

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

UNITED FARM WORKERS OF	)	Case No. 2023-RM-001-VIS
AMERICA,	)	
	)	
Petitioner Labor Organization,	)	
	)	ORDER DIRECTING HEARING ON
and	)	OBJECTIONS TO CERTIFICATION
	)	AND DISMISSING OBJECTIONS TO
DMB PACKING CORP. dba THE	)	CERTIFICATION
DIMARE COMPANY,	)	
	)	ORDER DENYING INTERIM
Employer.	)	APPEAL AND REQUEUST FOR STAY
	)	
	)	Admin. Order No. 2023-11
	)	
	)	(November 3, 2023)
	)	

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On September 12, 2023,<sup>1</sup> the United Farm Workers of America (the UFW) filed a majority support petition pursuant to Labor Code section 1156.37<sup>2</sup> seeking certification as the bargaining representative of a unit of agricultural employees employed by DMB Packing Corp dba the DiMare Company (DiMare). This is the first petition filed pursuant to the recently enacted section 1156.37, which creates a process by which labor organizations may be certified as exclusive bargaining representatives by submitting authorization cards or petitions showing evidence of employee support.

Pursuant to section 1156.37, subdivision (e)(1), the Regional Director of the Visalia Regional Office (Region) of the Agricultural Labor Relations Board (ALRB

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<sup>1</sup> All subsequent dates are in 2023 unless otherwise indicated.

<sup>2</sup> All subsequent statutory references are to the California Labor Code unless otherwise indicated.

or Board) commenced an investigation into the majority support petition and proof of majority support. DiMare submitted a list of employees and the Regional Director created an eligibility list of employees eligible to sign cards in support of the majority support petition based upon the information received from DiMare.<sup>3</sup> On September 19, the Regional Director issued a letter finding that the UFW had failed to provide proof of majority support. Pursuant to section 1156.37, subdivision (e)(4), the UFW was given 30 days to submit additional support (sometimes referred to as a “cure” period).

On October 20, after the conclusion of the cure period, the Regional Director issued a Regional Director’s Tally (Tally). The Tally reported that, during the cure period, the UFW had asserted that there were 49 employees who were eligible to vote who were not included on the initial September 19 eligibility list. In response, the Regional Director conducted an investigation into the eligibility of these individuals and concluded that there were 29 eligible employees who were not included on the eligibility list and should be added. The October 20 tally showed that the Region received 151 authorization cards in favor of the majority support petition out of a total of 297 eligible employees. Accordingly, the Regional Director found proof of majority support established.

On October 24, the ALRB’s Executive Secretary issued the Certification of Investigation of Validity of Majority Support Petition and Proof of Majority Support

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<sup>3</sup> After DiMare submitted the employee list, the UFW claimed that there were four eligible employees omitted from it. The Regional Director determined that two of these individuals were eligible and added them to the list. The Regional Director also removed the names of four ineligible individuals from the list.

(Certification). Shortly before the Certification issued, 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). In the Interim Appeal, DiMare argued that the Regional Director exceeded her authority by adding names to the eligibility list. DiMare requested that that the Board stay the Certification pending Board review of the contested authorization cards. The UFW filed an objection to the Interim Appeal that same day.

On October 30, DiMare filed objections to the Certification pursuant to section 1156.37, subdivision (f)(1). The UFW filed objections as well, which objections it characterized as "conditional" pending the outcome of DiMare's objections.

#### **I. DiMare's Interim Appeal and Request for Stay**

DiMare's Interim Appeal and request for stay are denied. Under section 1156.37, subdivision (e)(3), after the regional director determines a petition is valid and proof of majority support has been established, the Board "shall immediately certify the labor organization as the exclusive bargaining representative of the employees in the bargaining unit" and the duty to bargain "commences immediately after the labor organization is certified." Section 1156.37, subdivision (f)(1) states that objections may be filed "[w]ithin five days *after* the Board certifies a labor organization through a majority support election . . . ." (Emphasis added.) That subdivision also states that the filing of objections "shall not diminish the duty to bargain" or delay the time period for requesting Mandatory Mediation and Conciliation (MMC). Within the context of these statutory provisions, the Board has no authority to stay a certification on the basis of

claims concerning the processing of a majority support petition when those arguments are subject to the certification objection process set forth in the statute.

Similarly, it would be incorrect to allow a party to avoid the procedural and substantive provisions of the objection process set forth in section 1156.37, subdivision (f) by asserting what would otherwise be objections in the form of an “interim appeal” or other similar filing. Under the statute, allegations that the majority support procedure “was conducted improperly” or that “[i]mproper conduct” affected the results of the process properly are grounds for post-certification objections. (§ 1156.37, subd. (f)(1)(C), (D).) This encompasses claims such as those DiMare asserts here, i.e., that a union should not be certified through a majority support petition because the regional director processed the petition in an improper or erroneous manner. Thus, the Board rejects DiMare’s Interim Appeal as procedurally improper and invalid. In fact, after filing the Interim Appeal, DiMare did file objections to the Certification. The Board turns now to those.

## **II. DiMare’s Objections to the Certification**

Under section 1156.37, subdivision (f), within five days after the Board certifies a labor organization, any person may file objections to the Certification on any of the following grounds:

- (A) Allegations in the Majority Support Petition were false.
- (B) The board improperly determined the geographical scope of the bargaining unit.
- (C) The majority support election was conducted improperly.

(D) Improper conduct affected the results of the majority support election.

Upon receipt of objections, the Board may administratively rule on the objections or order a hearing to rule on the objections. (§ 1156.37, subd. (f)(2).) After a hearing, if the Board finds that any of the allegations of the grounds set forth above are true, the Board shall revoke the certification.

**A. Objections to be Set for Hearing**

The Board has determined that Employer Objections 1, 2, 5, 6, and 8 raise issues that are appropriate to refer to a hearing. As discussed further below, these objections generally relate to the Regional Director's handling of claims asserted by the UFW during the post-September 19 cure period that there were eligible employees omitted from the employer list who should have been added. DiMare contends that the Regional Director's handling of these matters was inconsistent with the requirements of the statute or otherwise erroneous. As we explain further below, we provide analysis for each objection and state the basis for dismissing or setting each objection for hearing. However, as a threshold matter, we note that one of DiMare's underlying arguments in each of the five objections concerning the eligibility list relates to the Regional Director's authority to modify the list. DiMare contends the Regional Director was entirely precluded from adding eligible employees to the eligibility list after the initial tally of support on September 19. Such a rule is not stated in section 1156.37, subdivision (e)(4) or anywhere else in the statute. Subdivision (e)(4) refers to the submission of "additional support," which is not inconsistent with the submission of support from

eligible employees erroneously omitted from the version of the eligibility list utilized for the initial count. We reject DiMare's contention that references to the "employer's list" in the statute mean that the employer could unilaterally exclude (whether deliberately or through mistake) otherwise eligible employees from the list provided to the Regional Director and those employees would thereby be disenfranchised with no recourse. To be clear, we make no findings here regarding the alleged omission of employees from the employer's list or the reasons for any omissions that allegedly occurred. But to allow the arbitrary disenfranchisement of employees omitted either intentionally or inadvertently from an employer's list is a result that cannot be tolerated under our Act. Thus, we hold 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. Accordingly, 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.

This is the first case under the new statutory majority support petition process. The hearing of these objections identified above and described more fully below will 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.<sup>4</sup>

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<sup>4</sup> The Board recognizes that the Regional Director and regional staff were required to apply this new statutory process without the benefit of established precedents

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).<sup>5</sup> 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.

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

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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.

<sup>5</sup> The Board’s regulations are codified at California Code of Regulations, title 8, section 20100 et seq.

issues of first impression under this statute, the Board has concluded that this objection should be set for hearing.

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.

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.

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 Board has determined that this objection should be set for hearing.

However, the Board dismisses and does not set for hearing contentions made in DiMare's argument in support of this objection that the Regional Director's decision not to disclose to DiMare the number of valid cards submitted by the UFW for the initial count conducted on or around September 19 was erroneous or objectionable. No such requirement exists in the statute entitling the employer to a pre-cure period tally of a labor organization's valid employee support, nor does DiMare cite any.

## **B. Objections Dismissed**

Employer Objection 3: In this objection, DiMare objects to "*all* authorization cards and signatures on any petitions submitted by the UFW as evidence of majority support on the grounds that the authorization cards or petitions failed to include information sufficient to inform the workers of what they were signing." (Emphasis in original.) DiMare admits that it has not seen any of the authorization cards to which it is objecting but asserts that there is no evidence that the cards that were submitted to the Regional Director informed employees that signing the card was equivalent to a vote in favor of the UFW, or that the signature on the card was valid for one year and not

revokable.

None of these requirements are stated in the statute. While DiMare cites provisions in the Board's *proposed* regulation designed to implement section 1156.37, that proposed regulation is just that; it has not yet been the subject of formal rulemaking and has no legal force or effect. Moreover, section 1156.37, subdivision (e)(2) clearly states that determinations regarding the validity of proof of support offered by a labor organization are "final and not subject to appeal or review." Further, DiMare produces no evidence of bias or prejudice by regional staff conducting the investigation of the majority support petition here. (See § 1145 ["All employees appointed by the board shall perform their duties in an objective and impartial manner without prejudice towards any party subject to the jurisdiction of the board"].) Put simply, we have no reason to doubt the integrity of the regional staff's investigation regarding the validity of the employee support produced by the UFW in accordance with the statute. (§ 1156.37, subd. (e)(1).)

Moreover, in evaluating objections to elections, the Board has long held that objecting parties bear the burden of meeting certain threshold prerequisites before the party will be entitled to a formal evidentiary hearing. (*George Amaral Ranches* (2012) 38 ALRB No. 5, p. 5.) Among these is the requirement of supporting election objections with declarations stating facts sufficient to support the objections. (*Ibid.*) The facts stated in the declarations must be within the personal knowledge of the declarant. (*Premiere Raspberries, LLC* (2017) 43 ALRB No. 2.) The objecting party bears the burden of showing why the election should not have been certified. (*Ruline*

*Nursery Co. v. ALRB* (1985) 169 Cal.App.3d 247, 254.)

In the case of Employer Objection 3, DiMare offers no declaratory support for its allegation that the authorization cards were deficient. Indeed, DiMare admits that it is unaware of the content of the cards, meaning that the objection to their content is based purely on speculation. For this reason, the Board dismisses this objection.

Employer Objection 4: In this objection, DiMare objects that the Regional Director “evidently did not compare the signatures on the authorization cards or petitions against the signature exemplars provided by DiMare.” DiMare argues that the Regional Director “failed to present any information” during the majority support petition process concerning how authorization cards and/or signatures were authenticated. As with Employer Objection 3, DiMare does not offer any evidentiary support for its contention and it appears to be based purely on speculation. Accordingly, the Board dismisses this objection. (*Dole Berry North* (2013) 39 ALRB No. 18, p. 4 [objection alleging forgery of signatures dismissed where objecting party failed to submit declaration from someone with personal knowledge that any signature was forged].)

Employer Objection 7: In this objection, DiMare asserts that the Regional Director “violated the Administrative Procedure Act when she exceeded her authority by creating an unprecedented underground regulation.” It is established that, in the absence of express statutory directives, the Board may discharge its delegated responsibilities either through general rule or by ad hoc adjudication and the decision “lies primarily in the informed discretion of the administrative agency.” (*ALRB v. Superior Court* (1976) 16 Cal.3d 392, 413, quoting *SEC v. Chenery Corp.* (1947) 332 U.S. 194.) In this case,

there was an absence of statutory and other authority to guide the Regional Director in handling the claims asserted by the UFW that there were eligible employees not included on the initial eligibility list. As the Board has no authority to decline to apply the Act, the Board could not do what DiMare seems to suggest and simply decide that section 1156.37 is “not suitable for enforcement at this time.” Rather the Regional Director appropriately proceeded to investigate and determine the particular matters before her, exercising her discretion concerning the processing of the issues presented. DiMare contends that the process used by the Regional Director was erroneous, a contention that, as a matter of first impression, the Board has set for hearing to allow the issue to be developed and argued. However, the Regional Director did not create any underground regulation. This objection is dismissed.

Employer Objection 9: In this objection, DiMare asserts that the UFW “acted in bad faith to add authorization cards when they accused DiMare and its [farm labor contractors] of paying employees in cash.” (bracketed material added.) DiMare states that the UFW asserted that certain employees were compensated in cash and therefore did not appear on DiMare’s payroll records “solely for altering the outcome of the final tally.” DiMare argues that the UFW’s contention that employees were paid in cash was “baseless” and contradicted by DiMare’s own witnesses and evidence.

Beyond the mere assertion that the claim was false, DiMare does not offer any evidence of the UFW’s bad faith. Furthermore, the UFW had no ability to unilaterally alter the eligibility list through any such claim but had to submit such claims to the Regional Director who investigated the claims and added some, but by no means all, of the

employees identified by the UFW to the eligibility list. Employer Objection 9 is dismissed.

Employer Objection 10: In this objection, DiMare asserts that the UFW “acted in bad faith when they filed an unsupported Unfair Labor Practice charge accusing DiMare of failing to provide the ALRB and the UFW with correct employee addresses and phone numbers.” The unfair labor practice charge referred to is the charge in case no. 2023-CE-026-VIS, filed on October 11, 2023, in which the UFW alleged that DiMare failed to provide correct employee addresses and telephone numbers in connection with the majority support petition and told workers they did not have to provide correct addresses or telephone numbers because the UFW would “just take the workers’ money.” The UFW requested remedies, including certification pursuant to section 1156.37, subdivision (j). DiMare argues that the charge is “clearly frivolous” because it fails to provide specifics concerning the alleged unlawful conduct, and because it is “blatantly false” as a matter of substance.<sup>6</sup>

While DiMare contends that the allegations of the charge are false, it offers no evidence of bad faith on the part of the UFW. Furthermore, the ALRB’s General Counsel is vested with “final authority” over the investigation of unfair labor practice charges and the issuance of complaints. (Lab. Code, § 1149.) The determination of whether the charge has any merit is the subject of the General Counsel’s investigation,

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<sup>6</sup> DiMare also argues that section 1156.37, subdivision (j) is unconstitutional. As discussed below in connection with Employer Objection 14, the Board has no authority to declare a statute unconstitutional.

which may ultimately result in dismissal of the charge or the issuance of a complaint, which is adjudicated in a formal hearing. Finally, DiMare fails to explain how the filing of the unfair labor practice charge had any effect whatsoever on the majority support election. This objection is dismissed.

Employer Objection 11: In this objection, DiMare asserts that the Regional Director “acted inappropriately when she refused to apprise DiMare of the circumstances of its investigation.” DiMare explains that this objection is based on the allegation that the Regional Director disclosed the results of the initial tally to the UFW but did not provide this same information to DiMare. DiMare was informed of the final tally after the conclusion of the cure period. DiMare cites no authority stating that it had a right to the results of the initial tally. Conversely, as DiMare concedes, section 1156.37, subdivision (e)(2) requires the Board to return proof of majority support it finds invalid along with an explanation of why the proof of support was found invalid to the labor organization, but not the employer. Furthermore, DiMare fails to explain how being denied the knowledge of how many valid cards the UFW submitted for the first tally prejudiced DiMare or affected the election.

Employer Objection 12: In this objection, DiMare asserts that the “signatures on the cards or petitions supporting the Majority Support Petition were obtained through fraud, duress, coercion, and other unlawful conduct.” DiMare argues that, both prior to the initial tally and during the cure period, UFW representatives subjected “numerous employees” to “overt fraud, coercion, duress, and other illegal conduct” as a part of the UFW’s effort to gain majority support. DiMare asserts that

some employees were offered money or other benefits to sign authorization cards.

DiMare alleges that a UFW representative asked the wife of another individual to sign an authorization card on the individual's behalf although she had informed the UFW that the individual was not eligible to vote. DiMare alleges that other employees were harassed or intimidated by UFW representatives who pressured employees to sign authorization cards, repeatedly visited employees' homes, or waited outside employees' homes.

Finally, DiMare alleges that there is an absence of evidence that the authorization cards were written in a language employees could understand.

DiMare offered four declarations in support of this objection. Two of these (Cortez and Higareda) are declarations of a DiMare supervisor and the principal of one of DiMare's farm labor contractors in which the declarants state that they spoke to employees who told them that UFW representatives came to their houses and offered money for them to sign cards and/or harassed and pressured them to sign. The other two declarations (Miranda and Orozco) were submitted in Spanish without the proposed English translations that are required by the Board's regulations. (Board reg. 20150.) However, these declarations, like the English language declarations, consist of statements by supervisors relating the hearsay statements of other individuals.

As discussed above, the Board has long held that election objections will not be referred for hearing where they are not supported by declarations stating facts within the personal knowledge of the declarants. Objections supported with hearsay evidence do not meet this standard. (*Coastal Berry Co., LLC* (2000) 26 ALRB No. 1, p. 98 [objection alleging Board agent misconduct dismissed where supporting declaration

was “based entirely on hearsay”]; *GH&G Zysling Dairy* (1993) 19 ALRB No. 17, pp. 5-6 [objection based on hearsay declaration properly dismissed].) Even in other contexts the Board has required declarations be based on personal knowledge or will not be considered. (*South Lakes Dairy Farms* (2013) 39 ALRB No. 2, p. 10 [“motions filed before the Board in which facts not in the record are alleged should be accompanied by a declaration filed under penalty of perjury by a person with personal knowledge of those facts”]; *Gerawan Farming, Inc.* (June 9, 2017) ALRB Admin. Order No. 2017-06, pp. 6-7, citing *Bozzi v. Nordstrom, Inc.* (2010) 186 Cal.App.4th 755, 761 [“Declarations must show the declarant’s personal knowledge and competency to testify, state facts and not just conclusions, and not include inadmissible hearsay or opinion”] and *Gilbert v. Sykes* (2007) 147 Cal.App.4th 13, 26 [“declarations that lack foundation or personal knowledge, or that are argumentative, speculative, impermissible opinion, hearsay, or conclusory are to be disregarded”].) Finally, DiMare’s contention that cards were written in a language that some employees could not understand is based on speculation.

Because DiMare failed to support Employer Objection 13 with admissible declaratory evidence, it is dismissed.

Employer Objection 13: In this objection, DiMare asserts that the Regional Director “acted inappropriately when she worked in lock step with the UFW to conceal allege evidence of additional employees that allegedly belonged on the eligibility list.” The arguments made by DiMare in support of this objection mirror the arguments made in connection with Employer Objections 2 and 8, namely that the Regional Director allegedly did not disclose evidence to DiMare in a timely manner and allegedly did not

give DiMare adequate time to present its own evidence.<sup>7</sup> The Board has set those objections for hearing. Employer Objection 13 is, however, distinguished from those other two objections by the allegation made that the Regional Director “worked in lock step” with the UFW. To the extent that this allegation is intended to raise the issue of improper bias towards or collusion with the UFW, DiMare presents no evidence of such. (See § 1145; Civ. Code, § 3548; Evid. Code, § 664.) This objection is dismissed.

Employer Objection 14: In this objection, DiMare asserts that “California Labor Code section 1156.37, subdivision (j) is unconstitutional on its face.” The Board lacks the authority to declare a statute unconstitutional or refuse to enforce a statute on constitutional grounds unless an appellate court has ruled the statute unconstitutional. (Cal. Const., art. 3, § 3.5; *Premiere Raspberries, LLC* (2018) 44 ALRB No. 2, p. 4; *Gerawan Farming, Inc.* (2013) 39 ALRB No. 5, p. 4; *Hess Collection Winery* (2003) 29 ALRB No. 6, pp. 6-7; see *Greener v. Workers’ Comp. Appeals Bd.* (1993) 6 Cal.4th 1028, 1038 [administrative agency must comply with a statute until an appellate court has considered and upheld a challenge to it].) Accordingly, the Board dismisses this objection.

### **III. The UFW’s Conditional Objections**

The UFW filed three objections, which it labeled “[Conditional] Objections to Employer Misconduct During Majority Support Petition Campaign.” (Bracketed

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<sup>7</sup> DiMare also argues that the Regional Director did not disclose the number of valid cards submitted by the union after the initial tally. As discussed above, the Board has dismissed the allegation that this was erroneous or objectionable conduct.

material in original.) The UFW alleges that DiMare failed to provide a complete and accurate employee list, which prevented the UFW from communicating with a large number of employees, that DiMare failed to keep accurate employee lists as required by law, as employees paid in cash were left off the list, and that DiMare polled and interrogated workers about their union support and discouraged employees from supporting the UFW. The UFW requests that its objections be held in abeyance pending the resolution of DiMare's objections. The UFW states that, should DiMare's objections be dismissed, the UFW would withdraw its own objections.

The Board will not assess the merits of the UFW's objections at this time but will proceed with the hearing on DiMare's objections. In the event that any of DiMare's objections are sustained, the Board will consider whether and how to address the UFW's objections.

### **ORDER**

PLEASE TAKE NOTICE that, pursuant to Labor Code section 1156.37, subdivision (f)(2), an investigative hearing in the above-captioned matter shall be conducted on a date and place to be determined. Pursuant to Labor Code section 1156.37, subdivision (f)(2), the investigative hearing shall be conducted within 14 days of the October 30, 2023 filing of the objections. The investigative hearing in the above-captioned matter shall be held and the Investigative Hearing Officer shall evaluate legal arguments and take evidence on Employer Objections 1, 2, 5, 6, and 8 consistent with the Board's directions in this Order. Employer Objections 3, 4, 7, and 9-14 are DISMISSED. The Board takes no action at this time on the "conditional" objections

filed by the UFW. The Board will consider whether and how to address the UFW's objections, as necessary, after the determination of DiMare's objections.

PLEASE TAKE FURTHER NOTICE that DiMare's Interim Appeal of Regional Director's Tally and Request for Stay of Certification Pending Board Review of Challenged Authorization Cards is DISMISSED.

IT IS SO ORDERED.

DATED: November 3, 2023

VICTORIA HASSID, Chair

ISADORE HALL III, Member

BARRY D. BROAD, Member

RALPH LIGHTSTONE, Member

CINTHIA N. FLORES, Member

VICTORIA HASSID, Chair, dissenting, in part:

I dissent, in part, from the majority with respect to how the Board should treat the "conditional" objections filed by the UFW. As detailed further below, and similarly to the Board's approach to DiMare's Interim Appeal and Request for a Stay, I

do not believe the Board has statutory or regulatory authority to review a filing of conditional objections.

The UFW cites Labor Code section 1156.37, subdivisions (f)(1) and (j), and Board regulation 20365 as providing the statutory and regulatory basis for its filing. The plain language of both the statute and regulation show that neither provides a method for objections to a majority support petition or the investigation and processing of such a petition. The Board regulation, entitled “Post-Election Objections,” clearly pertains to objections filed after a secret-ballot election conducted pursuant to Labor Code section 1156.3. (See Lab. Code, § 1156.3, subd. (e).) Indeed, Board regulation 20365, subdivision (a) expressly states that “[w]ithin five days after an election, any person may, pursuant to Labor Code section 1156.3(e), file with the Board a signed petition asserting that allegations made in the election petition filed pursuant to Labor Code section 1156.3(a) were incorrect ... or objecting to the conduct of the election or conduct affecting the results of the election.” By its own plain language, this regulation clearly relates to objections filed pursuant to Labor Code section 1156.3 after a secret-ballot election has been held. It does not relate to majority support petitions under section 1156.37. In fact, the Board has not yet adopted regulations governing objections filed pursuant to this new statute.

In turn, Labor Code section 1156.37, subdivision (j) provides:

If an employer commits an unfair labor practice or misconduct, including vote suppression, during a labor organization’s Majority Support Petition campaign, and the employer’s unfair labor practice or misconduct would render slight the chances of a new majority support 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.

This section provides a process where a labor organization may assert that an unfair labor practice or misconduct impacted a majority support campaign so significantly that it "would render slight the chances of a new majority support campaign reflecting the free and fair choice of employees," thus warranting the certification of the petitioning labor organization as the bargaining representative. This provision provides an avenue for a labor organization to be certified; however, it does not provide an avenue for objections to a review of a majority support petition.

Turning our focus to section 1156.37, subdivision (f)(1), I do not find that it provides a mechanism for "conditional objections." Subdivision (f)(1) states that "[w]ithin five days after the board certifies a labor organization through a majority support election, any person may file with the board a petition objecting to the certification on one or more of the following grounds ...."

I agree that a plain reading of Labor Code section 1156.37, subdivision (f)(1) provides that *any* party (including a labor organization) has the ability to file objections to a majority support petition if a labor organization is certified.<sup>8</sup> However, I

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<sup>8</sup> The statute suggests that parties can only object if a labor organization is certified, not in the event if a labor organization is not certified. Subdivision (f)(2) further

do not believe the statute allows for a conditional filing or allows the Board to hold such objections in abeyance.

I appreciate that this process presents multiple issues of first impression and that the UFW may be trying to test the Board's interpretation of this new process and also ensure they are preserving their rights. I dissent in this instance because I do not think the statute allows for an interpretation where any party can file conditional objections. In the event that a certified labor organization wishes to address disputes about the process or alleged misconduct I think the statute provides two possible paths: 1) through the filing of an unfair labor practice regarding misconduct or other violations of the Act that impacted the majority support petition process , or 2) in the event a party raises objections and those are set for hearing, through the presentation of evidence to argue against such objections.

Should the UFW, or any party, believe there needs to be such a process to ensure a certified labor organization can file objections I think this could best be addressed by future legislation.

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states that if the Board sets objections for hearing, it shall notify the objecting party "and the labor organization whose certification is being challenged." Ultimately, this procedural circumstance is not before us today, but it does indicate that section 1156.37, subdivision (f) may need further clarifying amendments to expressly allow parties to file objections when there isn't a certification.