STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

| | | |
|---|---|---|
| UNITED FARM WORKERS OF AMERICA,<br><br>Petitioner Labor Organization,<br><br>and,<br><br>HO SAI GAI FARMS, INC.,<br><br>Employer. | ) | Case No. 2024-RM-003<br><br>ORDER:<br><br>(1) SETTING FOR HEARING OBJECTION NOS. 1, 2, AND 4; AND<br><br>(2) DISMISSING OBJECTION NOS. 3, 5, AND 6<br><br>Administrative Order No. 2024-09 (April 18, 2024) |

On March 27, 2024, petitioner United Farm Workers of America (UFW) filed a majority support petition in the Visalia Regional Office of the Agricultural Labor Relations Board (ALRB or Board) under section 1156.37 of the Agricultural Labor Relations Act (ALRA or Act)[1] seeking to be certified as the exclusive collective bargaining representative of the agricultural employees of employer Ho Sai Gai Farms, Inc. (HSG). Following an investigation of the petition and proof of support submitted by the UFW, the regional director concluded the number of eligible agricultural employees in the bargaining unit to be 114 and that the UFW submitted 75 valid authorization cards, thereby establishing majority support.

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

On April 8, 2024, HSG timely filed a petition objecting to the certification. (Lab. Code § 1156.37, subd. (f)(1).) HSG's objections are as follows:

1. The allegations in the Majority Support Petition (MSP) were false as the employees in question are not agricultural employees, but rather are employees subject to the jurisdiction of the National Labor Relations Board (NLRB).

2. The unit described in the MSP by the UFW is inappropriate as it seeks to include employees who are not subject to the jurisdiction of the Agricultural Labor Relations Board (ALRB), but rather are employees under the National Labor Relations Act (NLRA).

3. The regional director failed to properly investigate the jurisdictional issues which were timely raised by HSG.

4. The unit in question is not within the ALRB's jurisdiction, but rather the unit is subject to NLRB jurisdiction.

5. The regional director's report fails to state whether the regional director compared signatures on the UFW's authorization cards with the signatures on the W-4 forms submitted by HSG.

6. There was misconduct by the UFW in securing authorization cards and the "non-election" was not held under laboratory conditions.

As discussed below, the Board sets for hearing objection nos. 1, 2, and 4. The remaining objections (nos. 3, 5, and 6) are hereby dismissed. [2]

[2] On April 17, 2024, the General Counsel filed a Notice of Related Unfair Labor Practices and Request for Additional Time to Determine Whether Consolidation is Appropriate. We deny the request because the allegations of unfair labor practice charge nos. 2024-CE-033, 2024-CE-034, 2024-CE-036, and 2024-CE-039 do not mirror the allegations of any majority support certification objections filed by the same party. (*Wonderful Nurseries, LLC* (Apr. 12, 2024) ALRB Admin. Order No. 2024-08, p. 14.)

## PROCEDURAL BACKGROUND

The UFW filed the underlying majority support petition in the Board's Visalia Regional Office on March 27, 2024. HSG filed an unsigned, undated response to the petition on March 29, contending it employed 115 agricultural employees in the relevant time-period. Later that day, the regional director requested that HSG immediately comply with Labor Code section 1156.37 by submitting a signed, dated employer response in the proper format, confirmation of the applicable payroll period, and a complete list of HSG's agricultural employees containing the required contact information. On March 30, HSG submitted a signed, dated employer response which indicated 120 agricultural employees worked during the relevant pay period.

The regional director removed five individuals from the list of agricultural employees because she concluded that they worked as statutory supervisors for HSG.[3] The regional director removed one individual from the eligibility list because she concluded that he did not work for HSG as an agricultural employee during the relevant period. The regional director made no determination as to whether three individuals included on the March 29, 2024 list as "Administrative Employees" should be classified as agricultural workers.[4]

---

[3] HSG did not dispute that three of the individuals removed by the regional director were statutory supervisors and thus should be removed from the list.

[4] The RD requested to interview these individuals, but HSG did not respond to this request until nearly 4:00pm on April 2, 2024, the date the tally had to be issued, so they were not interviewed as part of the regional director's investigation. The determination of the status of these employees would not have changed the outcome of the regional director's tally.

On the morning of March 29, prior to submitting its response to the majority support petition, counsel for HSG sent the regional director a letter via email and argued that the ALRB lacked jurisdiction over the workers subject to the majority support petition because they routinely worked in HSG's packing and cooling facilities and handled outside farmers' produce. HSG further contended that a large percentage of HSG's employees engage in both harvesting and packing and thus should not be considered agricultural employees. HSG cited *Camsco Produce Co., Inc*. (1990) 297 NLRB 905 in support of its position.

The regional director conducted an investigation regarding HSG's jurisdictional argument, and on March 30 requested documents and information regarding outside produce handled by HSG relevant to the legal argument it raised the previous day. She further requested to interview the chief executive officer (CEO) of HSG regarding HSG's cooling and packing facilities and the handling of outside produce. According to the regional director, HSG did not produce any documentation to support its position, but CEO Richard Gould did speak to regional staff on April 1.

Based on interviews with several agricultural employees and the interview with CEO Gould, the regional director concluded that HSG employees did not regularly handle outside produce in their packing operations, but rather the handling of outside produce occurred only when HSG had insufficient supply. In addition, she did not find evidence that all agricultural employees regularly worked in the packing and cooling department. Rather, a small and discreet group of workers typically worked in that department.

Based on the above determinations, the regional director found the appropriate bargaining unit to include 114 eligible employees.

Regarding the UFW's proof of support, the union submitted 92 authorization cards with its petition. Over the ensuing days while the petition remained pending with the region, the UFW submitted an additional 2 cards on March 28, and 19 cards on April 2, for a total of 113 submitted authorization cards.

The regional director's findings on the issues described above are set forth in a tally and accompanying declaration filed by the regional director on April 2. Based on the regional director's determination the UFW submitted 75 valid authorization cards out of a total of 114 eligible employees in the appropriate bargaining unit, the regional director found majority support to exist.

On April 3, 2024, the executive secretary issued a certification designating the UFW as the exclusive collective bargaining representative of HSG's agricultural employees, thereby immediately triggering HSG's duty to bargain with the UFW. (Lab. Code, § 1156.37, subd. (e)(3).)

## DISCUSSION

### I. HSG's Objections

#### A. Applicable Legal Standards

Labor Code section 1156.37, subdivision (f)(1) states any person may file objections to a labor organization's certification after a determination of majority support based on 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.

If an objections petition is filed, "the board may administratively rule on the petitioner's objections or may choose to conduct a hearing to rule on the petitioner's objections." (Lab. Code, § 1156.37, subd. (f)(2).) Although the Board does not yet have regulations in place to implement the statutory majority support petition process, our review of objections in this context is guided by established principles.

In the context of secret ballot elections, the California Supreme Court has upheld the Board's conditioning of a full evidentiary hearing upon the presentation of objections and factual declarations that establish a prima facie case of a valid basis for objection. (*Premiere Raspberries, LLC* (2017) 43 ALRB No. 2, p. 2; *George Amaral Farms* (2012) 38 ALRB No. 5, p. 5, citing *Lindeleaf v. ALRB* (1986) 41 Cal.3d 861, 874-875; *J.R. Norton Company, Inc. v. ALRB* (1979) 26 Cal.3d 1, 17.) The majority support petition statute recognizes the Board's authority and discretion to administratively dismiss objections without a full evidentiary hearing. (Lab. Code, § 1156.37, subd. (f)(2).)

The objecting party bears the burden of making a prima facie showing an error, impropriety, or misconduct occurred sufficient to warrant revocation of the labor organization's certification. (*Dessert Seed Co. v. Brown* (1979) 96 Cal.App.3d 69, 73;

*Radovich v. ALRB* (1977) 72 Cal.App.3d 36, 45.) This burden is a heavy one and requires a showing not only that improprieties occurred but that they were "sufficiently material" to have affected the outcome of the process. (*Gerawan Farming, Inc*. (2018) 44 ALRB No. 10, p. 4; *Oceanview Produce Co*. (1994) 20 ALRB No. 16, p. 6.) Indeed, Labor Code section 1156.37, subdivisions (e)(3) and (f)(2), taken together, evince the Legislature's intent to establish "a presumption in favor of certification with the burden of proof resting with the objecting party to show why the election should not be certified." (*Ruline Nursery Co. v. ALRB* (1985) 169 Cal.App.3d 247, 254 [discussing Labor Code section 1156.3, subdivisions (c) and (d)], citing *California Lettuce Co*. (1979) 5 ALRB No. 24, p. 4 ["the legislature has in effect established a presumption in favor of certification and indicated that the burden of proof rests upon the party objecting thereto"].)

In determining whether to set objections for hearing, the Board does not endeavor to assess the merits of the party's allegations and supporting evidence. Such factfinding appropriately takes place following development of an evidentiary record. Board regulation 20365, subdivision (c)(1) states "[a] party objecting to an election on the grounds that the Board or the regional director improperly determined the geographical scope of the bargaining unit, or that the allegations made in the petition filed pursuant to Labor Code section 1156.3(a) were incorrect, shall include in its petition a detailed statement of the facts and law relied upon."[5] Board regulation 20365, subdivision (c)(2) requires the party objecting to the conduct of the election or to

[5] The Board's regulations are codified at California Code of Regulations, title 8, section 20100 et seq.

misconduct allegedly affecting the results of the election to provide declarations setting "forth facts which, if uncontroverted or unexplained, would constitute sufficient grounds for the Board to refuse to certify the election."

Declarations submitted in support of objections alleging improper conduct in the processing of a majority support petition or by a party must meet basic requirements before the Board will order a hearing. (*Premiere Raspberries, LLC*, *supra*, 43 ALRB No. 2, p. 2; see *Gerawan Farming, Inc*. (June 9, 2017) ALRB Admin. Order No. 2017-06, pp. 6-7.) Declarations based on hearsay, facts not within the personal knowledge of the declarant, and speculation 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 dismissed]; see also *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*., *supra*, ALRB Admin. Order No. 2017-06, pp. 6-7; *Gerawan Farming, Inc*. (May 18, 2017) ALRB Admin. Order No. 2017-03, p. 17 [disregarding anonymous declaration because it lacked indicia of reliability and trustworthiness]; *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"]; *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"].)

When it is alleged a party has engaged in misconduct, our precedent also has required the objecting party to establish such misconduct affected the outcome of the election. (*Gerawan Farming, Inc*., *supra*, 44 ALRB No. 10, p. 4; *Premiere Raspberries, LLC*, *supra*, 43 ALRB No. 2, pp. 6-7.) This "outcome determinative" standard thus requires a showing that the alleged misconduct affected a sufficient number of employees or portion of the workforce to affect the outcome or result of the process. (*Gerawan Farming, Inc*., *supra*, 44 ALRB No. 10, p. 4; *Premiere Raspberries, LLC*, *supra*, 43 ALRB No. 2, pp. 10-12 [Board will not presume or infer that misconduct was so widespread or pervasive as to have affected the outcome of an election absent proper evidence].) Labor Code section 1156.37, subdivision (f)(1)(D) codifies this standard in the majority support petition context.

**B. Objections Set for Hearing (Nos. 1, 2, and 4)**

For the reasons that follow, we set for hearing objection nos. 1, 2, and 4. These objections relate to HSG's argument that HSG employees working in HSG's cooling and packing shed are not subject to ALRB jurisdiction because they regularly handle produce from growers other than HSG. In addition, HSG states that the field employees also work in the packing shed on a regular basis. In other words, HSG argues that these workers are not agricultural employees, and therefore are subject to NLRB

jurisdiction, not ALRB jurisdiction.[6] HSG raised this issue in its employer response to the petition and by email to the regional director during the investigation.

In secret ballot elections, any party or a Board agent may challenge the eligibility of a prospective voter based on the grounds that the individual is not an agricultural employee of the employer as defined by Labor Code section 1140.4, subdivision (b). (Board reg. 20355, subdivision (a)(7).) While the majority support process set forth in Labor Code section 1156.37 provides for an objections procedure and does not set forth a separate process for post-certification challenges to eligibility, an allegation that the regional director erred in determining the appropriate bargaining unit falls under the grounds for objections set forth in Labor Code section 1156.37, subdivisions (f)(1)(A) and (C).

The ALRA only applies to agricultural employees. Labor Code section 1140.4, subdivision (a) defines agriculture as follows:

> The term "agriculture" includes farming in all its branches, and, among other things, includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities (including commodities defined as agricultural commodities in Section 1141j(g) of Title 12 of the United States Code), the raising of livestock, bees, furbearing animals, or poultry, and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market and delivery to storage or to market or to carriers for transportation to market.

[6] ALRA section 1140.4, subdivision (b) limits the jurisdiction of the ALRB to employees who are excluded under the NLRA. The two jurisdictions are mutually exclusive. If a matter is arguably covered by the NLRA, principles of federal preemption will prevent the assertion of jurisdiction by the ALRB. (*San Diego Building Trades Council et al. v. Garmon et al*. (1959) 359 U.S. 236; *Gerawan Farming Co*. (1995) 21 ALRB No. 6; *Warmerdam Packing Co*. (1998) 24 ALRB No. 2, ALJ Dec. at p. 14.)

Under this definition, "agriculture" has a primary and secondary meaning. The primary meaning refers to actual farming operations, such as cultivation, tilling, growing and harvesting of agricultural commodities. The secondary meaning includes any practices which are performed by a farmer or on a farm as an incident to or in conjunction with such farming operations. A secondary practice that is not "incidental" to the farmer's own operations is not "agriculture" within the scope of the definition. (*Farmers Reservoir v. McComb* (1948) 337 U.S. 755, 766, fn 15.)

The Board has found individuals who work in cooling or packing sheds to be engaged in secondary agriculture because such duties involve the preparation of the commodities for market (see 29 C.F.R. § 780.150), and thus are incident to or in conjunction with the employer-farmer's primary agricultural operations. (*Andrews Distribution Co., Inc.* (1988) 14 ALRB No. 19, p. 9.) The Board has found workers in packing or cooling sheds that are not located on the employer's farm still to be engaged in secondary agriculture, and thus agricultural employees covered by the ALRA, when they handle only their own employer's produce. (*Ibid*.; *Grow Art* (1981) 7 ALRB No. 19, IHE Dec. at p. 18; *R.C. Walter & Sons* (1975) 2 ALRB No. 14, p. 2 [packing shed workers engaged in secondary agriculture, noting they handle grapes grown exclusively by their employer-farmer].) However, the issue of whether packing shed workers are engaged in secondary agriculture becomes more complicated when these workers handle produce from other growers in addition to that of their employer.

In *Camsco Produce Co., Inc*., *supra*, 297 NLRB 905, the NLRB stated that

it would assert jurisdiction over farm packing shed employees if any amount of farm commodities, other than those of the employer-farmer, are regularly handled by the employees. (*Id*. at p. 908.) The NLRB reasoned that an employer-farmer "who handles the products of other producers on a regular basis, however small the quantity may be, has departed from the traditional model of a farmer who simply prepares his own products for market." (*Ibid*.) At the same time, the NLRB recognized that employees of a farmer could still be exempt if they only handle outside products on a rare or emergency basis, such as when a storm destroys a significant part of the crop. The NLRB went on to find the employees in question in *Camsco* were not engaged in secondary agriculture, and thus were not exempt from NLRB jurisdiction, because the evidence showed the employees handled mushrooms produced by a farmer other than their employer, and the employer had not demonstrated that its handling of such mushrooms occurred very rarely, on only an emergency basis. (*Id*. at p. 909.)

There has not been much guidance from the NLRB on the question of what constitutes "regularly." The ALRB has held that where purchases from outside entities were not typical, were undertaken only because of insufficient supply from an employer's own operations, and were avoided whenever possible, this "outside mix" was not regular and therefore the operations were agricultural even under the *Camsco* standard. (*Olsen Farms, Inc.* (1993) 19 ALRB No. 20, p. 5, fn. 8.)

There are also scenarios where employees engage in both agricultural (either under the primary or secondary definitions) and non-agricultural work. In such situations, the NLRB will assert jurisdiction over the nonagricultural work, if it is

"substantial." (See *Olaa Sugar Co.* (1957) 118 NLRB 1442; *Camsco Produce Co., supra*, 297 NLRB 905.)

The ALRB, when faced with the situation where an employee spends only a portion of their work time for a single employer engaged in agriculture, consistently has applied the substantiality test found in "mixed work" cases. (See *Kawahara Nurseries, Inc*. (2010) 36 ALRB No. 3, p. 19; *Artesia Dairy* (2007) 33 ALRB No. 3, pp. 20-21; *Royal Packing Company* (1995) 20 ALRB No. 14; *Warmerdam Packing Company* (1998) 24 ALRB No. 2; *Associated-Tagline, Inc*. (1999) 25 ALRB No. 6; *Sutter Mutual Water Company* (2005) 31 ALRB No. 4.)

The ALRB, like the NLRB, has refrained from specifying a minimum percentage required to find work substantial; however, the NLRB has held that workers who spend less than 15 percent of their time doing the tasks in question could not be said to be engaged in the work a substantial amount of the time. (*NLRB v. Kelly Bros. Nurseries* (2d Cir. 1965) 341 F.2d 433, 438; *Light's Tree Co*. (1971) 194 NLRB 229.) In *Artesia Dairy, supra*, 33 ALRB No. 3, the Board sustained a challenge to the eligibility of an employee of a dairy (i.e., concluded she was not subject to ALRB jurisdiction) who only spent about 16% of her time engaged in agricultural work.

The regional director stated in her tally that based on her interviews with employees and HSG's CEO Gould, she determined that the handling of outside produce in the packing shed was not typical, and only happened when HSG had an insufficient supply of vegetables. She also found that only a small number of workers regularly worked in the packing shed. However, in support of its objections, HSG produced a

declaration by CEO Gould in which he states that HSG cools and packs third-party produce on a regular basis. Attached to Gould's declaration are invoices for the period January 1, 2023, to the present showing that HSG purchased approximately $186,000.00 worth of produce from three outside vendors. Gould also states that HSG field employees regularly work in the packing shed to supplement the labor force there.

The question of whether any individual HSG workers engage in duties that would bring them outside the definition of "agricultural employee" within the meaning of the ALRA presents a material issue of fact; therefore, we set objection nos. 1, 2 and 4 for hearing. A full picture of the duties of the employees alleged not to be agricultural employees must be clearly established at the hearing. HSG will have the burden of producing evidence to support its contentions as to the workers alleged to be non-agricultural employees.

### C. Objections Dismissed

For the reasons that follow, the Board dismisses objection nos. 3, 5, and 6.

**Objection 3**

Contrary to HSG's allegations, the regional director did investigate this issue. She states that she interviewed several workers and that regional staff interviewed HSG's CEO Gould. In fact, counsel for HSG states in his declaration that regional staff spoke to CEO Gould on April 2. The regional director also requested that HSG provide documentation to support its position, but none was received by the region. The record shows that the regional director did investigate the issue when HSG raised it and that she made a determined based on the information she had. While HSG disputes the conclusion

reached by the regional director, such a contention does not support HSG's claim the regional director did not investigate the issue. Accordingly, the Board dismisses this objection.

**Objection 5**

A regional director is not required to use signature exemplars to determine the validity of authorization cards in every case or as a matter of required procedure. Indeed, signatures on authorization cards are presumed valid. (*Wonderful Nurseries, LLC* (Mar. 18, 2024) ALRB Admin. Order No. 2024-04, p. 17; *Camvac International, Inc*. (1988) 288 NLRB 816, 860 [recognizing there is a "presumption is in favor of the validity" of authorization cards], citing *NLRB v. Gissel Packing Co*. (1969) 395 U.S. 575, 607; see *Perdue Farms, Inc*. (1999) 328 NLRB 909, 911; NLRB Casehandling Manual, Part II, Representation Proceedings, § 11027.1 [the validity of authorization cards "should be presumed unless called into question by the presentation of objective evidence"].)

We dismissed a similar objection in *DMB Packing Corp. dba The DiMare Company* (Nov. 3, 2023) ALRB Administrative Order No. 2023-11, page 11. In that case, the employer failed to support its objection demanding the use of signature exemplars by any evidence demonstrating a basis to do so. An allegation that regional staff improperly conducted the majority support petition process must be supported by proper evidence. (Cf. Board reg. 20365, subd. (c)(2).)

Similarly, HSG did not offer any declarations or other evidence in support of this objection. Accordingly, the Board dismisses this objection.

**Objection 6**

HSG submitted a declaration by Janira Vasquez, a paralegal at Sagaser, Watkins & Wieland in support of this objection. No other declaratory support was provided. Vasquez states that she spoke in person with several employees from HSG as well as from farm labor contractor Lencioni Farm Services. Vasquez describes several conversations in which employees told her that UFW representatives had contacted them between March 29 and April 3, and that they did not feel comfortable during the interactions, that they felt pressured to sign UFW documents, or did not understand what they were being asked to sign.

Vasquez's declaration is insufficient to support HSG's objection no. 6 because it is based entirely on hearsay. (See, *infra*, at p. 8; *Wonderful Nurseries, LLC*, *supra*, ALRB Admin. Order No. 2024-04, pp. 10-11.)

Accordingly, objection no. 6 is dismissed.

**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 and time to be determined. The investigative hearing officer shall evaluate legal arguments and take evidence on HO SAI GAI FARMS, INC.'s objection nos. 1, 2, and 4 consistent with the Board's directions in this Order.

HO SAI GAI FARM's objection nos. 3, 5, and 6 are DISMISSED.

IT IS SO ORDERED.

DATED: April 18, 2024

Victoria Hassid, Chair

Isadore Hall, III, Member

Barry Broad, Member

Member Lightstone and Member Flores, CONCURRING and DISSENTING.

We concur with our colleagues concerning the dismissal of employer objections 3, 5, and 6. However, we respectfully dissent from the majority's conclusion that HSG made a showing sufficient to justify setting objections 1, 2, and 4 for hearing. In particular, HSG's declaratory support on the issue of how many employees were assigned to work in HSG's packing facility, how frequently they were so assigned, whether they packed product obtained from third party vendors, and, if so, how frequently, was vague, conclusory and incomplete. Accordingly, we would not set those objections for hearing.