them . . . that they were going to conduct these interviews, where the questions were . . . or email them the questions, so that they had them." (Transcript at 10: 9-16)

With regards to an e-mail sent on September 17, 2023, regarding an allegation that some workers were left off the list (DiMare Exhibit 1), the IRD testified that there was an allegation of cash payments. (Transcript at 48: 24-25)

The IRD confirmed that she had not communicated separately with the UFW prior to sending the list to the UFW's counsel and the Employer's counsel on October 18, 2023. (Transcript at 49: 14) (DiMare Exhibit 4)

The IRD denied that the Employer provided any proof that the 26 individuals listed on the October 18, 2023, e-mailed letter either did not work or did not work during the eligibility period for the employer. She stated that the twenty-six "individuals remained on the list. If proof had been provided that they were not working for DiMare during the statutory period, they would have been removed." (Transcript at 51: 12-15) (DiMare Exhibit 13)

When questioned regarding providing additional time to the Employer's counsel to review the list sent out on October 20, 2023 (DiMare Exhibit 19), the IRD responded:

> "I would have discussed and sought guidance and conferred with my colleagues on that. Exactly how much time I can't say, but, as it was pointed out yesterday, the statute is silent on giving a deadline to submit to file the final tally. Yes. I don't know how much time, exactly, but again, it would just -- you know, I can't speculate on how much time I would have granted." (Transcript at 56: 10-16)

The IRD testified that in making the determination to add the 31 workers to the list, she generally "considered testimony, documents, the few documents, the documents that were available to me from the Employer, Employer's-side documents, the very few provided for the workers." (Transcript at 57: 8-12) She also testified that there were

individuals who were interviewed by her staff that were not added to the list. (Transcript at 57: 23-24)

The IRD described that after the field examiners interviewed workers, they saved their notes in a folder and that she read those notes. (Transcript at 66: 19-21) The IRD explained that sometimes some field examiners "forget to insert their assessment of credibility as they interview." (Transcript at 67: 6-9)

The IRD indicated that based on her review of the field examiner reports, she did not have concerns that the workers interviewed posed as someone else and denied that any UFW workers or attorneys were present during those interviews. (Transcript at 68: 5, 9)

The IRD testified that she developed the questionnaire prior to when the interviews were conducted. (Transcript at 80: 22-23) (UFW Exhibit 1)

The Regional Director's Tally notes the following:

> Nothing in Labor Code § 1156.37 nor the subcommittee's draft regulations contemplate the situation that has arisen here – an allegation that numerous workers who worked during the statutory period were left off of the employer-provided eligibility list. Looking to the ALRB's regulations regarding secret ballot elections, I recognize that in that context when workers' names are not found on the eligibility list to vote, they vote as challenged pursuant to Cal. Code Regs., tit. 8, § 20355(a)(8). However, neither the Act nor the proposed regulations as currently drafted provide for nor contemplate the use of the challenge procedure in majority support petitions. In addition, I find majority support petitions dissimilar from secret ballot elections in one important way – when a party chooses to challenge a voter in a secret ballot election, it must be done prior to the person casting their vote so as to preserve their right to vote secretly. Neither a union, nor an employer will know how that person will vote in the voting booth. If we implemented the challenge procedure in this context, both the employer and the labor organization know that the proof of support being challenged is a vote in favor of the union. Allowing parties to challenge voters only after they know how they voted would be contrary to the spirit and policies of the Act.

After determining that the Act and regulations do not contemplate the use of challenge procedures to workers' votes here, and in order to preserve workers' rights to vote, I opted to investigate the claims made by the union and make determinations based on the evidence available to me. The main inquiry for those workers who signed cards and whose names did not appear on the eligibility list was whether the evidence showed that they worked between September 4, 2023, and September 10, 2023. Based on this investigation, I determined sufficient evidence existed that 31 agricultural workers who did not appear on the employer-provided list, worked during the relevant period and added those agricultural workers to the eligibility list. (DiMare Exhibit 8, Bates number 003041-003042)

D. Analysis

1. Labor Code §1156.37

Labor Code §1156.37 reads as follows:

> (a) A labor organization may become the exclusive representative for the agricultural employees of an appropriate bargaining unit for purposes of collective bargaining with respect to rates of pay, wages, hours of employment, or other conditions of employment by filing a Non-Labor Peace Election Petition with the board alleging that a majority of the employees in the bargaining unit wish to be represented by that organization. The petition shall describe the geographical area that constitutes the unit claimed to be appropriate and shall be accompanied by proof of majority support, through authorization cards, petitions, or other appropriate proof of majority support. Only labor organizations that have filed LM-2 forms for the preceding two years with the federal government may petition for a non-labor peace election.
>
> (b) A labor organization that wishes to represent a particular bargaining unit, as described in Section 1156.2, may be certified through a non-labor peace election as that unit's bargaining representative by submitting to the board a petition for non-labor peace election. The petition shall allege all of the following:
>
> (1) That the number of agricultural employees currently employed by the employer named in the petition for non-labor peace election, as determined from the employer's payroll immediately preceding the filing of the petition for non-labor peace election, is not less than 50 percent of the employer's peak agricultural employment for the current calendar year.

(2) That no valid election has been conducted among the agricultural employees of the employer named in the petition for non-labor peace election within the 12 months immediately preceding the filing of the petition.

(3) That the petition is not barred by an existing collective bargaining agreement.

(c) The petition for non-labor peace election described in subdivision (b) shall be supported by a proof of majority support, through authorization cards, petitions, or other appropriate proof of majority support of the currently employed employees, as determined from the employer's payroll immediately preceding the filing of the petition for non-labor peace election. The showing of support shall be submitted together with the petition for non-labor peace election.

(d) A labor organization submitting a petition for a non-labor peace election shall personally serve the petition on the employer on the same day that the petition is filed with the board. Within 48 hours after the petition is served, the employer shall file with the board, and personally serve upon the labor organization that filed the petition, its response to the petition. As part of the response, the employer shall provide a complete and accurate list of the full names, current street addresses, telephone numbers, job classifications, and crew or department of all currently employed employees in the bargaining unit employed as of the payroll period immediately preceding the filing of the petition. The employer shall organize the employees' names and addresses and other information by crew or department and shall provide the list to the board and petitioning labor organization in hard copy and electronic format. The employee's first name, middle name or initial, last name, address, city, state, ZIP Code, telephone number, classification, and crew or department shall be organized into separate columns. Immediately upon receiving the employer response and employee list, the board shall provide the response and employee list by hardcopy and electronic copy to the labor organization that filed the non-labor peace election petition.

(e) (1) Upon receipt of a petition for non-labor peace election, the board shall immediately commence an investigation regarding the validity of the petition and the proof of support submitted. Within five days of receipt of the petition, the board shall make an administrative determination as to whether the requirements set forth in subdivision (b) are met by the petition and whether the labor organization submitting the petition has provided proof of majority support. In making this determination, the board shall compare the names on the proof of support submitted by the labor organization to the names on the list of currently employed employees provided by the employer. The board

shall ignore discrepancies between the employee's name listed on the proof of support and the employee's name on the employer's list if the preponderance of the evidence, such as the employee's address, the name of the employee's foreman or forewoman, or evidence submitted by the labor organization or employee shows that the employee who signed the proof of support is the same person as the employee on the employer's list.

(2) The board shall return proof of majority support that it finds invalid to the labor organization that filed the petition for non-labor peace election, with an explanation as to why each proof of support was found to be invalid. To protect the confidentiality of the employees whose names are on authorization cards or a petition, the board's determination of whether a particular proof of support is valid shall be final and not subject to appeal or review.

(3) If the board determines that the labor organization has submitted proof of majority support and met the requirements set forth in this section, it shall immediately certify the labor organization as the exclusive bargaining representative of the employees in the bargaining unit. An employer's duty to bargain with the labor organization commences immediately after the labor organization is certified.

(4) If the board determines that the labor organization has not submitted the requisite proof of majority support, the board shall notify the labor organization of the deficiency and grant the labor organization 30 days from the date it is notified to submit additional support.

(f) (1) Within five days after the board certifies a labor organization through a non-labor peace election, any person may file with the board a petition objecting to the certification on one or more of the following grounds:

(A) Allegations in the non-labor peace election petition were false.

(B) The board improperly determined the geographical scope of the bargaining unit.

(C) The non-labor peace election was conducted improperly.

(D) Improper conduct affected the results of the non-labor peace election.

(2) Upon receipt of a petition objecting to certification, the board may administratively rule on the petitioner's objections or may choose to conduct a hearing to rule on the petitioner's objections. If the board decides to conduct

a hearing on the objections, it shall mail a notice of the time and place of the hearing to the petitioner and the labor organization whose certification is being challenged. The board shall conduct the hearing within 14 days of the filing of an objection, unless an extension is agreed to by the labor organization. If the board finds at the hearing that any of the allegations in the petition of the grounds set forth in paragraph (1) are true, the board shall revoke the certification issued under subdivision (e).

(3) The filing of a petition objecting to a non-labor peace election certification shall not diminish the duty to bargain or delay the running of the 90-day period set forth in subdivision (a) of Section 1164.

(g) The board shall not permit the filing of any other election petition once a non-labor peace petition is filed until the board determines whether the labor organization filing the non-labor peace election petition should be certified.

(h) Once a labor organization has filed a non-labor peace election petition, no other non-labor peace election petition shall be considered by the board with the same agricultural employer until the board determines whether the labor organization that filed the pending non-labor peace election petition should be certified. However, the board may consider a second non-labor peace election petition if the second petition alleges that the first petition was filed because of the employer's unlawful assistance, support, creation, or domination of the labor organization that filed the first petition. In those cases, the board shall expedite its investigation of the matter and render a decision on certification within three months of the filing of the first petition. If the board finds that a labor organization was unlawfully assisted, supported, created, or dominated by an employer, that labor organization's petition shall be dismissed and the second petition shall be considered. A labor peace agreement shall not be deemed unlawful by virtue of the fact that it was entered into pursuant to Section 26051.5 of the Business and Professions Code. Any labor organization that has been unlawfully assisted, supported, or dominated by an employer shall be disqualified from filing any further petitions with the board for a period of one year. That labor organization's representatives, agents, or officers shall similarly be disqualified from filing any further petitions with the board for a period of one year. A labor organization assisted, supported, created, or dominated by an employer, along with its representatives, agents, or officers, shall be permanently barred from filing any further petitions.

(i) In any case where two or more labor organizations are seeking to represent the same bargaining unit through a non-labor peace election petition, the most recent proof of support shall prevail.

(j) If an employer commits an unfair labor practice or misconduct, including vote suppression, during a labor organization's non-labor peace election campaign, and the employer's unfair labor practice or misconduct would render slight the chances of a new non-labor peace election campaign reflecting the free and fair choice of employees, the labor organization shall be certified by the board as the exclusive bargaining representative for the bargaining unit. For purposes of a finding of an unfair labor practice or misconduct under this part and under this section, a misrepresentation of fact or law by an employer, an employer's representative, or agent is an unfair labor practice or misconduct whether or not a labor organization has had an opportunity to respond to or correct the misrepresentation.

(k) If an employer disciplines, suspends, demotes, lays off, terminates, or otherwise takes adverse action against a worker during a labor organization's non-labor peace election campaign, there shall be a presumption that the adverse action was retaliatory and illegal, and the employer shall escape liability for the illegal action only if the employer provides clear, convincing, and overwhelming evidence that the adverse action would have been taken in the absence of the non-labor peace election campaign.

(l) For purposes of Section 1156.5, a non-labor peace election is a valid election.

(m) This section shall remain in effect only until January 1, 2028, and as of that date is repealed.

2. Parties' Position

Employer:

In the post-hearing brief, DiMare argued the IRD's unwritten, unstated, and unvetted process was erroneous which led to ineligible individuals being allowed to vote, which altered election outcome. More specifically, DiMare argued that the IRD failed to ensure her staff was appropriately trained to implement the Majority Support Petition process; the IRD allowed the UFW to direct the IRD's eligibility investigation; the IRD had no process for confirming the identities of the voters; the IRD's questionnaire was one-sided and failed to elicit sufficient evidence to rely upon in making eligibility determinations; the IRD's process did not include a process for evaluating the credibility of interviewees; the IRD's eligibility determinations relied almost exclusively on her investigators' reports; the IRD did not adopt a clear standard for determining whether her investigation had resulted in sufficient evidence that workers were eligible; and that the IRD prematurely closed the investigation.

As presented above, the IRD provided lengthy testimony regarding the steps that she took in processing this Majority Support Petition. In footnote 4 of the Admin. Order, the Board acknowledged that the IRD and her staff "were required to apply this new statutory process without the benefit of established precedents" (Admin. Order at 6) It is noted that at the time of the issuance of this decision, there are no adopted regulations regarding Majority Support Petitions.

The IRD provided testimony that when Labor Code §1156.37 was enacted, there were staff meetings regarding the MSP (Transcript at 131: 1-4, 17), she discussed the filing

of this MSP with her colleague (Transcript at 133: 19-24) and that she had meetings with the field examiners as they were working on the MSP (Transcript at 10: 9-16). As this is a newly enacted statute, it is reasonable that the MSP trainings consisted of discussions and meetings as there was no opportunity to review or study previously gained knowledge and experience.

It is undisputed that the UFW alleged that 49 individuals were left off of the eligibility list and communicated that information to the IRD, however, no evidence was presented that the IRD allowed the UFW to direct this investigation.

The IRD testified that the process for verifying the identity of individuals was to ask for an individual's name (Transcript at 70: 22-24) and that it was policy to not demand workers for identification. (Transcript at 71: 2-3) While the Employer may desire that identification cards should have been checked for each interviewee, nothing suggests that the IRD or her staff violated any agency processes or policies regarding verification of individuals' identities.

The IRD explained that she developed a clear questionnaire which asked for information including the workers employment, where they worked, who they worked with and the names of their supervisors. (Transcript at 57: 3, 5) (Transcript at 61: 12-17) (Transcript at 58: 13-17) The questionnaire did not seek any information that would gauge interviewee biases or involvement with the UFW. (Transcript at 74: 15, 18, 21; 75: 7) Without the benefit of regulations and under the tight time constraints as outlined by the statute, it is reasonable that the IRD would develop a questionnaire as a tool to aid in

making her determination. No evidence was presented that the IRD violated the statute or agency policy in developing this questionnaire.

The IRD offered that she had received training regarding credibility determination (Transcript at 73: 24) and that while she had not personally trained her staff, they had received the credibility determination training through their supervisors or more experienced field examiners. (Transcript at 73: 13-16) She further offered that it is the field examiners process to make credibility determinations during the interviews. (Transcript at 71: 21-24) Nothing in the evidence presented suggests that either the IRD or her staff disregarded credibility determinations throughout this investigation.

In the post-hearing brief, DiMare stressed that the IRD spoke with one interviewee and "only received documentary evidence for two individuals". As the IRD had an investigative staff consisting of field examiners, it is not unreasonable that she did not personally speak to each individual to make her determination regarding their eligibility to be on the list.

The IRD stated "I was looking for evidence that supported that the worker in question had worked for DiMare during the eligibility period." (Transcript at 76: 9-11) She did not identify any particular legal standard that she used to apply to the evidence before her. As the statute does not require the utilization of a specific legal standard for the IRD to use to make findings and as there are currently no regulations is place, the IRD's methodology is reasonable and acceptable.

The IRD made her majority support determination as soon as she was able to do so. (Transcript at 86: 10-11; 87: 1-2) She acknowledged that the statute is "silent on giving a

deadline to submit to file the final tally" (Transcript at 56: 10-16) As the statute does not specify a deadline to submit the final tally and as there are currently no regulations is place, the IRD's action to make her determination as soon as she was able to do so is reasonable and acceptable.

DiMare further argued the IRD's erroneous process and mishandling of the UFW's allegations violated the Act by altering the outcome of the Majority Support Petition election. In its post-hearing brief, DiMare contends "If just five of the 31 individuals were not added to the eligibility list, then the UFW would have failed to achieve majority support. Stated another way, the UFW could not achieve majority support without the IRD adding at least 27 individuals to the eligibility list."

The IRD carefully explained the steps that she took during her investigation as outlined above. While the UFW purported that 49 individuals should have been included in the eligibility list, the IRD added 31 of those individuals to the list at the conclusion of her investigation thereby rejecting 18 individuals. While DiMare would have benefited had the IRD rejected at least 22 individuals from the eligibility list, the IRD's process does not equate to an erroneous process and/or mishandling of the UFW's allegations which would violate the Act.

DiMare also argued the IRD exceeded her authority under the Act by unilaterally expanding the eligibility list in direct contravention of DiMare's right to due process emphasizing that adding workers to the eligibility list is an extreme remedy that was not justified under a totality of the circumstances.

The Board determined that the "Regional Director does have authority under section 1156.37 to add to an eligibility list employees demonstrated to have been improperly omitted from an employer's list." (Admin. Order at 6) Testimony was presented during the hearing that the IRD gave DiMare time, albeit brief, to provide evidence regarding the eligibility of the 31 individuals. No evidence was offered that DiMare sought an extension of time to provide information to the IRD that any of the 31 individuals were ineligible to be placed on the list. The IRD testified that she would have considered giving additional time to DiMare if a request had been made. Based on the totality of circumstances in this instant, it is determined that DiMare's due process rights were not violated.

DiMare additionally argued that prior to unilaterally deciding to add individuals to the eligibility list, the IRD was required to do something more than simply conclude her investigation and issue a final determination. DiMare noted in its post-hearing brief that "[w]ith secret ballot elections, the parties have a right to appoint election observers that can raise challenges to voters' eligibility" and that "While these same procedural safeguards are not included in the text of the MSP statute, it does not follow that no such safeguards exist."

Again, the Board has determined that the Regional Director has authority under the statute to add individuals to an eligibility list. While secret ballot elections provide certain procedural "safeguards", those particular "safeguards" are not enumerated in the MSP statute. As such without regulations or other similar guidance, neither the IRD nor anyone else similarly situated can simply use procedures from ballot elections for the MSP statute.

Finally, DiMare argued the IRD should have implemented a challenged-ballot-like process because it could have cured many of the deficiencies in her investigation and related eligibility determinations.

As Labor Code §1156.37 does not reference the implementation of a challenged-ballot-like procedure, without regulations or other similar guidance, neither the IRD nor anyone else similarly situated can simply use procedures from ballot elections for the MSP statute.

DiMare's reply to the UFW's post-hearing brief:

DiMare submitted the following in its reply to the UFW's post-hearing brief:

> The UFW's arguments rely on the flawed viewpoint that voter "eligibility" and "proof of support" are one and the same By arguing that the IRD's process was proper, and that the underlying eligibility evidence should not be reviewed, the UFW is in effect arguing that it was proper for the IRD to make eligibility determinations as part of her investigation into the UFW's "proof of support," and that it was proper for her to do so in an unreviewable vacuum.
>
> Regional Directors cannot and should not be making eligibility determinations in an unreviewable vacuum. It is absurd to suggest that regional directors are now empowered to make these determinations without the possibility or opportunity for any kind of review. Regional directors should not be permitted to make these determinations outside of the reach of potential testing by the parties and potential review by the Board. Moreover, and most importantly, the regional directors' eligibility determinations should be reviewable by the Board—as they always have been—where appropriate.
>
> The UFW's argument that the Objections Hearing did not include the evidence related to the IRD's actions is based on a deliberate misreading of the Board's AO. Ultimately, in addition to effectively re-writing the Board's AO, the problem with the UFW's misreading of the AO is that it completely prohibits DiMare from developing the record and being heard on the factual and legal issues presented by this case. As is explained in DiMare's Post-

hearing Brief, reading the AO in this way resulted in a violation of DiMare's right to due process.

The UFW does very little to argue that the IRD's process was proper. UFW's arguments are insufficient to justify or defend the shoddy investigative process that the IRD adopted. IRD: (1) failed to ensure her staff was sufficiently trained to implement the MSP process; (2) allowed the UFW to direct the IRD's eligibility investigation; (3) failed to implement a process for confirming the identities of the voters; (4) utilized a one-sided questionnaire that amplified her confirmation bias; (5) failed to reliably evaluate the credibility of interviewees; (6) failed to adopt a clear evidentiary standards; and (7) prematurely closed her investigation and jumped to conclusions about eligibility before hearing from DiMare. The IRD's eligibility determinations were the product of an investigation that lacked any safeguards that were necessary to ensure that the IRD's determinations were supported by sufficient evidence.

The UFW's argument that DiMare was already given a reasonable opportunity to provide rebuttal evidence is not supported by the facts. Without knowing the names of the individuals allegedly left off the payroll records, DiMare had no way of looking into whether and to what extent these individuals might have worked for the company at any point. This is important because DiMare now knows that many of the 31 individuals—who the UFW alleges were paid in cash—did, in fact, work at DiMare before and/or after the eligibility period. the IRD immediately drew DiMare's focus away from that inquiry when the IRD added 24 individuals to the eligibility list on October 19. However, this argue is misplaced because DiMare was never provided a legitimate opportunity to present rebuttal evidence in the first place. Again, this is particularly true when the IRD was not giving any indication that she was willing to reconsider her "decision" to add the 29 individuals to the eligibility list.

The UFW's argument that the nothing in the MSP statute required a challenged ballot process is misleading and misses the point. Furthermore, the while the MSP statute is silent on the issue of challenged ballots, the IRD's interpretation must still be "based on a permissible construction of the statute." the important point is not that the MSP statute does not require a challenged ballot process, but that the MSP does not prohibit it. while Labor Code section 1156.37 does not contain a formal challenged ballot process built into the text of the statute, the Act nonetheless requires the Board to ensure the integrity of representational elections. While a strict adherence to the challenged ballot procedures built into the secret ballot election process might not have been appropriate in the MSP election setting, some kind of

> challenged-ballot-like process is needed to ensure the integrity of the MSP election process. the IRD could have implemented a process that better balanced the competing interests in play in order to ensure that all parties were afforded a full and fair opportunity to present their case and test the eligibility of the persons believed to be ineligible to vote in the first place.

Petitioner Labor Organization:

In the post-hearing brief, the UFW argued that DiMare's Objection Number 1 must be dismissed because it was not improper for the IRD to add 31 individuals to the eligibility list as the IRD followed regulatory, statutory, and decisional authority given to her. The UFW additionally argued that there is nothing in the statute, regulations or Board law which require that the individuals in this instant be treated as "challenge" ballots.

As previously stated, the Board determined that the "Regional Director does have authority under section 1156.37 to add to an eligibility list employees demonstrated to have been improperly omitted from an employer's list." (Admin. Order at 6) Labor Code §1156.37 is silent as to the implementation of a challenge-ballot process for MSP. Furthermore, there are no regulations in place, at this time regarding MSP. As such, without any statutory or regulatory guidance in place which would permit a challenge-ballot process for MSP, that process is improper in this instant.

The UFW further argued that DiMare's Objection Number 2 must be dismissed because although DiMare maintained that there was proof that the employees did not work during the eligibility period, no evidence was provided to the IRD and that DiMare did not ask for any extension of time to provide the evidence; therefore, DiMare should not argue that its due process rights are being violated.

As previously noted, testimony was presented during the hearing that the IRD gave DiMare time, albeit brief, to provide evidence regarding the eligibility of the 31 individuals. No evidence was offered that DiMare sought an extension of time to provide information to the IRD that any of the 31 individuals were ineligible to be placed on the list. The IRD testified that she would have considered giving additional time to DiMare if a request had been made. Based on the totality of circumstances in this instant, it is determined that DiMare's due process rights were not violated.

The UFW also argued that DiMare's Objection Number 5 must be dismissed because "the Board very clearly held in its order that Regional Directors have the authority to add excluded employees to an eligibility list" and that existing Board law supports this position[1].

The Board's determination that under Labor Code §1156.37, the Regional Director has authority to add to employees demonstrated to have been improperly omitted from an employer's list to an eligibility list (Admin. Order at 6) coupled with the determination that

[1] "[N]othing in Labor Code § 1156.37 nor the subcommittee's draft regulations contemplate the specific situation that arose in this case, but existing law, as confirmed by the Board's order, permits Regional Directors to add excluded employees to an eligibility list. See, e.g., 8 Cal. Code Regs. § 20310(f); Order at 6; Harry Singh & Sons (1975) 4 ALRB No. 63 (Regional Director did not abuse discretion by invoking presumption in Board Regulation 20310(d)(2) that employees are eligible to vote where Employer had inadequate payroll records and did not submit complete data in timely manner to verify employee status and voter eligibility); Valdora Produce Co., (1977) 3 ALRB No. 8 (Employees who are paid, or who are entitled to be paid for work during the pre-petition payroll period are eligible to vote even though their names may not appear on the payroll list); South Lakes Dairy Farms, (2010) 36 ALRB No. 5 (The fact that a challenged voter was not on the regular payroll and is paid in cash creates no presumption of ineligibility, citing Henry Garcia Dairy (2007) 33 ALRB No. 4, pp. 10-11; Artesia Dairy (2006) 32 ALRB No. 2, at 5 (agricultural workers who are not on the regular payroll can still be eligible to vote if they worked during the eligibility period). (UFW Post-Hearing Brief p. 7)

DiMare's due process rights were not violated as discussed above, negates DiMare's argument.

The UFW additionally argued that DiMare's Objection Number 6 must be dismissed because "[g]iven the Board's finding that a rule precluding adding names after the 5-day administrative determination period is not stated anywhere in the statute, DiMare's claim that the RD was precluded from adding names after this 5 day period is completely without merit."

Labor Code §1156.37(e)(1) states upon receipt of a Majority Support Petition, the board shall immediately commence an investigation regarding the validity of the petition and the proof of support submitted. Within five days of receipt of the petition, the board shall make an administrative determination as to whether the requirements set forth in subdivision (b) are met by the petition and whether the labor organization submitting the petition has provided proof of majority support. In making this determination, the board shall compare the names on the proof of support submitted by the labor organization to the names on the list of currently employed employees provided by the employer. The board shall ignore discrepancies between the employee's name listed on the proof of support and the employee's name on the employer's list if the preponderance of the evidence, such as the employee's address, the name of the employee's foreman or forewoman, or evidence submitted by the labor organization or employee shows that the employee who signed the proof of support is the same person as the employee on the employer's list.

Labor Code §1156.37(e)(4) states if the board determines that the labor organization has not submitted the requisite proof of majority support, the board shall notify the labor

organization of the deficiency and grant the labor organization 30 days from the date it is notified to submit additional support.

The statute is silent as to any timeline prohibitions that the Regional Director has to add individuals to the eligibility list. As such, the Regional Director is able to add individuals after the "initial tally".

The UFW finally argued that DiMare's Objection Number 8 must be dismissed because "no Board law or regulation requires DiMare be provided with evidence submitted by the Union." (UFW Post-Hearing Brief p. 10)

The statute does not contemplate that the Employer must be given access to evidence which supports the addition of individuals to the eligibility list during the cure period. As such, it is determined that the IRD did not act improperly when she did not provide DiMare the evidence submitted by the UFW in support of the addition of individuals to the eligibility list.

The UFW reply to DiMare's post-hearing brief:

The UFW submitted the following in its reply to DiMare's post-hearing brief:

> DiMare maintains that it should have been permitted to review and challenge the specific evidence relied on by the Regional Director ("RD") in adding 31 employees to the eligibility list. nothing in the Board's order supports DiMare's claim that the hearing was intended to be a full-blown challenge ballot hearing.
>
> DiMare's underlying argument concerning the eligibility list relates to the RD's authority to modify the eligibility list. it is up to the RD's independent judgement and discretion to determine eligibility based on the evidence presented. DiMare can point to nothing in the record or law showing the RD's decision was erroneous.

DiMare claims that it was not provided sufficient time to dispute the evidence of eligibility provided to the RD by the UFW. DiMare's claims are without merit, because although the RD was working on a compressed time schedule, DiMare failed to provide any evidence it claims it had, and therefore waived any claim that it was denied due process rights. DiMare had an obligation to maintain and provide accurate employment records, including a correct list of all employees that worked during the eligibility period, UFW's position is that DiMare cannot complain about the foreseeable consequences of such failure. Nevertheless, DiMare was provided sufficient opportunity to present evidence disputing the addition of workers proffered by the UFW but failed to present any evidence contesting the addition of those workers.

DiMare argues that the RD improperly failed to implement a challenged-ballot-like process and treat the additional employees the UFW sought to add as challenged ballots. There is nothing in the Labor Code or existing Board regulations that required the Regional Director to treat employees not on the employer-provided list as challenged ballots and the Employer's evidence at hearing did not demonstrate anything to the contrary. Given the regulatory, statutory, and decisional authority granted to Regional Directors in this situation, it was not improper for Regional Director Luna to add 31 employees to the eligibility list who were left off due to the employer's poor recordkeeping. Nor is there anything in the existing statute, regulations or Board law that requires she have treated the disputed workers as "challenge" ballots.

CONCLUSIONS OF LAW

Based on the testimony and documentary evidence presented in this instant, it is concluded that:

The IRD followed proper process in reaching the Majority Support Petition determination;

The IRD did not violate DiMare's due process rights to dispute the evidence regarding the individuals added to the eligibility list;

The IRD did not exceed her authority under the Act by expanding the eligibility list and did not violate DiMare's due process rights;

The IRD did not exceed her authority under the Act by accepting additional names for the eligibility list after the initial tally had taken place; and

The IRD acted properly by not providing DiMare the evidence submitted by the UFW in support of the addition of individuals to the eligibility list.

ORDER

It is ORDERED that DiMare's Objection 1 is DISMISSED.

It is ORDERED that DiMare's Objection 2 is DISMISSED.

It is ORDERED that DiMare's Objection 5 is DISMISSED.

It is ORDERED that DiMare's Objection 6 is DISMISSED.

It is ORDERED that DiMare's Objection 8 is DISMISSED.

DATED: March 15, 2024

Hermine Honarvar-Rule

Hermine Honarvar-Rule
Administrative Law Judge
Agricultural Labor Relations Board

STATE OF CALIFORNIA
AGRICULTURAL LABOR RELATIONS BOARD

PROOF OF SERVICE
(Code Civ. Proc., §§ 1013a, 1013b, 2015.5)

Case Name: **UNITED FARM WORKERS OF AMERICA**, Petitioner and
DMB PACKING CORP. DBA THE DIMARE COMPANY, Employer

Case No.: 2023-RM-001-VIS

I am over the age of 18 years and not a party to this action. I am employed in the County of Sacramento. My business address is 1325 J Street, Suite 1900-B, Sacramento, California 95814.

On October 4, 2024, I served this **DECISION AND ORDER (50 ALRB No. 2)** on the parties in this action as follows:

- **By Email** to the parties pursuant to Board regulation 20164 & 20169 (Cal. Code Regs., tit. 8, §§ 20164 & 20169) from my business email address angelica.fortin@alrb.ca.gov:

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Executed on October 4, 2024, at Sacramento, California. I certify under penalty of perjury that the foregoing is true and correct.

Angelica Fortin
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Legal Secretary