STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

GERAWAN FARMING, INC. Respondent, and, UNITED FARM WORKERS OF AMERICA, Charging Party.	)	Case Nos. 2012-CE-041-VIS 2013-CE-007-VIS 2013-CE-010-VIS 44 ALRB No. 1 (January 22, 2018)

DECISION AND ORDER

This case involves two allegations of unfair labor practices against respondent Gerawan Farming, Inc. ("Gerawan"). The first is an allegation that Gerawan violated section 1153, subdivision (e) of the Agricultural Labor Relations Act ("ALRA" or "Act")[1] by engaging in bad faith "surface bargaining" during the period from January 2013 to August 2013. The second allegation is that Gerawan violated section 1153, subdivision (e) by proposing and insisting on the exclusion of workers employed by Farm Labor Contractors ("FLCs") from the terms of any collective bargaining agreement reached between Gerawan and the United Farm Workers of America ("UFW").

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

Following a two-day hearing,[2] Administrative Law Judge ("ALJ") William Schmidt issued the attached decision and order in which he found that Gerawan engaged in bad faith bargaining with no intention of reaching an agreement for the period commencing January 18, 2013, and continuing through August 2013. He further concluded that Gerawan violated its duty to bargain in good faith by insisting on the exclusion of FLC workers from the core benefits of a collective bargaining agreement.

To remedy the above violations, the ALJ ordered standard notice, posting, reading and mailing remedies. The ALJ additionally ordered bargaining makewhole for the period of January 18, 2013, to June 6, 2013.

Gerawan, the UFW, and the ALRB's General Counsel all timely filed exceptions to the ALJ's decision. The Board has considered the ALJ's decision and the record in light of the exceptions and briefs and has decided to affirm the ALJ's factual findings and legal conclusions, consistent with the following discussion.

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[2] Before the hearing the General Counsel requested the ALJ take administrative notice of certain testimony of Dan Gerawan in an earlier proceeding (which eventually resulted in the Board's decision in *Gerawan Farming, Inc*. (2016) 42 ALRB No. 1). Gerawan opposed the request, alternatively requesting the ALJ take notice of additional testimony by Mr. Gerawan in that case. The ALJ granted both requests, stating he would review the prior testimony and consider it to the extent he found it relevant to the first cause of action. During post-hearing briefing, the General Counsel submitted a supplemental request for administrative notice of additional testimony by Mr. Gerawan. The ALJ granted this request over Gerawan's objection, and Gerawan now excepts to this ruling. We deny this exception. In addition to the ALJ's reasons for overruling Gerawan's objection, we note that the General Counsel's supplemental request pertained only to 11 lines of testimony from a page which already was included in the record from the General Counsel's original administrative notice request (two lines of which already were included in its original request granted by the ALJ).

Factual Summary

Prior to the hearing, the parties stipulated to numerous facts pertaining to the bargaining that occurred in 2013, as well as to the authenticity and admissibility of 62 joint exhibits. The ALJ approved the stipulation and received the 62 joint exhibits in evidence at the hearing.

The UFW was certified as the exclusive bargaining representative of Gerawan's California agricultural employees in 1992. (*Ray and Star Gerawan Ranches, et al*. (1992) 18 ALRB No. 5, pp. 19-20.) The parties had one in-person bargaining session in February 1995, and apparently no other bargaining occurred until after October 12, 2012, when UFW National President Armando Elenes ("Elenes") sent a letter to Gerawan's President, Dan Gerawan, requesting to negotiate for a collective-bargaining agreement. Elenes' letter requested ten categories of information about Gerawan's current employees, as well as the wages, benefits, and other compensation provided to unit workers in the period from 2010 through 2012. After receiving no response, Elenes sent a second letter to Dan Gerawan on October 30, 2012, repeating the union's request to meet for negotiations and for information.[3] Gerawan finally responded on November 2, 2012, and agreed to meet to negotiate. Gerawan did not produce any of the requested information with its November 2 response. Gerawan did produce some of the requested information in December 2012, but it did not provide certain economic information requested by the UFW until late June or early July 2013.

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[3] Elenes' October 30 letter repeated the ten information requests from his prior letter and included one additional request.

The parties met for their first negotiation session on January 17, 2013. Additional bargaining sessions were held on January 18, February 12, 13, 27, 28, and March 19, 21, and 28. On March 29, 2013, the UFW filed with the Board a request for referral to Mandatory Mediation and Conciliation ("MMC") pursuant to Labor Code section 1164 et seq. Gerawan opposed the UFW's MMC request, arguing among other things that the UFW had forfeited its bargaining rights by abandoning the employees it had been certified to represent. In *Gerawan Farming, Inc.* (2013) 39 ALRB No. 5, the Board rejected Gerawan's "abandonment" defense, and ordered the parties to MMC. The parties participated in MMC sessions with a mediator on June 6 and 11, and on August 8 and 19, 2013. Following the UFW's MMC request, and during the time the parties were engaged in MMC, the parties continued to hold negotiating sessions on their own and outside the presence of the mediator on April 2, June 3, and July 1, 24 and 29.

The parties failed to reach agreement on a collective bargaining agreement on their own or through MMC. On November 19, 2013, the Board approved a mediator's report setting the terms of a collective bargaining agreement between Gerawan and the UFW in *Gerawan Farming, Inc*. (2013) 39 ALRB No. 17. The MMC contract was to have a three-year duration running from July 1, 2013, through June 30, 2016. However, the MMC contract was never implemented as Gerawan pursued judicial review.[4]

[4] On review, the Fifth District Court of Appeal concluded, in agreement with Gerawan, that the Board erred in failing to consider Gerawan's abandonment defense, and further held that the MMC amendments to the ALRA were unconstitutional. The California Supreme Court on November 27, 2017, issued a decision reversing the appellate court's opinion, holding that the MMC statute does not violate substantive due process, equal protection, or constitute an unconstitutional delegation of legislative power, and further upholding the Board's long-standing rejection of union

Summary of the ALJ's Decision

At the outset of his decision, the ALJ rejected Gerawan's claim that the UFW was not the certified bargaining representative during the time material to the instant case. The ALJ also rejected Gerawan's claim that the 1992 certification, describing the bargaining unit as "all agricultural employees of Ray and Star Gerawan, a partnership, dba Gerawan Ranches, and of Gerawan Company, Inc. in the State of California …," did not include Gerawan's FLC workers. (Lab. Code, § 1140.4, subd. (c); *Vista Verde Farms v. ALRB* (1981) 29 Cal.3d 307.)

With respect to the surface bargaining allegations, the ALJ applied the test summarized by the National Labor Relations Board ("NLRB") in *Regency Service Carts, Inc*. (2005) 345 NLRB 671. Through the lens of the "totality of conduct" test, the ALJ examined the various indicia of bad faith bargaining, reviewing Gerawan's conduct as a whole both at and away from the bargaining table. (*Regency Service Carts, Inc., supra,* 345 NLRB 671, citing *Public Service Co. of Okla.* (2001) 334 NLRB 487, enfd. (10th Cir. 2003) 318 F.3d 1173; *Overnite Transportation Co.* (1989) 296 NLRB 669, 671, enfd. (7th Cir. 1991) 938 F.2d 815.)[5]

The ALJ found that critical delays marked the beginning of the bargaining process after the UFW sent the October 12, 2012 letter requesting bargaining and

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"abandonment" defenses by employers. (*Gerawan Farming, Inc. v. ALRB* (2017) 3 Cal.5th 1118.)

[5] At the beginning of his surface bargaining analysis, the ALJ noted that "Respondent's history of bargaining conduct from the beginning reflects, at best, a lackadaisical attitude toward its duty to bargain with its employee representative and, at worst, complete hostility toward that legal obligation." In affirming the ALJ's decision, we do not rely on the ALJ's discussion of the parties' bargaining history prior to 2012.

information. With respect to conduct occurring during the period of time relevant to this case, the ALJ first noted that the UFW's request to bargain in October 2012 went unanswered for nearly three weeks. As for the information requested by the UFW in its October 2012 letters, the ALJ found that Gerawan provided some information in December, which he deemed bordered on unlawful delay, and that Gerawan further delayed furnishing critical economic information until late June or early July 2013.[6]

The ALJ also found that two wage increases Gerawan gave its workers in March 2013 were "compelling evidence of its extreme bad faith approach to its bargaining efforts in 2013." (ALJ Decision ("ALJD"), p. 49.) Although Gerawan claimed to have bargained over the two-step increase in March, the ALJ found that "Gerawan presented both fifty-cent increases in such manner as to warrant the conclusion that the UFW got only a notice of a *fait accompli*." The ALJ also found it significant that the flyers or leaflets that Gerawan distributed to workers to inform them of the wage

[6] Gerawan argues in its exceptions that it did not cause delays and that it provided the UFW with all of the information the UFW needed to make its economic proposal before negotiation sessions began. The ALJ credited Elenes' testimony that Gerawan's failure to produce information related to the costs of its health care program was the cause of the UFW's inability to prepare its economic proposal. We have carefully examined the record, and find no basis for disturbing the ALJ's credibility determinations. The Board will not disturb credibility resolutions based on demeanor unless the clear preponderance of all the relevant evidence demonstrates that they are in error. (*United Farm Workers of America (Ocegueda)* (2011) 37 ALRB No. 3; *P.H. Ranch* (1996) 22 ALRB No. 1; *Standard Drywall Products* (1950) 91 NLRB 544.) In instances where credibility determinations are based on factors other than demeanor, such as reasonable inferences, consistency of witness testimony, or the presence or absence of corroboration, the Board will not overrule the ALJ's credibility determinations unless they conflict with well-supported inferences from the record considered as a whole. (*S & S Ranch, Inc*. (1996) 22 ALRB No. 7.)

increases "crudely projected a 'good guy – bad guy' message to the employees," namely in communicating the message to the employees that Gerawan wants the raise "to go into effect as soon as possible" and that Gerawan had "informed the UFW union of our plan, and we assume they will not cause any unnecessary delay."

As for the parties' conduct at the bargaining table, the ALJ compared the initial contract proposals presented on January 17, 2013 (by the UFW) and January 18, 2013 (by Gerawan) against those prepared in late July and early August 2013 for submission to the mediator during the MMC process.[7] The ALJ noted that the parties made minimal progress toward resolution during eight months of bargaining. The ALJ found that the parties' differences on the following subjects consumed the greatest amount of their time and effort: (1) Union Recognition; (2) Union Security; (3) Seniority; (4) Grievance-Arbitration; (5) No Strike-No Lockout; (6) Just Cause; (7) Management Rights; (8) Use of FLCs; and (9) Union Obligations.

[7] Gerawan argues in its exceptions that the ALJ erred in relying on evidence from the parties' MMC proceedings to support his findings of bad faith. Gerawan fails to identify any testimony or exhibits from the MMC proceeding upon which it alleges the ALJ improperly relied. Thus, Gerawan has not provided any evidentiary support for this exception, and we accordingly reject it. (See Cal. Code Regs., tit. 8, § 20282, subd. (a)(1).) Moreover, the ALJ recognized that the unfair labor practice allegations in this case pertain to the "voluntary" negotiations that occurred during the 2013 timeframe, using the "voluntary" modifier to refer to those negotiations that took place outside of the context of MMC and without the presence of a mediator. (ALJD, p. 13.) The ALJ further noted that, "[a]part from a few overlapping exhibits, little, if any, evidence was adduced concerning the bargaining that occurred under the auspices of the mediator." The admissibility of the contract proposal exhibits referenced in the ALJ's statement above is established by the parties' Joint Stipulations as to Facts and Exhibits, in which the parties stipulated to the admissibility of numerous exhibits relating to their bargaining notes and proposals.

The ALJ found that Gerawan advanced and rigidly adhered to proposals that it obviously knew the UFW would never accept, which supported a finding of bad faith bargaining. These included Gerawan's Right to Work, Economic Action, and Union Obligations proposals. The ALJ noted that Gerawan's reasons for insisting on these proposals was "clearly grounded on its own personal and very self-serving philosophy of [employee] freedom of choice."

The ALJ additionally noted that Gerawan's Union Obligations proposal and its proposals seeking to exclude the FLC employees from coverage under the agreement were not mandatory subjects of bargaining. (*Arlington Asphalt* (1962) 136 NLRB 742 [indemnification provision not a mandatory subject of bargaining]; *Hess Oil & Chemical Corp*. (1967) 167 NLRB 115, enfd. (5th Cir.1969) 415 F.2d 440 [request to alter certified bargaining unit not a mandatory subject of bargaining].) The ALJ found that Gerawan's insistence on these non-mandatory subjects was a device by which Gerawan sought to prevent an agreement.

After considering all of the above in his application of the totality of the circumstances test, the ALJ concluded that Gerawan engaged in bad faith surface bargaining with no intention of ever reaching agreement. The ALJ further concluded that Gerawan unlawfully refused to bargain about the wages, hours, and terms and conditions of employment of the FLC workers who are a part of the bargaining unit. While the ALJ found that Gerawan also violated its duty to bargain in good faith by its insistence on the Union Obligations proposal, he did not recommend any independent remedial order as to that conduct because there was no separate allegation in the complaint pertaining to the

Union Obligations provision. He did state, however, that he considered evidence about this provision as a factor in reaching the conclusion that Gerawan engaged in unlawful surface bargaining.

In addition to the typical cease and desist and notice remedies, the ALJ ordered a bargaining makewhole remedy for the period January 18, 2013, through to June 6, 2013. The ALJ analyzed the appropriateness of the makewhole remedy by applying the two-part test set forth in *William Dal Porto v. ALRB* (1987) 191 Cal.App.3d 1195 ("*Dal Porto*"). With respect to the length of the makewhole period, the ALJ rejected Gerawan's argument that the makewhole period should conclude on March 29, 2013, the date that the UFW requested MMC. Rather, he concluded that under *Arnaudo Brothers* (2015) 41 ALRB No. 6, where the MMC process has been invoked, the makewhole period commences when the bad faith began and continues to the date of the first session before the mediator. The first MMC session was June 6, 2013, and so the ALJ found that date to be the end of the makewhole period.

Discussion and Analysis

A. The Surface Bargaining Violation

Gerawan argues in its exceptions that it was engaging in lawful hard bargaining during the time period at issue. Gerawan cites to *Dal Porto, supra,* 163 Cal.App.3d at p. 549 for the proposition that parties have a right to engage in hard bargaining over positions in which they genuinely and sincerely believe without violating the duty to bargain in good faith. Gerawan further argues that the ALJ improperly judged the subjective terms of its contract proposals. Gerawan cites *TMY Farms, Inc*. (1983) 9

ALRB No. 10 and *Tex-Cal Land Management, Inc*. (1985) 11 ALRB No. 31 in support of its position that the subjective unreasonableness of some of its proposals is not sufficient to support a finding of surface bargaining. Gerawan also cites *NLRB v. American Nat'l Insurance Co*. (1952) 343 U.S. 395, 404 for the proposition that the Board may not sit in judgment upon the substantive terms of the parties' bargaining proposals. We reject these arguments, and affirm the ALJ's conclusion that Gerawan engaged in surface bargaining.[8]

The duty to bargain means more than merely demonstrating a willingness to meet and talk, but rather requires a party to enter such discussions with an open mind and sincere purpose in resolving differences and finding agreement. (*NLRB v. Big Three Industries, Inc*. (5th Cir. 1974) 497 F.2d 43, 46; *J.P. Stevens & Co., Inc*. (1978) 239 NLRB 738, 749, 762-763.) Surface bargaining violates the duty to bargain in good faith, and has been defined as "going through the motions of negotiating, without any real intent to reach an agreement." (*Dal Porto, supra*, 163 Cal.App.3d at p. 549, internal

[8] A theme running through Gerawan's brief is that the only party which stood to benefit from surface bargaining was the UFW. Gerawan's position is that it had an interest in reaching a negotiated agreement directly rather than having a collective bargaining agreement imposed on it through the MMC process, so it had no motivation to frustrate agreement. We find this argument unconvincing. Although the Board found previously in *Gerawan Farming, Inc., supra*, 42 ALRB No. 1 that Gerawan did not initiate the effort to decertify the UFW as the collective bargaining representative in 2013, Gerawan clearly desired the UFW's decertification, as shown by the fact that it lent unlawful assistance to the petition. Once the decertification effort was underway, Gerawan clearly had an interest in avoiding reaching a collective bargaining agreement as long as possible so there would be no contract bar to the decertification petition and subsequent election. (See Lab. Code, § 1156.7, subd. (b); see *Prentice-Hall, Inc*. (1988) 290 NLRB 646 [finding bad faith where the employer's bargaining conduct was designed to avoid agreement in the hope that employees would eventually reject the union].)

quotations omitted; see Lab. Code, § 1155.2, subd. (a).) A party's adamant insistence on a bargaining position is not necessarily unlawful in itself. "Hard bargaining" is permitted, and "[a] party is entitled to stand firm on a position if he reasonably believes that it is fair and proper or that he has sufficient bargaining strength to force the other party to agree." (*Atlanta Hilton & Tower* (1984) 271 NLRB 1600, 1603.) As the line between lawful hard bargaining and unlawful surface bargaining often is a fine one (see *Hudson Chemical Co*. (1981) 258 NLRB 152, 155), many cases will turn on the determination "whether the employer is lawfully engaging in hard bargaining to achieve a contract that it considers desirable or is unlawfully endeavoring to frustrate the possibility of arriving at any agreement." (*Atlanta Hilton, supra,* 271 NLRB 1600, 1603.)

Gerawan would have the Board analyze each of its actions and contract proposals separately, arguing that each individual proposal, viewed in isolation, reflects only permissible hard bargaining. This is not the correct standard for evaluating claims of surface bargaining. The NLRB and this Board apply a "totality of circumstances" test to determine whether a party's conduct, as a whole, both at and away from the bargaining table, demonstrates a violation of the duty to bargain in good faith. (*Regency Service Carts, Inc., supra,* 345 NLRB 671; *McFarland Rose Production, Inc.* (1980) 6 ALRB No. 18, p. 4.) Thus, we look to the entire course of bargaining rather than examining individual negotiating sessions or proposals in isolation. (*Altorfer Machinery Co*. (2000) 332 NLRB 130, 160 ["negotiations must be viewed in their totality, so that isolated events, proposals and counterproposals are not accorded undue weight, which is not truly reflective of the entirety of the process"]; *McFarland Rose Production, supra,* 6 ALRB

No. 18, p. 23 ["Surface bargaining is a violation which occurs over an extended period of time and it cannot be analyzed by examining individual bargaining sessions or positions in isolation from the totality of the parties' conduct"].) As the NLRB aptly stated in *Altorfer Machinery Co., supra*, 332 NLRB 130, fn. 2, "[a]lthough individual actions standing alone may be insufficient to demonstrate bad-faith bargaining, these actions must be considered a part of the totality of circumstances in determining whether a respondent has engaged in surface bargaining." (Citing *Continental Insurance Co*. (1973) 204 NLRB 1013, enfd. *Continental Insurance Co. v. NLRB* (2nd Cir. 1974) 495 F.2d 44, 48 ["the determination of intent must be founded upon the party's overall conduct and on the totality of the circumstances, as distinguished from the individual pieces forming part of the mosaic"]; *Altorfer Machinery Co., supra,* 332 NLRB 130, 148 ["The picture is created by a consideration of all the facts viewed as an integrated whole"].)

In *Atlanta Hilton, supra,* 271 NLRB 1600, 1603, the NLRB set forth seven factors indicative of a lack of good faith:

(1) delaying tactics;
(2) unreasonable bargaining demands;
(3) unilateral changes in mandatory subjects of bargaining;
(4) efforts to bypass the union;
(5) failure to designate an agent with sufficient bargaining authority;
(6) withdrawal of already agreed-upon provisions; and
(7) arbitrary scheduling of meetings.

A party need not engage in all of the above activities to be found to have bargained in bad faith; rather, unlawful surface bargaining can be found when a party's overall conduct reflects an intention to avoid reaching agreement. (*Altorfer Machinery Co., supra,* 332 NLRB 130, 148.) Even acts not in themselves unlawful may tend to

indicate a party's refusal to bargain in good faith. (See *J.P. Stevens & Co., supra*, 239 NLRB 738, 749.) Because a party is not likely to directly admit its bad faith intentions, the Board necessarily must draw inferences of a party's state of mind based on circumstantial evidence of the party's overall conduct both at and away from the table throughout the entire course of the parties' negotiations. (*NLRB v. Milgo Indus., Inc.* (2nd Cir. 1977) 567 F.2d 540, 543; *Continental Insurance Co., supra*, 495 F.2d at p. 48.) The Fifth Circuit in *NLRB v. Herman Sausage Co.* (5th Cir. 1960) 275 F.2d 229, 232 explained in this regard:

> In approaching it from this vantage, one must recognize as well that bad faith is prohibited though done with sophistication and finesse. Consequently, to sit at a bargaining table, or to sit almost forever, or to make concessions here and there, could be the very means by which to conceal a purposeful strategy to make bargaining futile or fail. Hence, we have said in more colorful language it takes more than mere "surface bargaining," or "shadow boxing to a draw," or "giving the Union a runaround while purporting to be meeting with the Union for purpose of collective bargaining." [Footnotes omitted.]

While Gerawan correctly points out that the Board does not have the power in unfair labor practice cases to compel either side to agree to any substantive contractual provisions (*H. K. Porter Co. v. NLRB* (1970) 397 U.S. 99), Gerawan is incorrect to the extent it argues that the Board cannot consider the substantive terms of the parties' contract proposals at all. Courts have held that the Board may examine the parties' substantive proposals in conducting its totality of circumstances analysis. (*NLRB v. F. Strauss & Son, Inc.* (5th Cir. 1976) 536 F.2d 60, 64, citing *NLRB v. Reed & Prince Mfg. Co.* (1st Cir. 1953) 205 F.2d 131, 134; *NLRB v. Holmes Tuttle Broadway Ford, Inc.* (9th

Cir. 1972) 465 F.2d 717, 719.) Although the Board does not sit in judgment upon the substantive merit of the parties' particular proposals, the Board is authorized to examine specific proposals and determine "whether, on the basis of objective factors, a demand is clearly designed to frustrate agreement on a collective-bargaining contract." (*Reichhold Chemicals* (1988) 288 NLRB 69, enfd. in part in *Teamsters Local Union No. 515 v. NLRB* (D.C. Cir. 1990) 906 F.2d 719.) The NLRB expressly recognized in *Altorfer Machinery Co*., *supra*, 332 NLRB 130, 149 that "[t]he reasonableness or unreasonableness of demands are among the factors which the factfinder can consider in the difficult task of laying bare the subjective intent of the parties," explaining further:

> "Sometimes, especially if the parties are sophisticated, the only indicia of bad faith may be the proposals advanced and adhered to," *NLRB v. Wright Motors, Inc*., 603 F.2d 604, 609 (7th Cir. 1979), and "if the board is not to be blinded by empty talk and by the mere surface motions of collective bargaining, it must take some cognizance of the reasonableness of the positions taken by the employers in the course of bargaining negotiations." *NLRB v. Reed and Prince Manufacturing Co*., 205 F.2d 131, 134 (1st Cir. 1953), cert. denied 346 U.S. 887.

With these considerations in mind, we turn first to the three proposals the ALJ found Gerawan adhered to in bad faith.

1. Gerawan's Right to Work, Economic Action, and Union Obligations Bargaining Proposals

Gerawan argues that its Right to Work, Economic Action, and Union Obligations proposals do not constitute a sufficient basis for finding bad faith bargaining. Gerawan's position is that it had legitimate reasons for making these admittedly "atypical" proposals, namely the "extremely unusual circumstances" created by the

UFW's attempt to "suddenly implant itself" into Gerawan's workplace after its "inexplicable 20-year absence." In addition, Gerawan claims that its proposals were justified because of the "legitimate question" of whether the UFW had abandoned the unit and "the burgeoning decertification movement [which] also cast serious doubt on whether the UFW could even claim to be the employees' representative much longer." (Gerawan's Brief in Support of its Exceptions ("Gerawan Br."), p. 57.) Moreover, Gerawan argues that each party has a right to engage in hard bargaining over positions in which they have a genuine and sincerely held belief without violating their duty to bargain, even if the other party deems those proposals to be unacceptable, resulting in stalemate. (Gerawan Br., p. 42, citing *Dal Porto, supra,* 163 Cal.App.3d at p. 549.)

For the following reasons, we reject Gerawan's arguments.

Right to Work

The UFW proposed a rather typical union security provision for inclusion in a contract. The UFW's proposal would require employees to become union members or pay an agency fee to the union as a condition of employment, and would further provide for the establishment of a check-off system for collecting union dues and fees. In turn, Gerawan proposed an "open shop" provision under the "Right to Work" moniker.

Gerawan contends it was legally entitled to propose and adhere to its proposal, arguing that the ALJ failed to recognize that "nothing in [the ALRA] compels the use of union security agreements." (Gerawan Br., p. 49, citing *Pasillas v. ALRB* (1984) 156 Cal.App.3d 312, 344-346.) Gerawan also argues that it is not bad faith for an employer to refuse to agree to a union security clause if it has a sincerely held belief that

employees should not be forced to join a union, and cites *Pacific Mushroom Farm* (1981) 7 ALRB No. 28, ALO Dec. pp.18-19, *Church Point Wholesale Grocery Co*. (1974) 215 NLRB 500, 501-02, *Frick Co.* (1961) 161 NLRB 1089, 1094, and *Frontier Dodge* (1984) 272 NLRB 722, 727-730 in support of its position.

Gerawan's "Right to Work" heading for its proposal — a heading on which it adamantly insisted — easily could be predicted to be unpalatable to the UFW, or any labor organization, and we agree with the ALJ that Gerawan surely knew the UFW would never agree to it. Indeed, "[i]t is difficult to believe that the Company with a straight face and in good faith could have supposed that this proposal had the slightest chance of acceptance by a self-respecting union, or even that it might advance the negotiations by affording a basis of discussion." (*Reed & Prince Mfg. Co*., supra, 205 F.2d at p. 139; *Hudson Chemical Co*., *supra*, 258 NLRB 152, 156.) The term itself is commonly regarded as anathema to labor organizations.[9]

With respect to the substance of the parties' proposals, Gerawan rejected outright the entirety of the UFW's proposal and rigidly adhered to its own. Gerawan's rationale for doing so further evidences Gerawan's lack of intent to reach agreement on this issue. Gerawan seeks to justify its bargaining position on this proposal under the guise of "protect[ing] its employees' freedom of choice." (Gerawan Br., p. 51.) At the

[9] The mediator who presided over the MMC proceedings similarly recognized that "The very title to this Article suggested by the Employer and its invidious connotation is predictably unacceptable to the Union." (Mediator's Report to Board, Sept. 28, 2013, p. 12.)

outset, Gerawan mischaracterizes the UFW's proposal as requiring union membership as a condition of employment. In fact, the UFW's proposal does not require union membership.[10] Moreover, Gerawan's attempt to justify its bargaining position based on its professed concern for the employees' choice of representative is inconsistent with basic principles underlying our Act. The Legislature's "clear purpose" in drafting the ALRA was to "preclude the employer from active participation in choosing or decertifying a union, and this certainly overrides any paternalistic interest of the employer that the employees be represented by a union of the present employees' own choice." (*F & P Growers Association v. ALRB* (1985) 168 Cal.App.3d 667, 678.) The United States Supreme Court has confirmed that the Board is "entitled to suspicion when faced with an employer's benevolence as its workers' champion against their certified union, which is subject to a decertification petition from the workers if they want to file one." (*Auciello Iron Works v. NLRB* (1996) 517 U.S. 781, 790; see *NLRB v. Schill Steel Products, Inc*. (5th Cir. 1973) 480 F.2d 586, 591.)

Gerawan argues that its employees were "already being paid the highest wages in the industry before the Union made any effort to represent them," and they "deserve to become acquainted with the Union and be provided with some semblance of

[10] The ALJ referred to the UFW's proposal as a "union shop" provision, but it more accurately may be described as an "agency shop" provision as it does not compel union membership as a condition of employment. Rather, the proposal provides for the collection of dues from those employees who are or seek to become union members or agency fees from those employees who do not wish to become members. (See *Pacific Northwest Newspaper Guild, Local 82 v. NLRB* (1989) 877 F.2d 998, 999.)

service in the form of representation before being asked to pay money to it." In other words, Gerawan's position is that its employees do not need a union.[11] However, the choice of union representation lies squarely in the hands of the employees and is not Gerawan's to make. Moreover, it is a choice that already has been made, and Gerawan's continued resistance to that fact directly violates long-standing Board precedent recently confirmed by the California Supreme Court: a union once certified under the ALRA's election procedures as the exclusive bargaining representative of a bargaining unit of agricultural employees remains certified until decertified under the same election procedures. (*Gerawan Farming, Inc*., *supra*, 3 Cal.5th at pp. 1154-1158; *Tri-Fanucchi Farms v. ALRB* (2017) 3 Cal.5th 1161, 1163-1164; *F & P Growers, supra*, 168 Cal.App.3d at pp. 676-678; *Montebello Rose Co. v. ALRB* (1981) 119 Cal.App.3d 1, 23-24; *San Joaquin Tomato Growers, Inc*. (2011) 37 ALRB No. 5, p. 3; *Pictsweet Mushroom Farms* (2003) 29 ALRB No. 3, p. 6; *Dole Fresh Fruit Co*. (1996) 22 ALRB No. 4, pp. 14-15; *Nish Noroian Farms* (1982) 8 ALRB No. 25, pp. 13-14.)

Gerawan even goes so far as to suggest the UFW be subjected to the equivalent of a one-year probationary period before it should be able to collect any dues or fees from its employees. The ALJ appropriately termed this proposal "ludicrous" and without any legal support under the ALRA. Nevertheless, Gerawan asserts that the mediator who conducted the MMC proceedings agreed with the reasonableness of its

[11] Gerawan's initial response to the UFW's October 2012 bargaining requests stated that Gerawan's employees "enjoy what are probably the industry's highest wages and best working conditions, and they achieved them without your involvement."

open shop provision, and that the ALJ improperly ignored this. (Gerawan Br. p. 49.) In fact, the mediator rejected Gerawan's proposal and adopted the UFW's proposal in full, even commenting in doing so:

> … the Employer's perspective on Union dues and fees is cast in dark tones, and ascribes to the Union some nefarious, self-serving purpose in collecting them … The Employer presumes to speak on behalf of employees, which in itself is a conflict of interest, claiming that the Union's bargaining efforts are "unwanted." Finally, in the face of statutory language which is directly to the contrary, [footnote omitted] the Employer states that the imposition of agency fees is inconsistent with the ALRA's protections of freedom of association and self-organization. (Mediator's Report, Sept. 28, 2013, p. 11.)

To the extent the mediator opined that it possibly may be an "overreach" to require employees to pay fees to a union they "have had little if anything to do with" — the line on which Gerawan seizes to support its arguments on this point, we reject any such proposition as inconsistent with the ALRA, Board precedent, and California judicial precedent. The Board's precedent clearly establishes that a certified union's alleged absence has no effect on the union's status as the employees' exclusive bargaining representative. With respect to the stated concern over employees who have not had any prior relationship with the certified union, the same could be said for any employee newly hired into a unionized workforce — a point even more significant in the agricultural industry where employee turnover is high. (See *Gerawan Farming, Inc.*, *supra*, 3 Cal.5th at pp. 1154-1155, citing *F & P Growers*, *supra*, 168 Cal.App.3d at p. 677.) But this does not change the fact such newly hired employees become a part of the bargaining unit. The California Supreme Court recognized in *Harry Carian Sales v.*

ALRB (1985) 39 Cal.3d 209, 240 that "the ALRA, and labor law generally, are premised on a legal fiction of sorts that the union elected by past employees is the freely chosen representative of current employees." Further, it is a long-standing principle in labor law that new employees hired into the bargaining unit are presumed to support the incumbent union in the same proportion as the employees they replace. (*NLRB v. Curtin Matheson Scientific, Inc*. (1990) 494 U.S. 775, 779 ["The Board has long presumed that new employees hired in nonstrike circumstances support the incumbent union in the same proportion as the employees they replace"]; *Massachusetts Machine & Stamping, Inc*. (1977) 231 NLRB 801, 802 ["it is well established that turnover or increase in size of the work force alone does not rebut the presumption of a majority status, since there is also a presumption that new employees will support the union in the same proportion as the previous employee complement"].)

Just as new employees hired into a bargaining unit are represented by the incumbent union, that union owes such new employees, and all employees in the bargaining unit, a duty of fair representation. A union security provision is a common means by which to facilitate the collection of dues and agency fees, and generally is intended to alleviate the concern posed by "free riders." (See *NLRB v. General Motors Corp*. (1963) 373 U.S. 734, 741, 744.) The ALJ noted that the UFW's proposal would assist it in fulfilling its representational duties to the employees "in this very large unit spread out … across 19 square miles." Gerawan again improperly assumes the role of its employees' spokesperson in responding that the "free rider" concern does not apply to it

because it is able to represent its employees better than the UFW and, thus, its employees do not need a union.

In sum, Gerawan opposed the UFW's request and maintained its own rigid adherence to its "Right to Work" proposal based solely on its philosophical opinions as to its employees' free choice rights and its fervent opposition to the UFW's status as its employees' exclusive bargaining representative. It never truly considered the UFW's proposal, and admittedly took no effort to assess what the costs, if any, of implementing a check-off system would be. (See *Dal Porto*, *supra*, 163 Cal.App.3d at pp. 551-552.) As the NLRB stated in *Chester County Hospital*, *supra*, 320 NLRB 604, 622, "[w]here, as here, the employer adamantly opposes union security and checkoff on vague or generalized 'philosophical' grounds or questionable assertions of policy, the inference is warranted that the Employer entered negotiations with a fixed intention not to consider or agree to any form of union security or checkoff," in violation of its duty to bargain in good faith. (*Universal Fuel, Inc*. (2012) 358 NLRB 1504, 1521 ["the opposition to union security and dues checkoff based on philosophical grounds without business justification has been held to constitute evidence of bad-faith bargaining"]; see also *Sweeney & Company v. NLRB* (5th Cir. 1971) 437 F.2d 1127, 1134-1135; *Rockingham Machine-Lunex Co.* (1981) 255 NLRB 89, 107, 109, enfd. *Rockingham Machine-Lunex Co. v. NLRB* (8th Cir. 1981) 665 F.2d 303; *Carolina Paper Board Corp.* (1970) 183 NLRB 544, 551.)

The cases upon which Gerawan relies are distinguishable. *Frick Co.*, *supra*, 161 NLRB 1089 involved an allegation that the employer refused to negotiate over the

topic of union security prior to impasse. The NLRB rejected the allegation, finding that the evidence showed the employer did engage in discussions on that topic. (*Id*. at p. 1104.) The issue in this case is not whether Gerawan outright refused to discuss this mandatory subject of bargaining, but rather whether its conduct in purporting to negotiate on this issue demonstrated a lack of intent to reach agreement. *Pacific Mushroom Farm, supra*, 7 ALRB No. 28, *Church Point Wholesale Grocery Co., supra*, 215 NLRB 500, and *Frontier Dodge, supra*, 272 NLRB 722 involve circumstances where numerous concessions on other items were made or the parties otherwise were able to reach agreement on all or nearly all other contract terms. In other words, the cases appropriately applied the surface bargaining "totality of circumstances" test to evaluate the parties' conduct during the entire course of negotiations. In contrast, Gerawan would have the Board view its bargaining position on union security and dues check off in isolation, contending that its steadfast position on this issue alone cannot support a finding of bad faith. Our finding that Gerawan engaged in unlawful surface bargaining takes into account its other conduct at and away from the table during the course of the parties' negotiations. The employer in *Frontier Dodge* also presented the union with alternatives to its union security proposal, but the union refused to consider any of them. (*Frontier Dodge, supra*, 272 NLRB 722, 730.) Gerawan presented no such counters, instead rigidly adhering not only to its open shop proposal but even to its "Right to Work" title — a clear nonstarter, as discussed above.

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Economic Action

The UFW proposed a standard no-strike/no-lockout provision. Gerawan's proposal, entitled "Economic Action," stated: "The Company, Union and the employees shall be free to take whatever lawful economic action they deem necessary during the term of this Agreement." Gerawan argues its proposal was intended to allow workers to have all rights under the ALRA to engage in lawful economic actions, and so this cannot possibly be evidence of an intention to prevent an agreement. (Gerawan Br., p. 53.) Gerawan further argues no-strike clauses are a mandatory subject of bargaining and so it was entitled to insist on this provision. (*NLRB v. Tomco Communication, Inc*. (9th Cir. 1978) 567 F.2d 871, 879.)

Gerawan claims it took the position it did on its Economic Action proposal because it felt its employees "should be entitled to take all lawful economic actions under the ALRA to voice concerns." (Gerawan Br., p. 53.) The rationale underlying Gerawan's bargaining position again is rooted in its "freedom of choice" philosophy. The UFW reasonably perceived Gerawan's highly unorthodox proposal as an attempt to undermine its status as the employees' bargaining representative. Again, it is hard to believe Gerawan "with a straight face and in good faith could have supposed that this proposal had the slightest chance of acceptance …." (*Reed & Prince Mfg. Co*., *supra*, 205 F.2d at p. 139; *Public Service Co*., *supra*, 318 F.3d at pp. 1177-1178 [NLRB properly inferred bad faith from employer's proposals aimed at undermining union].)

Further undermining Gerawan's position that its Economic Action proposal was advanced in good faith is the fact that the proposal is directly contrary to the purpose

of a collective bargaining agreement. (*H. J. Heinz Co. v. NLRB* (1941) 311 U.S. 514, 524 [describing the collective bargaining agreement "as the effective instrument of stabilizing labor relations and preventing, through collective bargaining, strikes and industrial strife"].) That Gerawan's proposal is entirely inimical to labor peace and the underlying policies and purposes of the ALRA, as well as federal labor policy under the National Labor Relations Act ("NLRA"), is obvious. "In enacting the [ALRA], the California Legislature specifically declared the collective bargaining process is the preferred method for attempting to bring peace and stability to California's agricultural fields." (*Ruline Nursery Co. v. ALRB* (1985) 169 Cal.App.3d 247, 253; *ALRB v. Superior Court* (1979) 16 Cal.3d 392, 398 ["In enacting this legislation the people of the State of California seek to ensure peace in the agricultural fields by guaranteeing justice for all agricultural workers and stability in labor relations"].) "The overriding goal of federal labor law is labor peace, and is promoted when the parties to a labor dispute avoid a test of strength involving a strike or a lockout by negotiating a collective bargaining agreement, which will standardly include a no-strike clause, thus assuring labor peace during the term of the agreement …." (*Duffy Tool & Stamping, L.L.C. v. NLRB* (7th Cir. 2000) 233 F.3d 995, 997.) As the NLRB explained in *Altorfer Machinery Co*., *supra*, 332 NLRB 130, 165 — a case on which Gerawan relies in its exceptions, one of the NLRA's primary objectives "is to utilize collective-bargaining contracts as a means for minimizing, if not eliminating, disruptions to the free flow of commerce caused by labor disputes. Obviously, strikes are one such disruptions." The NLRB criticized a strike proposal by the employer in that case, finding it "contemplates the very type of conduct which is

inherently disruptive of the free flow of commerce," and "presents the prospect of ongoing labor dispute and incident disruption." (*Ibid*.; see also *J.P. Stevens & Co*., *supra*, 239 NLRB 738, 765.) Gerawan's "Economic Action" proposal was so far contrary to the fundamental purposes of the ALRA as to undermine any argument that the proposal was advanced in good faith with a genuine intent to reach agreement.

We also reject Gerawan's argument that it was entitled to insist upon its position to the point of impasse because a no-strike clause is a mandatory subject. While a party generally is entitled to stand firm on a position it reasonably believes is fair and proper (*Atlanta Hilton*, *supra*, 271 NLRB 1600, 1603), Gerawan's basis for doing so here was unreasonable and, particularly taken together with its overall bargaining conduct, was evidence of bad faith. (See *Altorfer Machinery Co*., *supra*, 332 NLRB 130, 149; *Reed & Prince Mfg. Co*., *supra*, 205 F.2d at p. 134; *McDaniel Ford, Inc*. (1997) 322 NLRB 956, 965 ["the insistence on extreme or unreasonable proposals can be part of the evidence in determining whether demands made by a particular party was designed to frustrate agreement in the collective-bargaining process"].)

Union Obligations

Gerawan's "Union Obligations" proposal generally would require the UFW to indemnify and hold Gerawan harmless from "any and all claims, losses, damages, costs or expenses whatsoever … that it may incur directly or indirectly as a result of the Company performing under this Agreement …" or as a result of any violation of state or federal law by the UFW or any of its officers or employees. It additionally would require the UFW to purchase insurance in what the ALJ described as "unusually high amounts."

Gerawan's proposal further would require the UFW to cooperate with workers' compensation fraud investigations by Gerawan and its carriers, and to waive any claim that the conduct of such investigations constituted unlawful surveillance under the ALRA. Although Gerawan lowered its insurance demands by the end of negotiations, it steadfastly insisted on inclusion of this proposal in a collective bargaining agreement. The UFW had no equivalent proposal on this topic or counter-proposal to Gerawan's proposal, and the record supports the ALJ's finding that the UFW never seriously considered any aspect of Gerawan's proposal.

Gerawan does not dispute its proposal was "unusual" or even "unreasonable," contending instead that it is irrelevant to the bad faith bargaining inquiry whether its proposal was either. We disagree. Gerawan's union-indemnification proposal is not a mandatory subject of bargaining, as it does not relate to the employees' wages, hours, or terms and conditions of employment. (Lab. Code, § 1155.2, subd. (a); *Arlington Asphalt Co., supra,* 136 NLRB 742, 745, enfd. *sub nom. NLRB v. Davison* (4th Cir. 1963) 318 F.2d 550, 557; see also, e.g., *C-E NATCO/C-E INVAICO* (1984) 272 NLRB 502, 505 ["The law is well settled that a performance bond or indemnity proposal is a permissive, nonmandatory subject of bargaining"]; *Covington Furniture Mfg. Corp*. (1974) 212 NLRB 214, 217-218, enfd. (6th Cir. 1975) 514 F.2d 995; *Binstock v. DHSC, LLC* (N.D. Ohio Sept. 5, 2017) 2017 U.S. Dist. LEXIS 143165, at *14.) "[T]he Board and the courts have consistently treated a contract requirement of a performance bond or financial indemnity agreement proposed by either employer or union for the other, as a nonmandatory subject of bargaining, and have held that employer or union insistence to

impasse on such a requirement was a violation of the obligation to bargain in good faith." (*Covington Furniture Mfg. Corp*., *supra*, 212 NLRB 214, 217.)

Moreover, Gerawan's stated rationale in support of its proposal provides further evidence of its bad faith in insisting on it. Gerawan argued in support of its August 2, 2013 proposal that "[t]he Union's conduct, after a 20-year absence, in attacking the Company without having attempted to gain any experience about its operations or the employees within the bargaining unit, has caused the Company great concern about being held responsible for the Union's conduct." The conduct about which Gerawan complains is UFW representatives visiting employees at their homes and taking access at Gerawan's property. Gerawan further argued in its post-hearing brief to the ALJ that its insurance demands were necessary to provide it a monetary remedy against the union for any damages occurring while exercising its rights under the ALRA to take access to Gerawan's property.

Gerawan's purported fears are entirely speculative, and, as with its contentions in support of its "Right to Work" proposal, attribute nefarious intentions to the UFW. To support its unsupported fears it seeks to impose on the UFW the equivalent of a pay-to-play requirement. A labor organization certified under the ALRA's election provisions as the exclusive bargaining representative of an appropriate unit of agricultural employees is not required to post security in favor of an employer as a condition of exercising its rights under the ALRA.[12] The NLRB found "convincing evidence" of an

[12] Nor is a labor organization required to post a bond as a prerequisite to exercising access rights under Board regulation 20900. (Cal. Code Regs., tit. 8, § 20900.)

employer's bad faith approach to bargaining where the employer "treated the Union as an intruder, one which required some watching after, rather than as a statutorily invited guest on the premises." (*J.P. Stevens & Co.*, *supra*, 239 NLRB 738, 162-163.) Gerawan's proposal reflects a similar disposition. With respect to Gerawan's expressed concerns over the UFW contacting members of the bargaining unit it represents, the NLRB in *Covington Furniture Mfg. Corp.*, *supra*, 212 NLRB 214, 218-219, rejected a similar argument:

> Respondent contends that the indemnity-penalty clause was a mandatory subject of bargaining because its purpose was to protect the rights of its employees under the Act. However, as pointed out by the court in *Davison*, *supra*, Respondent has confused the anticipated problem that, from its standpoint, generated the proposal, namely, the right of its employees to refrain from as well as participate in union activity and to be free from discrimination and interference in that regard, with the particular proposal it devised to solve the anticipated problem, namely, a financial security provision to indemnify Respondent with a fixed money penalty if interference with the employees' rights should occur. [Footnote omitted.] Because such an indemnity provision is not directly but only speculatively and at most remotely related to terms and conditions of employment, and because a proposal for such an indemnity provision has the tendency to circumscribe the bargaining process, it is not a mandatory subject of bargaining, and insistence upon adoption of the provision as a condition for entering into a collective-bargaining contract was a *per se* refusal to bargain in good faith.

Although the ALJ did not find a separate bargaining violation based solely on Gerawan's insistence on the Union Obligations proposal (as the General Counsel did not separately allege such a violation), the ALJ properly considered

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Gerawan's conduct with respect to this proposal in his totality of circumstances analysis. (See *Latino Express, Inc*. (2014) 360 NLRB No. 112, p. 47.)

In its exceptions, Gerawan cites *Atlanta Hilton*, *supra*, 271 NLRB 1600, 1603, *Public Service Co., supra,* 334 NLRB 487, and *Altorfer Machinery Co., supra*, 332 NLRB 130, fn. 2, in support of its argument that its bargaining conduct on this proposal does not support a finding Gerawan intended to avoid reaching agreement on a contract with the UFW. These cases do not support Gerawan. Again, we do not separately consider Gerawan's bargaining positions in isolation from one another or the larger picture of its conduct throughout the negotiations both at and away from the table. The facts of *Atlanta Hilton* are clearly distinguishable from this case. The NLRB in that case found that none of the seven factors it enumerated as indicative of a lack of good faith were present. The only allegation of bad faith against the employer in that case involved its bargaining position on a single proposal to extend the terms of its prior collective bargaining agreement with the union. The record in this case supports the ALJ's finding that Gerawan exhibited several of the hallmark indicia of bad faith identified in *Atlanta Hilton*, including that it delayed providing information, made unreasonable bargaining demands, made unilateral changes in mandatory subjects of bargaining, and engaged in efforts to bypass the union. Both *Public Service Co*., *supra*, 334 NLRB 487, 488 and *Altorfer Machinery Co.*, *supra*, 332 NLRB 130, fn. 2, confirm that bad faith bargaining allegations require review of a party's proposals in combination and the manner in which they are proposed, in addition to the party's other conduct, rather than as separate stand-

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alone actions. Under this standard, Gerawan's conduct with respect to its "Union Obligations" proposal clearly supports a finding of overall bad faith bargaining.

2. Other Contested Bargaining Proposals and Positions

Gerawan argues the ALJ failed to take into consideration concessions made by it in other areas, including seniority and grievance-arbitration. The General Counsel in her exceptions asks the Board to find that Gerawan's persistent refusal to agree to a just cause limitation on employee discipline as an additional indicium of bad faith. We begin with the parties' dispute over a "just cause" provision before turning to the other provisions.

"Just Cause"

The UFW proposed limiting employer action to discipline or discharge employees to situations involving "just cause." Gerawan contends it never rejected the notion of a just cause term, but rather that it did not understand the union's proposal. Thus, Gerawan asserts it requested the UFW define "just cause" in order that "it could carefully consider its implications." The ALJ did not specifically find that Gerawan's refusal to agree to the UFW's just cause proposal was an indicium of surface bargaining. He observed, however, that even if the union had provided a definition as Gerawan had insisted, it "would almost certainly have provided more fodder for quarreling." (ALJD, p. 32.)

Gerawan's rationale for resisting the union's just cause proposal is not convincing. Its chief negotiator, Ron Barsamian, surely must be familiar with the term in

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his many years as a negotiator and labor lawyer.[13] The NLRB in *Prentice-Hall, Inc.*, *supra*, 290 NLRB 646, 669 criticized an employer's purportedly reluctant "concession" on a just cause term, noting that just cause is "a well-recognized and well-defined standard." (See *Show Industries, Inc*. (1993) 312 NLRB 447, 455 [stating that a just cause standard for disciplinary action is a common feature in a typical collective bargaining agreement].)[14] It is rare for collective bargaining agreements to set out specific definitions of the term. (See *Landry v. Cooper/T. Smith Stevedoring Co*. (5th Cir. 1989) 880 F.2d 846, 848, fn. 1 ["As is the usual circumstance in collective bargaining agreements, the contract did not define 'just cause'"].) The term is by no means foreign to practitioners in the field of labor law and labor relations, nor is it at all a foreign concept to labor arbitrators often called upon to apply it. (*Babcock & Wilcox Construction Co*. (2014) 361 NLRB No. 132, p. 36 ["most collective-bargaining

[13] Gerawan's proposals both early in the negotiations and towards the end of the negotiating process included "for cause" limitations in its management rights proposal. Barsamian claimed this was an error. Nevertheless, Gerawan's repeated inclusion of a "for cause" limitation in its own proposals — which is the equivalent of a "just cause" standard — suggests its bargaining team was familiar with the concept. (Elkouri & Elkouri, How Arbitration Works (8th ed. 2016), § 15.2.A.ii, p. 15-4; Koven, Just Cause: The Seven Tests (3d ed. 2006), p. 3, fn. 3.)

[14] As Mediator Goldberg observed in adopting the Union's just cause proposal in the MMC contract, "[t]he absence of just cause or comparable job security language in a labor agreement is a rare phenomenon, as is the retention of at-will employment for those who work under a collective bargaining agreement. The Union's ability to provide job security and protection against arbitrary or unreasonable disciplinary action are fundamental reasons for employees to seek out and advocate for their representation. Any proposal to retain at-will status despite that representation is so contrary to these notions as to be predictably unacceptable to any labor organization." (Mediator's Report to the Board, p. 29.)

agreements contain provisions prohibiting discipline and discharge except for 'just cause,' and arbitrators are well versed in applying those principles"].) It is discussed in labor arbitration treatises, including the well-known How Arbitration Works, and even has a treatise devoted entirely to it: Just Cause: The Seven Tests.[15]

The NLRB in *A-1 King Size Sandwiches, Inc*. (1982) 265 NLRB 850, 859 found an employer bargained in bad faith when it, among other things, rejected the union's just cause discipline proposal. The NLRB concluded the employer's efforts "to retain exclusive and unbridled control over discipline and discharge and both layoff and recall" evidenced its bad faith. Enforcing the NLRB's order, the Eleventh Circuit described the union's just cause proposal as "a common and non-controversial clause." (*NLRB v. A-1 King Size Sandwiches, Inc*. (11th Cir. 1984) 732 F.2d 872, 876.)

Gerawan never attempted to provide its own definition to the just cause term, instead feigning ignorance as to its meaning and insisting that the union define it for Gerawan. (See *D'Arrigo Bros. of California* (1983) 9 ALRB No. 51, at ALJ Dec. pp. 36-38, 56-57 [no bad faith in employer's position on discipline and discharge where employer proposed definitions in response to union's "just cause" proposal].) We find Gerawan's conduct in this regard reflects the type of "shadow boxing" or "giving the

[15] Elkouri & Elkouri, How Arbitration Works (8th ed. 2016); Koven, Just Cause: The Seven Tests (3d ed. 2006), p. 27 [recognizing the seven tests of just cause first articulated by Arbitrator Daugherty "represent the most specifically articulated analysis of the just cause standard as well as an extremely practical approach. [Footnote omitted] The comprehensiveness of these tests, their utility, and the widespread acceptance they have received in the 40 years since their first publication in 1966 have led us to structure this book around them"]; *Enterprise Wire Co*. (Daugherty, 1966) 46 Lab. Arb. Rep. 359.

union the runaround" while purporting to be bargaining that the court described in *Herman Sausage Co.*, *supra*, 275 F.2d at p. 232.

Accordingly, we find merit in the General Counsel's exception on this proposal and find that in addition to Gerawan's Right to Work, Economic Action and Union Obligation proposals, Gerawan's position with respect to the UFW's just cause proposal provides further evidence of a mindset not open to agreement or true give-and-take as is required by the duty to bargain in good faith. (See *A-1 King Size Sandwiches, Inc.*, *supra*, 732 F.2d at p. 878; *Tomco Communications*, *supra*, 567 F.2d 871; *Pease v. NLRB* (6th Cir. 1981) 666 F.2d 1044.)

Other Proposals and Bargaining Positions

On the issue of seniority, Gerawan argues that the UFW never substantively altered its seniority proposal, while Gerawan did compromise and agree to use an employee's length of service as a factor in determining recalls or filling vacancies. (JT Exhibit 59, Resp. D01297.) Notwithstanding Gerawan's initial insistence on preserving its at-will employment policies and past practices (as well as its notation early in negotiations that seniority "hurts employees"), Gerawan did offer concessions on this subject by offering to consider "length of service" in the context of layoffs and recalls, as well as in filling positions due to vacancy or promotional opportunity, in addition to other factors such as skill, competence, and ability. Gerawan's limited concessions to allow for consideration of a worker's length of service in these situations do not defeat the surface bargaining allegations in the context of the totality of circumstances. As the court stated in *Herman Sausage Co.*, supra, 275 F.2d at p. 232, "to sit at the bargaining table… or to

make concessions here and there, could be the very means by which to conceal a purposeful strategy to make bargaining futile or fail." Changing position on some topics "may be consistent with surface bargaining, for it is the essence of surface bargaining to create the impression of serious bargaining while actually making no effort to conclude an agreement." (*McFarland Rose Production* (1980) 6 ALRB No 18, p. 28.) And while Gerawan again resorts to the Mediator's Report as justifying its bargaining positions on this issue, the mediator recognized that "seniority rights are a fundamental component of any collective bargaining relationship" (p. 16), and that seniority rights are "common to labor agreements (p. 18).

With respect to the issue of dispute resolution, Gerawan argues that the Grievance and Arbitration provisions were "one of the key areas showing Gerawan's good faith in reaching an agreement with the UFW," and that Gerawan adopted nearly all of the provisions set forth by the UFW. Gerawan's claim that it made more movement than the UFW on this provision is not persuasive given that its initial proposal was that it would handle all grievances internally and determine them itself with no union involvement. (See JT Exhibit 9, Article 6.) In response to the UFW's initial proposal for implementing a grievance-arbitration system, Gerawan proposed — under the title "Resolving Employee Concerns" — maintaining its existing procedure for addressing employee complaints through use of its existing internal procedures "as per past practice." Only after a grievance remained "unresolved" after utilizing Gerawan's procedures would Gerawan agree to "confer" with the UFW "on what approach or venue might be utilized to resolve the issue." But even this token offer to confer with the union

after Gerawan had determined the merit of an employee grievance provided no assurance of resolution beyond what Gerawan already had determined appropriate.

Grievance-arbitration is a common feature in collective bargaining agreements. The United States Supreme Court has held that federal labor policy "is to promote industrial stabilization through the collective bargaining agreement," and that "[a] major factor in achieving industrial peace is the inclusion of a provision for arbitration of grievances in the collective bargaining agreement." (*United Steelworkers of America v. Warrior & Gulf Navigation Co*. (1960) 363 U.S. 574, 578.) The Court further described the inclusion of a grievance-arbitration process in a collective bargaining agreement "as a substitute for industrial strife." (*Ibid.*; *Plumbing, Heating Etc. Council v. Howard* (1975) 53 Cal.App.3d 828, 834 ["It has been recognized that '"arbitration under collective bargaining agreements [is] one of the most potent factors in establishing and maintaining peace and protection in industry"'; hence, 'it can be safely stated that it is a fundamental part of both federal and California public policy to promote industrial stabilization through the medium of collective bargaining agreements'"].) These are the same types of policy concerns which prompted the Legislature to enact the ALRA in order to bring peace and stability to the agricultural fields.

Thus, we are not persuaded that Gerawan's "concessions" on grievance-arbitration are as noteworthy as it portrays them. While Gerawan may have made more movement on this issue than the UFW, it is similarly true that Gerawan's starting point, i.e., Gerawan determines all employee grievances itself, allowed for the most movement

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to the positions at which the parties ultimately arrived.[16] On the record before us, these concessions are not sufficient to detract from Gerawan's positions on its Right to Work, Economic Action, Union Obligations proposals, as well as its resistance to the UFW's just cause proposal, which we find demonstrate a strategy by Gerawan to frustrate the possibility of reaching agreement on a collective bargaining agreement. (See *Altorfer Machinery Co.*, *supra*, 332 NLRB 130, 150, citing *NLRB v. Big Three Industries, Inc.*, *supra*, 497 F.2d at p. 46.)

In sum, Gerawan's argument that the ALJ failed to consider concessions it made on the above proposals is not convincing.

2. Gerawan's Conduct Away From the Bargaining Table

a. Delays in Providing Information

Gerawan argues that it did not cause critical delays in negotiations and that it provided the UFW with all of the information it needed in order to make an economic proposal on November 16, 2012. Gerawan's position is that the ALJ either failed to review, or misinterpreted, the evidence in concluding that Gerawan delayed furnishing critical economic information until late June 2013. We do not find merit in this argument.

"One aspect of the duty to bargain 'collectively in good faith with labor organizations' (§ 1153, subd. (e)) requires the employer to make a reasonable and diligent effort to comply with the union's request for relevant information." (*Cardinal*

[16] The parties eventually reached a tentative agreement on nearly all aspects of a grievance-arbitration provision, but a dispute remained over the source of arbitration services to be used.

Distributing Co. v. ALRB (1984) 159 Cal.App.3d 758, 762, citing *O. P. Murphy & Sons* (1978) 5 ALRB No. 63.) "The importance of this rule, and its underlying policy consideration of fostering informed collective bargaining, are underscored by cases which hold that an employers' breach of the duty constitutes a refusal to bargain in good faith." (*Ibid*., citing *NLRB v. Acme Industrial Co*. (1967) 385 U.S. 432, 435-436 and *As-H-Ne Farms* (1978) 6 ALRB No. 9.) A refusal to furnish requested information is an independent violation of the Act's requirement that parties bargain in good faith, and is also evidence of surface bargaining. (*Queen Mary Restaurants Corp. v. NLRB* (9th Cir. 1977) 560 F.2d 403, 408; *K-Mart Corp. v. NLRB* (9th Cir. 1980) 626 F.2d 704, 707 ["The refusal to furnish requested information is in itself an unfair labor practice, and also supports the inference of surface bargaining"]; see also *Valley Inventory Service* (1989) 295 NLRB 1163, 1166 ["An unreasonable delay in furnishing such information is as much a violation of Section 8(a)(5) of the Act as a refusal to furnish the information at all"].)

"Information pertaining to employees within the bargaining unit is presumptively relevant to a union's representational duties … Thus, employee personnel information, job descriptions, pay-related data, employee benefits, and policies that relate thereto are all presumptively relevant … Presumptively relevant information must be furnished on request to employees' collective-bargaining representatives unless the employer establishes legitimate affirmative defenses to the production of the information." (*Ralphs Grocery Co*. (2008) 352 NLRB 128, 134, affd. and incorporated by reference in (2010) 355 NLRB 1279.) The NLRB has held that the premiums paid under

health insurance plans constitute wages, and as wages, such information is presumptively relevant. (*The Nestle Company* (1978) 238 NLRB 92, 94; *Honda of Hayward* (1994) 314 NLRB 443 [information regarding health insurance plans for bargaining unit employees is presumptively relevant].)

The ALJ found that Gerawan initially failed for three weeks to answer the UFW's October 2012 request to bargain and for information. While Gerawan did provide some of the requested information in December 2012,[17] the ALJ found Gerawan delayed furnishing critical economic information until late June or early July 2013. (ALJD, p. 47.) This was eight months after the UFW made its initial information request. (*Baldwin Shop 'N Save* (1994) 314 NLRB 114, 124 [two-month delay in providing information related to health care coverage unlawful]; see *Regency Service Carts, Inc*. (2005) 345 NLRB 671, 674-675 [delays of three and four months unreasonable]; *Valley Inventory Service*, *supra*, 295 NLRB 1163, 1166 [four-month delay unreasonable]; *Interstate Food Processing Corp*. (1987) 283 NLRB 303, 306 [five-month delay unreasonable]; see also *Triple E Produce Corp*. (1997) 23 ALRB No. 8, p. 2 [ALJ Dec. p. 49; delay of more than six months "clearly unreasonable"]; *Chula Vista City School District* (1990) PERB Dec. No. 834-E, p. 51 ["a delay of six months in providing information has been held a failure to negotiate in good faith"].) While Gerawan attempts to defend the surface bargaining

[17] The ALJ noted that the December response itself was "on the borderline of unlawful delay in many reported cases." (ALJD, p. 47; see, e.g., *Bituminous Roadways of Colo*. (1994) 314 NLRB 1010, 1014 [six-week delay]; *Bundy Corp*. (1989) 292 NLRB 671, 672 [six-week delay]; *Woodland Clinic* (2000) 331 NLRB 735, 737 [seven-week delay]; *Seiler Tank Truck Service, Inc*. (1992) 307 NLRB 1090, 1101 [seven-week delay]; *Gloversville Embossing Corp*. (1994) 314 NLRB 1258 [two-month delay].)

allegations against it by claiming that the UFW's failure to pass an economic package before July prevented the parties' from reaching agreement, the ALJ credited Elenes' representation that Gerawan's failure to produce information related to the costs of the health care program inhibited the UFW's ability to pass its economic package. (ALJD, p. 47.) In any event, an unreasonable delay in furnishing information, by itself, is a per se unfair labor practice, and the fact that the information eventually was produced does not militate against such findings. (*K & K Transportation Corp., Inc.* (1981) 254 NLRB 722, 735-736; *Queen Mary Restaurants Corp*. (1975) 219 NLRB 776, 795 [employer's unreasonable delay (four months) in providing health insurance information demonstrates "conduct wholly inconsistent with its statutory obligation" to bargain in good faith], enfd. *Queen Mary Restaurants Corp., supra*, 560 F.2d at pp. 408-409; *United States Gypsum Co*. (1972) 200 NLRB 305, 308; see also *Petaluma City Elementary School District/Joint Union High School District* (2016) PERB Dec. No. 24485-E, pp. 19-20 ["An unreasonable delay in providing necessary and relevant information is as much a per se violation of the duty to bargain as is an outright refusal to provide the information"].) As a general rule, presumptively relevant information, including economic terms such as wages or health insurance information, must be furnished upon request, without regard to its immediate relationship to the negotiation of a collective bargaining agreement or the union first establishing its precise relevance. (*United States Gypsum Co., supra*, 200 NLRB 305, 307.)

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We uphold the ALJ's finding that Gerawan's unreasonable delay in furnishing economic information requested by the union provides further evidence of an approach to bargaining lacking in good faith.

b. Gerawan's 2013 Interim Wage Increases and the Flyers Informing Employees of the Increases

Gerawan contends that the manner by which it implemented interim wage increases in March 2013 "does not reflect in any way on Gerawan's intention to reach a collective bargaining agreement with the UFW." Specifically, Gerawan argues:

> … the events surrounding the wage increases were completely divorced from Gerawan's efforts to negotiate a contract with the UFW. The fact that the interim wage increases took place while the parties were negotiating toward an overall agreement is purely circumstantial and coincidental. There is no reason to think that Gerawan could not have implemented the interim wage increases in exactly the way that it did while legitimately negotiating toward a contract with the UFW at the same time. While the ALJ may disapprove of Gerawan's behavior regarding the interim wage increases, he cannot use it to establish surface bargaining.

This argument reflects a gross misunderstanding of the duty to bargain. The ALRA imposes on an employer, and a labor organization, an obligation to meet and confer in good faith "with respect to *wages*, hours, and other terms and conditions of employment." (Lab. Code, § 1155.2, subd. (a), emphasis added; *Reed & Prince Mfg. Co.* (1951) 96 NLRB 850, 856 ["The Board has frequently had occasion to point out that the unilateral granting of a wage increase during the course of negotiations with the legally constituted bargaining representative of its employees is a violation of the Act"].) An employer violates its duty to bargain when it implements unilateral changes in terms and

conditions of employment. (*NLRB v. Katz* (1961) 369 U.S. 736, 743.) This prohibition against the implementation of unilateral changes is even stronger when the parties actively are engaged in bargaining: "[W]hen, as here, the parties are engaged in negotiations, an employer's obligation to refrain from unilateral changes extends beyond the mere duty to give notice and an opportunity to bargain; it encompasses a duty to refrain from implementation at all, unless and until an overall impasse has been reached on bargaining for the agreement as a whole." (*Bottom Line Enterprises* (1991) 302 NLRB 373, 374.) Unilateral changes in mandatory subjects of bargaining are among the factors we examine when considering allegations of surface bargaining. (*Atlanta Hilton*, *supra*, 271 NLRB 1600, 1603; see *Reed & Prince Mfg. Co.*, *supra*, 96 NLRB 850, 856-858.)

The ALJ found the two wage increases implemented by Gerawan in March 2013 provided "compelling evidence of its extreme bad faith approach to its bargaining efforts in 2013." The first wage increase was communicated to employees in flyers on March 20 — one day after Gerawan proposed the increase to the UFW and before the UFW accepted it. The flyer informed employees that "Ray, Mike, and Dan Gerawan have made the decision to give crew labor a raise just as they always have," and that Gerawan had "informed" the UFW of its "plan" and hoped the union "will not cause any unnecessary delay." A second increase was proposed to the UFW late in the evening on March 27. Gerawan communicated the increase to employees by another flyer on March 28 containing the same language from the March 20 flyer described above. We agree with the ALJ that Gerawan gave the UFW notice of a *fait accompli*, not a meaningful opportunity to bargain, that presented the union the Hobson's choice to quickly accept

Gerawan's terms or face further disparagement by it. (*Champion International Corp*. (2003) 339 NLRB 672, 678-688; *S & I Transportation, Inc*. (1993) 311 NLRB 1388, fn. 1; *J.P. Stevens & Co*., *supra*, 239 NLRB 738 [finding an employer's "Hobson's choice" tactics were "a most effective means of undermining the collective-bargaining process and denigrating the Union's status as collective-bargaining agent"].) Put another way, "the Union was not so much presented with an opportunity to bargain about the wage increase as it was afforded a chance to give approval to Respondent's decision to grant it." (*Central Virginia Electric Cooperative* (1981) 254 NLRB 417, 426; *J.P. Stevens & Co*., *supra*, 239 NLRB 738, 751.)

The message communicated by Gerawan to its employees further evidences a strategy to undermine the union in the eyes of the employees. According to the flyers, Gerawan decided "to give" the employees a raise "just as they always have." While Gerawan portrays itself as the benefactor of its employees, no mention is made of the union other than to depict it as an obstacle to Gerawan's ability to bestow its good will on the employees. Gerawan argues that it had a First Amendment right to communicate to its employees about the two interim wage increases that it claims the parties agreed to during negotiations. It is true an employer generally may communicate with its employees about the status of ongoing negotiations "in noncoercive terms;" however, it equally is true an employer exceeds such permissible bounds of communication when conducted "under such conditions as to suggest to employees that 'the Employer rather than the Union is the true protector of the employees' interest.'" (*AMF Inc*. (1975) 219 NLRB 903, 909; *Reed & Prince Mfg. Co*., *supra*, 96 NLRB 850, 856 [even after a lawful impasse, wage

increases "must not be put into effect in such a way as to disparage the bargaining agent or undermine its prestige or authority"]; *Hardesty Co., Inc*. (2001) 336 NLRB 258, 261, 269 [employer's unilateral action sought "to communicate to employees that there is no need for the Union as their collective-bargaining representative" and "served to undermine the Union[']s status as collective bargaining agent with the obvious objective of causing disaffection of its membership"], enfd. *NLRB v. Hardesty Co., Inc*. (8th Cir. 2002) 308 F.3d 859; see also *Armored Transport, Inc*. (2003) 339 NLRB 374, 376; *Gerstenslager Co*. (1973) 202 NLRB 218, 224 [improper direct dealing where employer's newsletter informed employees of new "Attendance Guidelines" it was implementing "with no reference whatsoever to the Union"], enfd. *NLRB v. Gerstenslager Co*. (6th Cir. 1973) 487 F.2d 1332.) The Board has found that conduct reflecting an underlying purpose to bypass or undermine the union "manifests the absence of a genuine desire to compromise differences and to reach agreement in the manner the Act commands." (*Montebello Rose Co., Inc.* (1979) 5 ALRB No. 64, p. 25, citing *Akron Novelty Mfg. Co*. (1976) 224 NLRB 998, 1001.)

Accordingly, we uphold the ALJ's finding that Gerawan's conduct surrounding the March 2013 wage increases further evidences Gerawan's lack of good faith in bargaining towards a collective bargaining agreement with the UFW.[18]

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[18] The ALJ additionally found evidence of bad faith in Gerawan's initial identification of the March 2013 wage increases to the UFW as "interim" increases but then later taking the position that they were Gerawan's entire wage proposal. (ALJD, p. 49.)

3. The ALJ's Reliance on Other Unlawful Conduct by Gerawan as Found in 42 ALRB No. 1

Gerawan argues that it was an error for the ALJ to cite the Board's findings in *Gerawan Farming, Inc.*, *supra*, 42 ALRB No. 1 as evidence to support his conclusions in the instant matter because an appeal of that decision is pending before the Fifth District Court of Appeal. Gerawan also argues that a stay is required because there is a potential that the Board will create inconsistent, conflicting decisions.

The ALJ in his decision extensively cites portions of the Board's and ALJ's decisions in 42 ALRB No. 1, primarily concerning the flyers Gerawan began distributing to its employees after the UFW requested bargaining in October 2012. This includes the flyers Gerawan distributed to its employees in March 2013 announcing the "interim" wage increases. The ALJ additionally cited portions of the Board's decision in that case summarizing the Board's findings of Gerawan's unlawful support and assistance for the decertification effort, as well as findings that Gerawan unlawfully solicited employee grievances and engaged in direct dealing with its employees.

In his surface bargaining analysis, the ALJ specifically points only to the June 2013 unilateral wage increase Gerawan provided its FLC workers and to the March 2013 interim wage increases. Dan Gerawan admitted in the earlier proceeding to giving the UFW no advance notice of the June 2013 unilateral wage increase, and the March 2013 flyers are included in the record in this case. We find nothing improper in the ALJ's

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reference to these materials or his reliance on them.[19] To the extent the ALJ suggests in his later discussion concerning the remedial makewhole award that Gerawan instigated the decertification effort by suggesting an election to its employees (whom the ALJ states "finally took the hint, and acted"), we agree with Gerawan that such a suggestion is contrary to our findings in 42 ALRB No. 1.[20] However, this does not affect our affirmance of the ALJ's surface bargaining findings, as the ALJ did not rely on any findings of instigation in reaching his conclusions but only suggested possible instigation by Gerawan in the remedial portion of his order, which we address separately below.

That Gerawan has petitioned for review of our prior decision in 42 ALRB No. 1 is of no moment in this case. Our findings and affirmance of the ALJ's surface

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[19] Although the ALJ in his surface bargaining analysis does not specifically rely on the Board's findings of unlawful support and assistance to the decertification effort, solicitation of grievances, and employee direct dealing as found by the Board in 42 ALRB No. 1, we would find nothing improper in doing so. We are not required to ignore this history. (*Reed & Prince Mfg. Co*., *supra*, 96 NLRB 850, 857, enfd. 205 F.2d at pp. 139-140.) While the union may have been remiss in performing its representational functions in the years before it requested to commence bargaining with Gerawan in October 2012, Gerawan's various unlawful acts aimed at undermining, and ultimately removing, the union in the time since the UFW requested bargaining in October 2012 are not matters we are required to ignore. (*Ibid*.; *J. P. Stevens & Co*., *Inc*., *supra*, 239 NLRB 738, 769.) Thus, while the record of Gerawan's bargaining conduct in this case fully supports our findings that it simply engaged in the surface motions of bargaining without any real intention of reaching agreement with the union, we consider such unlawful conduct as found in our prior decision as providing additional context to the parties' labor relations. As Gerawan admits in its exceptions brief, the Board's factual findings from that case are conclusive if supported by substantial evidence from the record considered as a whole. (Gerawan Br., pp. 64:28-65:2, citing Lab. Code, § 1160.8.)

[20] The ALJ additionally acknowledged the unlawful assistance and support Gerawan provided the decertification effort, consistent with our findings in 42 ALRB No. 1, and we find no impropriety in his doing so, consistent with the preceding footnote.

bargaining findings are based on the record in this case. The ultimate disposition of Gerawan's petition for review in the other case has no bearing on our disposition of this case. (See *Pactiv Corp.* (2002) 337 NLRB 898, 901 [denying respondent's request to stay proceedings pending another action when resolution of the other action would have no dispositive effect on the unfair labor practice allegations]; *Aliante Gaming, LLC* (2016) 364 NLRB No. 78, slip opn. pp. 19-20 [ALJ entitled to rely on another judge's findings in an earlier case even though the case was pending before the Board on exceptions], citing *Grand Rapids Press of Booth Newspapers* (2002) 327 NLRB 393, fn. 1, and 394-395; see also *Beverly Hills Unified School District* (1990) PERB Dec. No. 789-E, p. 18 [Public Employment Relations Board relying on determinations made in a prior decision pending appeal].) For similar reasons, we deny Gerawan's request for a stay of this case pending the appellate court's review of our decision in 42 ALRB No. 1.

B. Refusal to Bargain Over Terms and Conditions of Employment of FLC Employees

The ALJ concluded that Gerawan separately violated Labor Code section 1153, subdivision (e), by its persistent refusal to bargain over the wages, hours, and terms and conditions of employment of the FLC workers who are a part of the bargaining unit. We affirm the ALJ.

The ALJ found Gerawan's proposals from the beginning through the conclusion of bargaining sought to exclude FLC workers from any collective bargaining agreement. Gerawan's initial proposal outright excluded them from any contract, and its

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final proposals effectively removed determinations concerning FLC workers' terms and conditions of employment from the scope of any contract.

There is no question that the FLC workers are a part of the bargaining unit represented by the UFW. (Lab. Code, §§ 1140.4, subd. (c), 1156.2; *TMY Farms* (1976) 2 ALRB No. 58, pp. 4-5; *Bud Antle, Inc*. (2013) 39 ALRB No. 12, p. 9; see *Cardinal Distributing Co.*, *supra*, 159 Cal.App.3d at p. 768 ["section 1140.4, subdivision (c) provides that an employer which engages a labor contractor shall be deemed the employer of the contractor's work force 'for all purposes under [the act]'"].) FLC workers voted in the election resulting in the UFW's certification. (See *Gerawan Ranches* (1990) 16 ALRB No. 8, p. 9, fn. 7; *Gerawan Ranches*, *supra*, 18 ALRB No. 5, p. 16.) An employer's refusal to bargain over the wages, hours, and other terms and conditions of employment of FLC workers constitutes a per se violation of the duty to bargain. (*Paul W. Bertuccio* (1984) 10 ALRB No. 16, at ALJ Dec. p. 21, enfd. in relevant part in *Bertuccio v. ALRB* (1988) 202 Cal.App.3d 1369, 1377 [affirming Board's finding that employer's "insistence on exclusion from the bargaining unit of certain workers provided by labor contractor Quintero amounted to a refusal to bargain in good faith"].)

A proposal to modify the scope of a bargaining unit, or to remove employees from the bargaining unit, is not a mandatory subject of bargaining. (*Hess Oil & Chemical Corp.*, *supra*, 415 F.2d at p. 445 ["We hold that an issue concerning the constriction of an appropriate unit so as to exclude certain members from that unit is not a subject for bargaining and an insistence upon it constitutes a violation of § 8(a)(5)"].) Likewise, an employer's insistence that bargaining be restricted to less than all

employees in the bargaining unit similarly constitutes a refusal to bargain. (*Paul W. Bertuccio, supra*, 10 ALRB No. 16, at ALJ Dec. p. 20, citing *Beyerl Chevrolet, Inc*. (1975) 221 NLRB 710 ["Respondent's inclusion of language which arbitrarily limits the scope of the unit in any of its bargaining proposals shows a reluctance on its part to attempt to reach a collective-bargaining agreement"].)

We agree with the ALJ that Gerawan's insistence on removing the FLC workers from the scope of any collective bargaining agreement, and its persistent refusal to bargain over their wages, hours, and terms and conditions of employment, violate section 1153, subdivision (e). Gerawan's claim that its proposals to exclude FLC workers were in good faith is not a defense. (*Paul W. Bertuccio, supra*, 10 ALRB No. 16, at ALJ Dec. p. 20 [employer's good faith belief that employees were not included in bargaining unit not a defense]; *Davison, supra*, 318 F.2d at p. 554 [as to nonmandatory subjects, "[t]he good faith of the insisting party is no defense"]; see *J.P. Stevens & Co., supra*, 239 NLRB 738, 766.)[21]

[21] The General Counsel excepts to the ALJ's decision asking the Board to determine whether a proposal to exclude FLC employees from a collective bargaining is permissive or illegal. The ALJ did not specifically conclude whether such a proposal was permissive or illegal. The UFW has agreed to such terms in collective bargaining agreements with other employers (and it is upon this point Gerawan relies in asserting its proposal was made in good faith). The General Counsel asserts "[i]t is vitally important for the Board to declare it illegal under the Act for employers or unions to seek, propose or agree to the exclusion of agricultural employees hired through FLCs from any and all provisions of a collective bargaining agreement." We decline to issue the declaration requested by the General Counsel, which we find unnecessary to our disposition of this case. For purposes of our decision, and the ALJ's decision, it is sufficient that a proposal to exclude FLC employees from a collective bargaining agreement is not a mandatory subject of bargaining, and that Gerawan committed an unfair labor practice by insisting

C. The Makewhole Remedy

Gerawan argues that makewhole is not an appropriate remedy in this case. Gerawan asserts that it was already paying the highest wages in the industry, and there were two agreed-upon wage increases during negotiations that went into immediate effect. Gerawan points to a wage survey that it conducted among its own employees to determine whether the employees earned higher wages working at other facilities. The survey indicates that Gerawan paid the highest general labor rates among the other employers. This survey is not an exhibit in the instant record, but it is referred to in the Mediator's Report to the Board at page 56.

In addition, Gerawan argues that the UFW had the information it needed to make an economic proposal but did not do so. Gerawan argues that it is not possible to conclude that its conduct prevented the parties from reaching an agreement for higher wages, thus under *Dal Porto, supra*, 191 Cal.App.3d 1195 and *J.R Norton Co. v. ALRB* (1979) 26 Cal.3d 1, makewhole is not an appropriate remedy.

Gerawan argued in its post-hearing brief to the ALJ that under *Tri-Fanucchi Farms* (2015) 236 Cal.App.4th 1079 makewhole is not appropriate because of the UFW's "abandonment" of the unit. In its exceptions, Gerawan asserts that the court

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on such terms and by refusing to negotiate over the wages, hours, and terms and conditions of employment of the FLC employees. While the General Counsel urges the Board to declare the illegality of a proposal to exclude FLC employees from a collective bargaining agreement on the basis that such a term violates the UFW's duty of fair representation, we will not decide that issue in the absence of an unfair labor practice case actually presenting such issues for resolution, consistent with our remedial authority under the Act.

found makewhole inappropriate in *Tri-Fanucchi*, and complains that it was "almost inconceivable that the ALJ would assert that Gerawan's actions in this matter warrant significantly harsher treatment than that of the employer who completely ignored the UFW in *Tri-Fanucchi*. (Gerawan Br., p. 72.)

Moreover, Gerawan argues that the UFW's invocation of MMC on March 29, 2013, precluded further bargaining. Gerawan maintains that makewhole is only an appropriate remedy in the context of voluntary collective bargaining. Finally, even assuming makewhole was an appropriate remedy, Gerawan argues that the makewhole period should end on the date the UFW invoked MMC — March 29, 2013. Gerawan argues that the *Arnaudo Brothers* decision[22] relied upon by the ALJ is distinguishable because in that case, the employer continued to bargain in bad faith until the first MMC session, while in this case, the UFW "stated that they had no desire or reason to continue bargaining with Gerawan until the MMC process began." (Gerawan Br., p. 74.)[23]

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[22] *Arnaudo Brothers, supra*, 41 ALRB No. 6. On August 7, 2017, after exceptions and replies in the instant case were filed, the Fifth District Court of Appeal issued a decision reversing the Board's award of makewhole in that case. The Court upheld the Board's determination that the union had not disclaimed interest in representing the bargaining unit. On October 25, 2017, the California Supreme Court granted the Board's petition for review of the Fifth District's opinion on the makewhole issue, while denying the employer's petition for review on the disclaimer issue. (See *Arnaudo Brothers, LP v. ALRB* (2017) 14 Cal.App.5th 22, review granted Oct. 25, 2017, S244322.)

[23] This is not an accurate representation of Elenes' testimony. Elenes did not make this statement in quotes when he testified, and Gerawan points to no other evidence that this precise statement was made by Elenes or another UFW representative during negotiations. Elenes did testify that by late March or early April "it was quite evident … that [MMC] was really going to be our option in order to reach an agreement." (TR I:186.)

Gerawan's position is that the UFW abandoned Gerawan's effort to bargain with it on the date MMC was invoked, so the UFW should not be rewarded by makewhole relief beyond March 29, 2013.

We conclude that, under the circumstances presented in this case, the makewhole remedy is appropriate for the following reasons. Section 1160.3 of the ALRA authorizes the Board to award makewhole "when the board deems such relief appropriate for the loss of pay resulting from the employer's refusal to bargain." (Lab. Code, § 1160.3.) Makewhole relief is not ordered as a penalty for unacceptable conduct but rather for the purpose of "making employees whole" for losses of pay suffered by employees. (*Ibid; George Arakelian Farms, Inc. v. ALRB* (1989) 49 Cal.3d 1279, 1286, fn. 3.) "Make-whole relief is compensatory in that it reimburses employees for the losses they incur as a result of delays in the collective bargaining process." (*J.R. Norton v. ALRB, supra,* 26 Cal.3d at p. 36.) The Board's precedent confirms that makewhole awards have been deemed appropriate in surface bargaining cases. (*Paul Bertuccio, supra,* 17 ALRB No. 16; *Robert Meyer dba Meyer Tomatoes* (1991) 17 ALRB No. 17; *O.P. Murphy Produce Co., supra,* 5 ALRB No. 63.) Where makewhole is awarded, the makewhole period commences from the date of the violation and normally continues until the employer is shown to have commenced good faith bargaining. (*Mario Saikhon, supra,* 13 ALRB No. 8, p. 16.)

In considering makewhole, the ALJ applied the test stated in *Dal Porto, supra,* 191 Cal.App.3d 1195. Under the "*Dal Porto* test," once evidence is produced showing that the employer unlawfully refused to bargain, a presumption is created that

the parties would have consummated a collective bargaining agreement providing for higher employee pay had the employer bargained in good faith. (*Dal Porto, supra*, 191 Cal.App.3d at pp. 1208-1209.) The burden of persuasion thus shifts to the employer to rebut this presumption. (*Ibid.*) If the employer cannot rebut the presumption, "the Board is entitled to find an agreement providing for higher pay would have been concluded." (*Id*. at p. 1209.)

In order to rebut the *Dal Porto* presumption, the employer must "show that some other, legitimate cause had operated to prevent agreement" and that "the parties would not have agreed even if the employer had *not* refused to bargain [in good faith]." (*United Farm Workers of America v. ALRB* (1993) 16 Cal.App.4th 1629, 1638.) It is recognized that "the effect on the bargaining process of an unfair labor practice [is] often difficult if not impossible to ascertain" and that, therefore, the question of what would have occurred had the employer not bargained in bad faith is necessarily fraught with uncertainty. (*Dal Porto, supra*, 191 Cal.App.3d at pp. 1207-1208.) Yet, because this uncertainty is created by the employer's unlawful conduct, the employer bears the burden of overcoming it with evidence that is both relevant and not speculative. (*United Farm Workers of America, supra*, 16 Cal.App.4th at p. 1638; *Dal Porto, supra*, 191 Cal.App.3d at p. 1208 ["The most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created"].)

Here, the Board has found that Gerawan unlawfully engaged in surface bargaining in violation of the Act. Therefore, the Board presumes that an agreement providing for higher employee wages would have been reached in the absence of

Gerawan's unlawful conduct unless Gerawan can rebut that presumption. We affirm the ALJ's conclusion that the record does not support Gerawan's claim that it was already paying the highest wages in the industry, as this claim was based only on Gerawan's own self-serving, unproven assertions. Gerawan in its exceptions proffers only a reference to its wage survey presented in the MMC sessions in arguing that it was paying the highest wages. Furthermore, even if Gerawan had presented persuasive evidence that it was paying higher wages than its competitors, it would not necessarily establish that a contract providing for higher wages would not have been reached through good faith bargaining. In fact, Gerawan unilaterally raised its purportedly industry-leading wages not once but twice during the bargaining process.

Moreover, Gerawan's argument that it was the UFW's failure to make an economic proposal that impeded the bargaining process lacks merit, as we uphold the ALJ's conclusion that Gerawan had still not provided the information the UFW needed to make a full economic proposal as late as June 2013. Thus, we affirm the ALJ's conclusion that Gerawan failed to meet its burden to show that a contract providing for higher wages would not have been reached had Gerawan bargained in good faith and, therefore, "the Board is entitled to find an agreement providing for higher pay would have been concluded." (*Dal Porto, supra*, 191 Cal.App.3d at p. 1208.)

In addition, we find makewhole is appropriate under *F & P Growers Association* (1983) 9 ALRB No. 22, affirmed at *F & P Growers Association, supra,* 168 Cal.App.3d 667.) Under *F & P Growers*, the Board is to "consider on a case-by-case basis the extent to which the public interest in the employer's position weighs against the

harm done to the employees by its refusal to bargain." (*Id*. at pp. 7-8.) Except in cases where the employer's position furthers the policies and purposes of the ALRA, "the employer, not the employees, should ultimately bear the financial risk of its choice to litigate rather than bargain." (*Id*. at p. 8.)

Having conducted a de novo review of the record and considered the arguments Gerawan presented in its briefing, the Board finds that Gerawan's conduct in this case does not further the policies and purposes of the Act. Gerawan's decision to engage in what the ALJ accurately described as a "time-consuming bargaining charade," part of which "included an unrelenting effort to discredit" its employees' representative (ALJD, p. 56), far from furthering the policies of the Act, was inimical to those purposes. In particular, Gerawan's conduct was destructive of the core right of employees "to negotiate the terms and conditions of their employment" through their bargaining representative. (Lab. Code, § 1140.2.)

Gerawan attempts to compare its conduct favorably to the conduct that was at issue in *Tri-Fanucchi*. (*Tri-Fanucchi Farms* (2014) 40 ALRB No. 4.) Initially, to the extent that Gerawan attempts to rely upon the Fifth District Court of Appeal's decision in that case, the California Supreme Court has since reversed the appellate court's reversal of the Board's makewhole award in that case. (*Tri-Fanucchi Farms, supra,* 3 Cal.5th at pp. 1172-1173.) Furthermore, the employer's refusal to bargain in that case was a forthright (if meritless) attempt to challenge the Board's established precedent on "abandonment." Gerawan, in contrast, appeared at the bargaining table under the entirely false pretense that it was prepared to bargain in good faith and proceeded to deliberately

conduct itself in such a way as to make agreement impossible. Under the *F & P Growers* standard, an employer's good faith and reasonableness do not determine the issue of whether makewhole is appropriate. (*Cardinal Distributing Co.*, *supra*, 159 Cal.App.3d at pp. 778-779.) However, although an employer's good faith does not preclude an award of makewhole, in cases where surface bargaining was found the respondent necessarily engaged in bad faith conduct.

To the extent that Gerawan argues that its assertion of the "abandonment" defense furthers the policies and purposes of the Act, we find, as we have in previous cases, that the assertion of that defense under these circumstances does not advance the policies of the Act.[24] (*Tri-Fanucchi Farms, supra*, 40 ALRB No. 4, p. 18, affd. by *Tri-Fanucchi Farms, supra*, 3 Cal.5th at pp. 1171-1173; see *Joe G. Fanucchi & Sons/Tri-*

[24] Gerawan's positions on the UFW's representational status are inherently contradictory. On the one hand, Gerawan asserts — as it has in various other contexts — that the UFW abandoned the bargaining unit and thus no longer represents its employees. On the other hand, Gerawan has contended throughout this case that it remained open to bargaining with the UFW and endeavored to reach a collective bargaining agreement with it. Gerawan's initial letter to the UFW on November 2, 2012, after the union's renewed bargaining demand even states that Gerawan will proceed with scheduling negotiations with the UFW and respond to its information requests. Gerawan cannot have it both ways. By indicating its willingness to enter into negotiations with the UFW and respond to its information requests, and by eventually doing both, Gerawan conceded the UFW's status as its employees' certified bargaining representative. (See *Technicolor Government Services, Inc. v. NLRB* (8th Cir. 1984) 739 F.2d 323, 327 ["Once an employer honors a certification and recognizes a union by entering into negotiations with it, the employer has waived the objection that the certification is invalid"]; *Brown & Connolly, Inc*. (1978) 237 NLRB 271, 275 [employer demonstrated its acceptance of union's representational status by arranging to begin negotiations with it]; Lab. Code, § 1153, subd. (f).) It thus waived any argument the UFW no longer retained its certified status.

Fanucchi Farms (1986) 12 ALRB No. 8, pp. 9-10 [ordering makewhole where Employer raised defenses that had already been rejected under existing case law].)

Finally, Gerawan's argument that an award of makewhole is not appropriate in circumstances where MMC has been invoked is not supported by any legal authority. There is nothing in the MMC statue that precludes a makewhole award for an unfair labor practice violation. (See *Arnaudo Brothers, supra*, 41 ALRB No. 6, at ALJ Dec. p. 12.)[25] The mediator's authority in the MMC process is limited to resolving the final terms of a collective bargaining agreement regarding mandatory subjects of bargaining (wages, hours, or other terms and conditions of employment). (Lab. Code, §§ 1164, subd. (d), 1164.3, subd. (a).) The mediator has no authority under the MMC process to order unfair labor practice remedies; that authority remains exclusively with the Board. (Lab. Code, §§ 1160.3, 1160.9; *Kaplan's Fruit & Produce Co. v. Superior Court* (1979) 26 Cal.3d 60, 67 [recognizing ALRB's "exclusive jurisdiction" over unfair labor practices].) Moreover, Gerawan and the UFW continued to bargain without the assistance of the mediator after the MMC process had been invoked and after the parties' initial MMC session with the mediator. Gerawan's bad faith bargaining tactics continued throughout this time.

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[25] The Fifth District Court of Appeal reversed the Board's award of makewhole relief on other grounds in *Arnaudo Brothers, supra*, 14 Cal.App.5th 22, review granted Oct. 25, 2017, S244322. (Cf. *Tri-Fanucchi Farms, supra*, 3 Cal.5th at p. 1173 [appellate court erred in affording no deference to Board's remedial determination concerning award of makewhole relief].)

Based upon our review of the facts and circumstances and the equities of this case, we conclude that an award of makewhole is appropriate.[26] With respect to the length of the makewhole period, Gerawan argues that makewhole should be cut off on March 29, 2013. For the reasons discussed above, Gerawan's argument that UFW's invocation of MMC on March 29, 2013, precluded further bargaining is without merit and is undercut by the record, including as stipulated to by the parties.[27]

The UFW and the General Counsel argue that the makewhole period should extend beyond June 6, 2013. The UFW argues that the makewhole period should commence on January 18, 2013, and run until the date in the future that Gerawan actually implements the terms of the MMC contract. The General Counsel reasons that nothing in

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[26] The General Counsel requests that the Board rule in its decision on the method that the Regional Director should use to calculate the amount of makewhole. The General Counsel's position is that the contract terms in the mediator's report in *Gerawan Farms, Inc., supra,* 39 ALRB No. 17 be used as the most reasonable measure of makewhole. We decline to rule on this issue at this time. The makewhole methodology was not litigated in this proceeding. The use of a subsequent MMC contract as a measure of makewhole would be a matter of first impression that should be fully briefed and litigated by the parties in the compliance phase of the case.

[27] Gerawan contends in its exceptions that MMC "supplants" consensual bargaining and suggests that good faith bargaining is not required after MMC is invoked. The Board has found, and the California Supreme Court recently confirmed, that MMC is not a substitute for bargaining but rather a mere extension of the bargaining process. (*Arnaudo Brothers, supra,* 41 ALRB No. 6, p. 2, fn. 2; *Gerawan Farming, Inc., supra,* 3 Cal.5th at pp. 1156-1157.) We reject Gerawan's suggestion that the statutory good faith bargaining obligation does not apply where referral to MMC is possible or after MMC is requested by either party. The possibility a party may request referral to MMC, or the fact that a party has done so, does not privilege the other party to disregard its bargaining obligation or to otherwise engage in a campaign of bad faith tactics to frustrate bargaining and the prospect of reaching agreement. (*Gerawan Farming, Inc., supra,* 3 Cal.5th at p. 1157 [finding that when the Legislature enacted the MMC statute, "it expanded the 'duty to bargain' to include the MMC process"].)

the majority decision in *Arnaudo Brothers*, *supra*, 41 ALRB No. 6, relied upon by the ALJ, suggests a *per se* rule that a makewhole remedy must be cut off on the date of the first MMC session, and contends that such a rule would be inconsistent with the idea that the MMC process is part of the collective bargaining process. The General Counsel argues that in the present case there is "extensive evidence of bad faith bargaining after the commencement of MMC," continuing and overlapping with the effective date of the MMC contract. Thus, the General Counsel argues that the makewhole period should end on August 30, 2013, "unless the MMC contract is enforced, in which case the Board should end the makewhole period on the first day of … Gerawan's refusal to implement the MMC contract." (GC Br., p. 14.)

We agree that the commencement of the first MMC session does not necessarily terminate a makewhole period, and, under the circumstances presented in this case the makewhole period continues beyond the initial mediation session held by the parties.

The Legislature stated that it established MMC "in order to ensure a more effective collective bargaining process . . ." (Sen. Bill No. 1156 (2001-2002 Reg. Sess.).) In doing so "the Legislature did not alter the Board's remedial authority in unfair labor practice or election objections cases." (*D'Arrigo Bros. Co. of California* (2013) 39 ALRB No. 4, p. 31.) To prevent an employer from benefitting economically while committing an unfair labor practice, the makewhole remedy is designed to restore to employees wages lost as a result of their employer's unlawful bargaining conduct. During the

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effective period of a contract reached during the MMC process, the underlying rationale for the makewhole remedy is removed.

In *Arnaudo Brothers*, the Board majority determined under the circumstances of that case that it was appropriate for the makewhole period to terminate on the date of the first MMC session. (*Arnaudo Brothers, supra*, 41 ALRB No. 6, p. 2, fn. 2.) However, the general rule continues to be that the makewhole period continues until such time as the employer commences good faith bargaining. In this case, it is clear that good faith bargaining did not come with the commencement of MMC, as Gerawan's bad faith bargaining tactics continued after that date. However, we reject the General Counsel's and UFW's contentions that the makewhole period should extend beyond the effective date of the MMC contract.

The term of the MMC contract as ordered by the Board began July 1, 2013. The General Counsel's position that makewhole should end on August 30, 2013, would result in a punitive remedy because there would be overlap with makewhole award and the period covered by the MMC contract. (*Dal Porto, supra*, 191 Cal.App.3d at p. 1204 [makewhole is remedial in nature and may not be imposed in a punitive fashion].) The UFW's position — that makewhole should run until the date that Gerawan fully implements the terms of the MMC contract would also clearly be punitive. Therefore, we find that the makewhole period in this matter should commence on January 18, 2013, and end on June 30, 2013.

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ORDER

Pursuant to Labor Code section 1160.3, respondent Gerawan Farming, Inc., its officers, agents, labor contractors, successors, and assigns shall:

1. Cease and desist from:

(a) Engaging in collective-bargaining negotiations with the United Farm Workers of America ("UFW") with no intention of reaching an agreement covering the wages, hours, and other terms and conditions of employment for the employees in the following bargaining unit:

> All agricultural employees of Ray and Star Gerawan, a partnership, dba Gerawan Ranches, and of Gerawan Company, Inc., in the State of California for the purposes of collective bargaining, as that term is defined in section 1155.2(a).

(b) Persisting in its refusal to bargain with the UFW about the wages, hours, and other terms and conditions of employment those members of the above bargaining unit who are employed by farm labor contractors.

(c) In any like or related manner interfering with, restraining, or coercing its agricultural employees in the exercise of the rights guaranteed by section 1152 of the Agricultural Labor Relations Act ("Act").

2. Take the following affirmative actions necessary to effectuate the policies of the Act:

(a) Make whole its agricultural employees for the losses they suffered as a result its failure to bargain in good faith beginning on January 18, 2013, and continuing through June 30, 2013, in accordance with this decision.

(b) Preserve and, within fourteen (14) days of a request, make available to the ALRB or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including related electronic records, necessary to analyze the amount of pay due under this Order.

(c) Upon request of the Regional Director, sign the attached Notice to Agricultural Employees ("Notice") and, after its translation by a Board agent into all appropriate languages, reproduce sufficient copies in each language for the purposes set forth hereinafter.

(d) Mail signed copies of the attached Notice to the last known address of all agricultural employees it employed, including those employed through farm labor contractors, during the period from January 2013 through August 2013.

(e) Grant ALRB agents access to work sites where the agricultural employees in the above bargaining union work at mutually arranged times in order to read the attached Notice to them and to answer questions employees may have about their rights under the Act outside the presence of supervisory personnel.

(f) Compensate employees for the time spent during the Notice reading and the following question and answer period at the employees' regular hourly rates, or each employee's average hourly rate based on their piece-rate production during the prior pay period.

(g) Post copies of the attached Notice, in all appropriate languages, in conspicuous places on its property, for sixty (60) days, the period(s) and place(s) to be

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determined by the Regional Director, and exercise due care to replace any Notice which has been altered, defaced, covered or removed.

(h) Provide access during the notice posting period to ALRB agents to ensure compliance with the notice posting requirements of this ORDER.

(i) Provide a signed copy of the Notice to each person it hires for work as an agricultural employee during the twelve-month period following the issuance of the ALRB's Order in this case.

(j) Notify the Regional Director in writing, within thirty (30) days after the date of issuance of this Order, of the steps Respondent has taken to comply with its terms and, upon request, also notify the Regional Director periodically in writing of further actions taken to comply with the terms of this Order until notified that full compliance has been achieved.

DATED: January 22, 2018

Genevieve A. Shiroma, Chairwoman

Cathryn Rivera-Hernandez, Member

Isadore Hall, III, Member

CASE SUMMARY

GERAWAN FARMING, INC.
(United Farm Workers of America)

Case Nos. 2012-CE-041-VIS
2013-CE-007-VIS
2013-CE-010-VIS
44 ALRB No. 1

Background

This case involves two allegations of unfair labor practices ("ULP"s) against Gerawan Farming, Inc. ("Gerawan"). The first is an allegation that Gerawan violated the Agricultural Labor Relations Act ("ALRA" or "Act") by engaging in bad faith "surface bargaining" during the period from January 2013 to August 2013. The second allegation is that Gerawan violated the ALRA by proposing and insisting on the exclusion of workers employed by Farm Labor Contractors ("FLCs") from the terms of any collective bargaining reached between Gerawan and the United Farm Workers of America ("UFW").

ALJ Decision

The Administrative Law Judge ("ALJ") found that Gerawan engaged in bad faith bargaining with no intention of reaching an agreement for the period commencing January 18, 2013, and continuing through August 2013. He further concluded that Gerawan violated its duty to bargain in good faith by insisting on the exclusion of FLC workers from the core benefits of a collective bargaining agreement. To remedy the above violations, the ALJ ordered standard notice, posting, reading and mailing remedies, and he ordered bargaining makewhole for the period January 18, 2013 to June 6, 2013.

Board Decision

The Board affirmed the ALJ's factual findings and legal conclusions consistent with its own decision. The Board applied the "totality of the circumstances" test applicable in surface bargaining cases and determined that Gerawan's conduct as a whole, both at and away from the bargaining table, demonstrated a violation of the duty to bargain in good faith. The Board agreed with the ALJ that Gerawan's insistence on removing the FLC workers from the scope of any collective bargaining agreement, and its persistent refusal to bargain over their wages, hours, and terms and conditions of employment, violated the ALRA. The Board also denied Gerawan's request for a stay of this case pending the appellate court's review of the Board's decision in *Gerawan Farming, Inc.* (2016) 42 ALRB No. 1.

With respect to the remedy, the Board concluded that an award of makewhole was appropriate, but modified the end date of the makewhole period to June 30, 2013. The Board found that Gerawan did not rebut the presumption that an agreement providing for higher employee wages would have been reached in the absence of Gerawan's unlawful conduct.

The Board concluded that Gerawan's conduct in this case did not further the policies and purposes of the ALRA. In particular, Gerawan's conduct was destructive of the core right of employees "to negotiate the terms and conditions of their employment" through their bargaining representative. Finally, the Board rejected Gerawan's argument that an award of makewhole is not appropriate in circumstances where MMC has been invoked.

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STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of: GERAWAN FARMING, INC., Respondent, and, UNITED FARM WORKERS OF AMERICA, Charging Party,	Case Nos.: 2012-CE-041-VIS 2013-CE-007-VIS 2013-CE-010-VIS **DECISION AND RECOMMENDED ORDER**

Appearances:

For the ALRB General Counsel: *Veronica Melendez, Assistant General Counsel and Silas Shawver, Deputy General Counsel,* with *Julia Montgomery, General Counsel, Chris Schneider, Visalia Regional Director, and Xavier R. Sanchez, Assistant General Counsel*, on the brief.

For the Respondent: *Ronald Barsamian and Patrick Moody, Attys., Barsamian and Moody,* Fresno, CA and *Natalie Packer, Atty.*, Gerawan Farming, Inc., Fresno, CA, with *David A. Schwarz, Atty., Irell & Manella, LLP*, Los Angeles, CA, and *Michael P. Mallery, General Counsel*, Gerawan Farming, Inc., on the brief.

For the Charging Party: *Edgar Ivan Aguilasocho, Atty., Martinez, Aguilasocho & Lynch*, Bakersfield, CA.

DECISION

This consolidated proceeding presents two complex questions for resolution. The first is whether Gerawan Farming, Inc. (GFI, Gerawan, Employer or Respondent)

engaged in bad faith "surface bargaining" in violation of Labor Code section 1153(e) while negotiating for a collective-bargaining agreement with the United Farm Workers of America (UFW, Union or Charging Party), the certified representative of its agricultural employees, in the eight-month period from January 2013 through August 2013.[1] The second is whether GFI independently violated Section 1153(e) during those same negotiations by "continuously proposing and insisting" that the terms of any agreement it reached with the UFW would not apply to the employees of Gerawan's farm labor contractors (FLCs) who, for reasons found below, are also members of the certified bargaining unit. As to the first question, one labor law scholar has written that "[t]he nature of the bargaining process is such that it is almost impossible for the Board and courts to distinguish between tough bargaining and bargaining in bad faith," the exact problem posed here.[2] The second question strikes me as one of unusual significance to the administration of unique provisions in California's Agricultural Labor Relations Act (ALRA) concerning the definition of an employer that is determinative to the scope of bargaining units and the bargaining duty.

STATEMENT OF THE CASE

The UFW filed these three charges in 2012 and 2013, alleging that Gerawan had refused to bargain in good faith as required by Labor Code section 1153(e). As described

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1 Labor Code section 1153(e) provides that it is an unfair labor practice for an agricultural employer to "refuse to bargain collectively in good faith with labor organizations certified pursuant to the provisions [of the Agricultural Labor Relations Act]." Labor Code section 1154(c) imposes a comparable duty on labor organizations certified to represent workers under the Agricultural Labor Relations Act (Act). Labor Code section 1155.2(a), provides that bargaining in good faith means "the performance of the mutual obligation of the agricultural employer and the representative of the agricultural employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any questions arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession."

2 See Julius G. Getman, *The Supreme Court on Unions, Why Labor Law is Failing American Workers*, Cornell University Press, 2016, at 36.

in the General Counsel's Third Amended Complaint (Complaint, her operative pleading in this proceeding) the charge in 2012-CE-041-VIS, filed on December 6, 2012, alleges that Respondent Gerawan's officers and agents, including Dan, Mike and Ray Gerawan, engaged in bad faith bargaining. The charge in Case 2013-CE-007-VIS, filed on February 26, 2013,[3] alleged that Respondent Gerawan threatened and coerced worker members of the UFW's bargaining committee, engaged in unspecified surveillance, undermined the UFW's status as the employee bargaining representative, and engaged in direct dealing with employees. The charge in Case 2013-CE-010-VIS, filed on March 20, alleged that Gerawan violated the ALRA by "proposing and insisting on" the exclusion of the farm labor contractor (FLC) employees from the terms of any collective bargaining agreement the parties might conclude.

On September 9, 2014, the ALRB General Counsel issued a comprehensive First Amended Complaint against Gerawan containing allegations of unlawful conduct against Gerawan arising from 21 separate unfair labor practice charges filed by the UFW.[4] Further, it sought to consolidate those numerous allegations for hearing with the objections to the November 5, 2013, election conducted by the Agricultural Labor Relations Board (ALRB or Board) in 2013-RD-003-VIS, then scheduled to commence on September 26, 2014.

The First Amended Complaint included Cases 2012-CE-041-VIS and 2013-CE-007-VIS but did not include Case 2013-010-VIS, the charge involving Respondent's proposal to exclude the FLC workers from any potential collective bargaining agreement. On September 16, 2014, Gerawan requested that the Board sever those cases in the General Counsel's First Amended Complaint in accord with the standards established by the Board's Decision and Order in *Gerawan Farming, Inc*.

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3 Dates that appear without the year refer to the 2013 calendar year.

4 Neither Agricultural Labor Relations Act (ALRA) nor the National Labor Relations Act (NLRA), after which the ALRA is modeled, are self-enforcing. Accordingly, a charge must be filed in order to initiate an unfair labor practice proceeding.

(2013) 39 ALRB No. 20. On September 19, 2014, the ALRB granted Gerawan's request and severed Cases 2012-CE-041-VIS and 2013-CE-007-VIS, as well as several other cases included in the First Amended Complaint from the proceeding that commenced on September 26, 2014, and continued for the next six months. (See ALRB Administrative Order 2014-27.) On April 15, 2016, the ALRB issued its decision in the prior lengthy proceeding that adopted and expanded upon the findings made by Administrative Law Judge Mark Soble. (See *Gerawan Farming, Inc*. (2016) 42 ALRB No. 1 (the prior case or proceeding).)[5]

On June 17, 2016, the General Counsel issued a Second Amended Complaint containing allegations of unlawful conduct by Gerawan based on eight unfair labor practice charges filed by the UFW, all of which, save for Case 2013-010-VIS, had been severed from the First Amended Complaint by the ALRB's September 19, 2014, Administrative Order 2014-27. The General Counsel's Second Amended Complaint consolidated the following cases for hearing: 2012-CE-041-VIS, 2013-CE-007-VIS, 2013-009-VIS, 2013-CE-010-VIS, 2013-CE-030-VIS, 2013-CE-041-VIS, 2013-CE-044-VIS, and 2013-CE-045-VIS.

On September 9, 2016, the General Counsel supplanted the Second Amended Complaint with the Third Amended Complaint (Complaint, her operative pleading in this matter). As originally drawn, the Complaint included six of the cases listed in paragraph, above. It did not include Cases 2013-CE-030-VIS or 2013-CE-045-VIS.

On September 23, 2016, the General Counsel moved for "partial summary adjudication with respect to certain aspects of the Third Amended Complaint" seeking a finding that the allegations set forth in paragraphs 12, 17, 48, 49, 50, 62, and 63 had been proven in the prior proceeding. I granted the General Counsel's motion and concluded that the findings made as to Complaint paragraphs 48, 49, 50, 62, and 63 established that

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5 The Board's Decision and Order in 42 ALRB No. 1 is presently pending review before the Fifth District Court of Appeal in *Gerawan Farming, Inc. v. ALRB*, Case F073720.

those matters had been previously litigated and resolved in 42 ALRB No. 1. Accordingly, I severed and dismissed Case 2013-CE-041-VIS for that reason. See Omnibus Order, et al., dated October 21, 2016.

On October 25, 2016, the General Counsel and GFI resolved the allegations arising from Cases 2013-CE-009-VIS and 2013-CE-044-VIS whereupon the General Counsel withdrew those two cases and the Second Cause of Action.

Based on this history, the issues raised by the Complaint that remained for hearing involve only the allegations raised by the charges in Cases 2012-CE-041-VIS, 2013-CE-007-VIS, and 2013-CE-010-VIS, i.e., those pertaining to the Complaint's First and Third Causes of Action. The charges in Cases 2012-CE-041-VIS and, 2013-CE-007-VIS form the basis of support for the General Counsel's allegations in the Complaint's First Cause of Action claim that Gerawan violated Labor Code section 1153(e) by engaging in bad faith surface bargaining in the period from January 2013 to August 2013. The charge in Case 2013-CE-010-VIS forms the basis of support for the General Counsel's allegations in the Complaint's Third Cause of Action that Gerawan violated Labor Code section 1153(e) by proposing and insisting on the exclusion of workers employed by the FLCs from the terms of any collective-bargaining agreement reached between Gerawan and the UFW.

I took testimony this matter on November 1 and 2, 2016, at Fresno, California.[6] Having now considered the entire record in this matter,[7] the demeanor of the witnesses

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6 The hearing transcript contains two volumes. When cited, Tr. I refers to the first day; Tr. II refers to the second day. The trailing Arabic numeral denotes the transcript page.

7 On the same day that she filed her post-hearing brief, General Counsel filed a supplemental request seeking administrative notice of further portions of Dan Gerawan's testimony in the prior proceeding beyond those I granted in my ruling at the hearing. Respondent opposed this second motion on the ground that the General Counsel failed to provide the advance notice required by Evidence Code section 453(a). The objection is overruled and notice is taken concerning the added testimony cited. This matter, once a part of the prior proceeding until severed by Administrative Order No. 2014-27, involves the same parties as in the prior proceeding save for the decertification petitioner who was not a party to any of the

who testified, and the excellent briefs filed on behalf of General Counsel, Respondent, and Charging Party, I have concluded that the General Counsel has sustained her burden with respect to the First and Third Causes of Action in the pending Complaint based on the following:

FINDINGS OF FACT

I. Jurisdiction, Labor Organization Status, and the Appropriate Unit

The Complaint alleges, Respondent's Answer admits, and I find that at relevant times GFI, a California corporation with its principal place of business located in Fresno, California, and engaged in growing, packing and shipping fresh fruit, was an agricultural employer within the meaning of Labor Code section 1140.4(a) and (c) at the times relevant here.[8] The Complaint alleges, Respondent admits, and I find that the UFW was a labor organization within the meaning of Labor Code section 1140.4(f) at times relevant here.

Although Respondent's Answer admits that the ALRB certified the UFW as the exclusive representative of the Gerawan California agricultural employees in 1992, its Answer denies that the UFW continued as the certified bargaining representative at times

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cases involved here and who lacked a basis for intervention in this proceeding. Furthermore, as later explained, key issues here are intricately intertwined with the events involved in the prior case. Because Evidence Code section 453(a) notice requirement applies to the parties' request for notice, whereas Section 452(d) accords an ALJ discretion to take administrative notice of relevant adjudicative facts in the record of a prior related proceeding, I do so here whether requested by a party or not. (See *Castillo-Villagra v INS* (9th Cir. 1992) 972 F 2d 1017, 1026-1028, articulating the rationale for according a broader scope of official notice in an administrative proceeding from that available in cases litigated before the courts and, particularly, those tried before a jury.)

8 In *Gerawan Ranches* (1995) 21 ALRB No. 6, at page 4, the ALRB noted that Gerawan Ranches, Gerawan Farming, Inc., and other Gerawan-owned enterprises had been found to be a single integrated enterprise by an NLRB regional director in a related case. Respondent made no claim in this proceeding that its duty to bargain with the UFW was mitigated by the fact that its current corporate form bears a name that differs from the employer entity named in the ALRB's 1992 certification case. In addition, Judge Soble reported that Respondent's counsel stated during the prior hearing that the Company was not raising a defense based upon the name of the entity charged in the General Counsel's complaint, which is the same as here. (See ALJD p. 10 at fn. 9 appended to 42 ALRB No. 1.)

material to the Complaint or that the UFW is or was ever the certified bargaining representative of workers employed by Gerawan's FLCs. For the reasons explained below, I find the assertions in Respondent's Answer regarding the scope of the unit and the current effect of the certification without merit.

As to the currency of the UFW's certification, the long established "certified-until-decertified" ALRB principle applies in this situation. That principle, a shortcut for the Board's actual holding, provides "that, except in cases where the union disclaims interest in representing the bargaining unit or becomes defunct, the union remains certified until removed or replaced through the ALRA's election procedures, regardless of any bargaining hiatus or union inactivity that may have occurred." (*Tri-Fanucchi Farms, Inc.* (2014) 40 ALRB No. 4, slip op. at 8, and the cases cited there in support.) To date, the UFW has not been decertified, and nothing in this record shows that it has become defunct or has disclaimed interest in representing the GFI workers. In fact, this record shows the contrary. Accordingly, I find that the UFW's 1992 certification as the exclusive representative of the Gerawan agricultural employees remained effective at all times relevant here.[9]

In addition, claims made by the parties as to both causes of action, but most particularly the Third Cause of Action, present issues as to whether the collective-bargaining unit in this matter includes or excludes the Gerawan's FLC workers. For reasons discussed below, I find that the agricultural employees employed by Gerawan's FLCs have always been and remain members of the certified bargaining unit.

The ALRB's 1992 certification describes the unit in this manner: "All agricultural employees of Ray and Star Gerawan, a partnership, dba Gerawan Ranches, and of Gerawan Company, Inc., in the State of California for the purposes of collective bargaining, as that term is defined in section 1155.2(a)." (See *Gerawan Ranches, et al.*

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9 Gerawan also asserted the UFW abandoned the certified unit as a defense in the MMC case involving this bargaining. The disposition of that defense is discussed below.

(1992) 18 ALRB No. 5, slip op. 19-20.)[10] Accordingly, absent unusual circumstances not shown to be present here, i.e., situations involving so-called "labor contractors plus," or custom harvesters, the workers employed by Gerawan's FLCs would be included in the unit by operation of the statute.

This is so because Labor Code section 1140.4(c) excludes farm labor contractors as employers under the Act by design and deems an agricultural employer utilizing labor provided by an FLC to be the employer of the FLC workers for purposes of collective bargaining under the ALRA.[11] (*Vista Verde Farms v. ALRB* (1981) 29 Cal. 3d 307.) The *Vista Verde* court concluded that Section 1140.4(c) defined the scope of collective bargaining enshrined within the ALRA and the purpose for doing so in this manner:

> In the absence of any specific provision excluding farm labor contractors from the "agricultural employer" category, such contractors would naturally have fallen within such a classification. The relationship between a labor contractor and the workers under its control bears many of the hallmarks of a traditional employer-employee relationship since the contractor frequently exercises supervisory control over the workers and pays their wages. (See *§§ 1682, subd. (b)*; 1695-1696.5.) For a number of substantial reasons which we discuss hereafter, however, the Legislature concluded that the bargaining process under the act should occur between unions and growers rather than between unions and labor contractors, and that bargaining units should be established on a grower-wide (also referred to as an "industrial" or a "wall-to-wall") basis rather than among workers employed by a particular labor contractor. It was to achieve this result that the ALRA excluded farm labor contractors from the definition of agricultural employer.

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10 In subsequent litigation, the ALRB concluded that an NLRB representation case decision initiated by Gerawan preempted the ALRB from remedying alleged unfair labor practices (unilaterally changing rates of pay and working conditions and refusing to reinstate economic strikers) arising among a group of its packing shed employees because the NLRB found those workers to be employees under the NLRA and not ALRA agricultural employees. (*Gerawan Ranches, et al* (1995) 21 ALRB No. 6.)

11 This section goes on to empower the Board to determine an "appropriate" unit or units in situations where the employer maintains non-contiguous, multi-location operations. This isolated discretion in unit determination matters granted to the ALRB under the ALRA stands in stark contrast to the broad discretion its federal counterpart grants to the National Labor Relations Board (NLRB) in fashioning appropriate bargaining units.

(*Id*. at p. 323.) Hence, it follows that when a unit description set forth in an ALRB certification refers to the agricultural employees of a particular grower (agricultural employer in statutory language), by definition it includes both the grower's direct hires and those agricultural workers employed by the FLCs the grower utilizes.

The statute aside, a substantial basis exists to infer that all parties understood and agreed that this specific bargaining unit included the agricultural employees employed by Gerawan's FLCs. To begin with, the evidence shows that the FLC workers voted in the 1990 elections. Most notably, in *Gerawan Ranches* (1990) 16 ALRB No. 8 at slip op. 3, the Board affirmed, in the absence of exceptions by Gerawan, the Regional Director's finding in a Report on Challenged Ballots issued after the 1990 runoff election that a group of 66 workers who cast challenged ballots were eligible to vote. The Regional Director based his finding on the fact that the names of these voters appeared on either "*the Employer's master list or on lists of crews provided by the Employer or labor contractors.*" [Emphasis mine.] Further, as discussed in more detail below, Respondent's own proposals tacitly acknowledge the inclusion of the FLC's employees the certified bargaining unit. Otherwise, it would make no sense to quibble over making any part of an agreement reached with the UFW inapplicable to them. In addition, to obtain ammunition justifying its proposals during the 2013 voluntary bargaining that sought to exclude the FLC workers from some or all provisions of any bargaining agreement reached, Respondent subpoenaed from the UFW all current collective bargaining agreements it entered into with other agricultural employers providing for the exclusion of FLC workers from some or all of the terms of the agreement reached.[12]

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[12] While testifying, UFW negotiator Elenes readily admitted the UFW entered into agreements in the past that excluded FLC workers from parts or all of the contract provisions. He implied, however, that currently the union administration seeks to correct that practice. Throughout the negotiations, he claimed that the exclusion of the FLC workers from an agreement would be illegal.

II. The Alleged Unfair Labor Practices

A. Respondent's Operations and Work Force

Gerawan, a family owned farming business said to be the largest stone fruit producer in the United States, commenced operations in 1938. At times relevant to this case, Gerawan grew, harvested, and packed tree fruits and table grapes on about 12,000 acres (about 19 square miles) of farmland in Fresno and Madera Counties, California. Gerawan estimated at one time that it employed approximately 5,100 direct-hire workers and 6,300 FLC workers in 2012. However, the parties' Joint Stipulation states that Gerawan employed approximately 5000 direct-hires, plus about 800 to 1500 FLC workers in 2013.

In December 2015, Gerawan announced that it would discontinue its table grape operations in 2016, a move adversely affecting an estimated 2,500 employees.[13] Whether this impact will be borne by only the direct-hire employees or by both the direct-hires and the FLC workers is unknown. The tree fruit season (and the hiring that comes with it) typically begins in March and continues through late September or early October. When it still grew table grapes, that season also commenced in March but usually extended into early November.

GFI broadly classifies its direct-hires as either "cultural" employees or "crew" workers. Its cultural employees generally work on a steady basis. They include water truck and tractor drivers, irrigator operators, and nursery workers. Gerawan historically fixed individual pay rates for its cultural workers based on a periodic evaluation program. GFI's crew labor perform the harvesting, pruning, and other similar work. When it needs more workers, GFI often obtains them through farm labor contractors. It then integrates the FLC workers into its harvesting and pruning crews so that they perform work identical to that of its direct-hire crew workers. GFI's direct-hire crew workers receive a

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13 See: http://www.fresnobee.com/news/business/agriculture/article51392905.html, Fresno Bee e-Edition last visited February 6, 2017.

fixed hourly rate. Ostensibly, the FLC employers, rather than GFI, set the wage rates and benefits for their own employees but the evidence establishes that the FLC wage rates are typically lower than the rates paid to GFI's own workers.[14] But as a crew typically includes both GFI and FLC workers, and as layoffs can, or ordinarily do, occur on a crew-wide basis, the remaining mixed crews may include FLC workers for periods when some direct-hire employees are in layoff status.

B. The Overlapping MMC Process – Case No. 2013-MMC-2013

On March 29, 2013, about two and a half months following the first face-to-face voluntary bargaining session between the Gerawan and the UFW under review here, the Union invoked the mandatory mediation and conciliation (MMC) procedures available under the Agricultural Labor Relations Act by filing the required declaration in Case No. 2013-MMC-003-VIS. (See Lab. Code § 1164, et seq.) Gerawan sought dismissal of this action claiming: 1) the UFW's initiating declaration failed to meet the requirements of Labor Code § 1164.11; 2) the UFW had forfeited its rights by abandoning the unit of GFI employees it had been certified to represent; and 3) the statutory MMC process violated its due process rights under the federal and state constitutions.

On April 16, the ALRB rejected Gerawan's arguments regarding the alleged deficiencies in the UFW's initiating declaration, found Gerawan's "abandonment" claim without merit, and concluded that it lacked authority to rule on the constitutional question because Article III, Section 3.5 of the California Constitution prohibited it from declaring a state statute unconstitutional absent a prior appellate court decision on point. (*Gerawan Farming, Inc*. (2013) 39 ALRB No. 5.) The ALRB rejected Gerawan's abandonment defense based on its long-established principle that once certified, a labor organization remains certified under the ALRA until it is decertified, it disclaims interest in

[14] However, the Board affirmed Judge Soble's finding in the prior case, that Mike Gerawan virtually dictated a dollar an hour increase in the hourly rate paid to the FLC workers in June 2013. (42 ALRB No. 1: ALJD 37-38.)

representing the employees in the certified unit, or it becomes defunct.[15] (See 39 ALRB No. 5:3-4.) On review, the Fifth District Court of Appeals concluded, in agreement with Gerawan, that the Board erred failing to consider the abandonment defense in the context of an MMC petition and that the MMC amendments to the ALRA were unconstitutional. (*Gerawan Farming, Inc*. v. *ALRB*, Case No. F068526.) Presently, the constitutionality of the MMC statute and Gerawan's "abandonment defense" together the Board's failure to consider the abandonment defense raised in the context a Section 1153(e) unfair labor practice case in *Tri-Fanucchi*,supra, are pending before the California Supreme Court. (See *Gerawan Farming, Inc. v. ALRB*, Case No. S227243 and *Tri-Fanucchi Farms v. ALRB*, Case No. S227270 respectively.)

On June 6 and 11, and on August 8 and 19, 2013, the parties met for bargaining sessions in the presence of Matthew Goldberg, the mediator they selected in compliance with the ALRB's order in 39 ALRB No. 5. At the June sessions, Goldberg served in the role of a mediator. The parties failed to come to an agreement even with the assistance of the mediation efforts. Goldberg conducted the August sessions on the record as by then his role had become comparable to that of an interest arbitrator.[16] On September 28, Mediator Goldberg filed his first report with the Board recommending the terms of a collective bargaining agreement as provided by Labor Code section 1164(d). On October 15, Gerawan filed a Petition for Review of the Mediator's Report wherein it challenged various terms of the mediator's recommended collective bargaining agreement and

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15 The Board's decision relied the following ALRB precedent: *Dole Fresh Fruit Company* (1996) 22 ALRB No. 4; *Pictsweet Mushroom Farms* (2003) 29 ALRB No. 3; *San Joaquin Tomato Growers, Inc*. (2011) 37 ALRB No. 5. Additionally, the Board cited *F&P Growers Ass'n v. ALRB* (1985) 168 Cal.App.3d 667, 672-674, rejecting an employer's defense to refusal to bargain allegations under the ALRA based on its assertion that the certified labor organization no longer enjoyed the support of the majority of the unit employees.

16 As the Joint Stipulation shows, Gerawan and the UFW also held voluntary bargaining sessions in June, July, and August in addition to their sessions with Mediator Goldberg but still failed to reach an agreement. Aspects of the voluntary negotiations during that three-month period are a part of this case.

repeated other claims made in its prior filings during the MMC process. The ALRB found merit to certain claims Gerawan made concerning the recommended collective bargaining agreement and remanded certain provisions to the mediator for clarification or further consideration. (*Gerawan Farming, Inc.* (2013) 39 ALRB No. 16.) Thereafter, the ALRB approved the mediator's recommendations in his second report for the terms of the collective-bargaining agreement and entered an order to that effect. (*Gerawan Farming, Inc*. (2013) 39 ALRB No. 17.)

C. The Relevant Facts in the Current Proceeding

The relevant aspects of the Complaint before me charges that GFI engaged in overall bad faith surface bargaining during the 2013 voluntary negotiations.[17] It further alleges that GFI persistently refused to bargain about the wages, hours and working conditions of the FLC workers it utilizes. Respondent's Answer denies both claims. This section begins with a brief examination of the parties' post-certification bargaining history in the 1990s and then turns to the more recent history that commenced with the UFW's renewed bargaining request in October 2012.

1. The Brief Bargaining History in the 1990s and the Prolonged Hiatus

On May 15, 1990, a majority of the Gerawan employees and the FLC workers employed at the time selected the UFW as their bargaining representative in a runoff election conducted by the ALRB. On July 8, 1992, the ALRB overruled numerous objections Gerawan filed to the 1990 election and certified the UFW as the exclusive representative of its workers. (*Gerawan Ranches*, et al. (1992) 18 ALRB No. 5.)

Later that month, the UFW formally requested to negotiate. In mid-August, Gerawan agreed but requested that that the UFW first submit its initial proposal. Meanwhile, at year's end, the Board issued its decision affirming Administrative Law Judge James Wolpman's findings and conclusions that GFI violated Labor Code section

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17 The modifier "voluntary" refers to those negotiations that occurred outside those mandated by the MMC process. Apart from a few overlapping exhibits, little, if any, evidence was adduced concerning the bargaining that occurred under the auspices of the mediator.

1153(e) between the election and the certification by closing six labor camps it maintained as housing for its field workers without providing the UFW an opportunity to bargain over this mandatory subject as the ALRA requires. The Board also affirmed Judge Wolpman's finding that GFI violated Section 1153(c) and (d) by discharging five employees. (*Gerawan Ranches, et al.* (1992) 18 ALRB No. 16.)

On November 22, 1994, the UFW submitted the previously requested initial proposal to Gerawan. In February 1995, the parties held their first in-person bargaining session. During this meeting, Gerawan requested that the UFW submit another, more complete proposal, which the UFW apparently agreed to do but never did as far as is known. As for bargaining, nothing further appears to have happened until October 2012.

Through these more recent proceedings, GFI has asserted repeatedly that following the February 1995 bargaining session, it simply heard nothing further from the UFW again until more than two decades passed following its certification. Quite clearly, "heard nothing" exaggerates the situation as the reports contain yet another ALRB decision issued on September 1, 1995, showing 1994 and 1995 litigation in two forums over the proper unit placement of certain GFI packing shed employees. (See *Gerawan Ranches, et al.* (1995) 21 ALRB No. 6.) In that case, the ALRB concluded that an NLRB decision finding GFI's packing shed workers to be employees under the National Labor Relations Act (NLRA) preempted all further action by the ALRB concerning that group. As GFI noted in this case, the NLRB's action effectively "clarified" the unit the ALRB certified in 1992. (Jt. Exh. 59:
RespD01287.)

Moreover, GFI's current "heard nothing" claim fails to indicate what it did when it undertook to change the unit employees' wages, hours, and other terms and conditions of employment during the UFW's "dormancy." Thus, no evidence in this proceeding shows that GFI made any effort to notify or otherwise initiate contact with the UFW throughout this lengthy period in order to comply with its legal duty under Section 1153(e) of providing the employees' certified representative with an opportunity to bargain over

proposed changes to their wages, hours, and other terms and condition of employment that obviously occurred over those many years. The prior decision specifically addressed this particular legal obligation imposed on employers where, as here, a majority of their employees select an exclusive representative. (See 42 ALRB No. 1: 63, fn. 27.)

2. The Prelude to the 2013 Bargaining

In a letter to GFI's President, Dan Gerawan, dated October 12, 2012, then UFW National Vice President Armando Elenes requested to negotiate for a collective-bargaining agreement.[18] (Jt. Exh. 1.) Elenes' letter proposed to meet for negotiations at an agreeable location in Fresno during the first full week of December 2012. It also sought ten categories of information about Gerawan's operations, their current employees, and the wages, benefits, and other remunerations provided to unit workers in the period from 2010 through 2012. Most notably, this letter contained request 9 seeking a "(d)etailed summary of any benefits, vacation pay, bonuses, holidays, piece rates and wages provided to employees for 2010, 2011, and 2012."
(Jt. Exh. 1:GCD0043.)

After receiving no response to his October 12 letter, Elenes sent a second letter to Dan Gerawan dated October 30, 2012, repeating the Union's request to meet for negotiations and again requesting information largely similar to that requested by his October 12 letter. (Jt. Exh. 2.) Request 10 in the October 30 letter is identical to request 9 in the October 12 letter. (Jt. Exh. 2:GCD00435.) But in his October 30 letter, Elenes threatened to file an unfair labor practice charge with the ALRB if he failed to receive a response within five (5) days.

On November 2, 2012, GFI faxed a letter to Elenes signed by Ray, Mike, and Dan Gerawan agreeing to meet with the UFW to negotiate but bitterly complaining about their

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[18] At the time of the hearing, Elenes had worked at the UFW for nearly 20 years. At that time, he served as UFW's Third Vice President responsible for managing its external organizing fund and its internal organizing fund for the Pacific Northwest.

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prior history and the prospects of an agreement ultimately imposed through the ALRB's mandatory mediation and conciliation (MMC) process added to the ALRA in 2003:[19]

> As we proceed, it's very important that neither of us forget that few, if any, employees still exist from the election 22 years ago. Some were not even born yet. How, then, do we or you explain to them that they will now have a contract and dues thrust upon them by a union they never voted for and who abandoned them 20 years ago?
>
> Gerawan Farming is a family company with close ties to our employees. They enjoy what are probably the industry's highest wages and best working conditions, and they achieved them without your involvement. No one has asked the current workforce whether they wish to be represented by the UFW, or any other union for that matter. The UFW has always promoted the right of farmworkers to have freedom of choice, and yet no choice is being given to our current employees.
>
> When the UFW asked for and received the mandatory mediation procedures in the early part of this century, it claimed that it was needed because growers delayed bargaining and undercut the UFW's ability to represent farmworkers. By then, we had not heard from you for at least 10 years, and now 10 more years have passed before you make a demand to bargain, just as our harvest season is winding down.
> Given the recent changes to the law under SB 126, we have little opportunity to negotiate a contract with you before you have the ability to ask a mediator to impose a contract on the employees.
>
> We understood that the UFW sought the adoption of the mandatory mediation procedures a decade ago to address the problems created when employers delayed reaching an agreement and bargained in bad faith. In our case, the 20-year delay in negotiating was not caused by us, but by the UFW abandoning the bargaining process, which is a situation that was not discussed when the legislature considered the bill to require mandatory mediation. We do not believe that the legislators and the Governor intended mandatory mediation and the changes made by SB 126 to be used as a means of forcing contracts upon employers and employees when no effort was made by the union to negotiate for two decades.

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[19] Ray is the father of Dan and Mike. These three together with Ray's wife, Star, own the family's farming enterprises and hold positions in the corporate entities.

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> While we move forward in meeting our legal obligation, we believe you and we have a moral obligation to protect the people that work for Gerawan from having something imposed upon them that they did not even ask for or desire. We will work with you, in good faith, to reach agreement on those matters which concern our employees, and we request that you do the same without resorting to third parties to decide what our agreement should be.[20]

At the prior hearing, Dan Gerawan readily admitted his anger at the UFW's 2012 bargaining request. Following just that testimony for which the counsel for the General Counsel requested and received administrative notice, Dan's anger appears unusually deep and long lasting. It perhaps explains the motive underlying the current expenditure of what must have been enormous sums by the Gerawan enterprises opposing the UFW and seeking to rid itself of any legal obligation to deal with that organization.

Eventually however, the parties' and the various constituencies assisting them mutually agreed to schedule the initial bargaining sessions for January 17 and 18. During the first session the UFW presented and explained its proposals. On January 18, GFI presented its initial proposal. Despite the rhetoric about the statutory MMC process in the GFI's November 2 letter, the proposal GFI's negotiators brought to the bargaining table on January 18 and largely clung to in their most critical aspects throughout the voluntary bargaining period almost certainly guaranteed that the UFW would need to invoke the statutory MMC process. Indeed, GFI's counsel pointed out during his opening statement that the 90-day period from the initial request for bargaining required under the statute before attempting to invoke MMC had already run when the face-to-face bargaining began.

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[20] Respondent's arguments implicit in the second paragraph of this letter are inconsistent with the presumptions applied in the labor relations context. It has been presumed for years that newly hired employees support the certified union in the same proportion as the employees they replace. *National Plastic Products Co.* (1948) 78 NLRB 699, 706. Absent such a presumption, certifications would "wear out" as the result of employee turnover and the disruptions based on claims similar to that made here would ensue perpetually.

3. The Joint Stipulation About the 2013 Voluntary Bargaining.

The parties entered into a Corrected Joint Stipulation as to Facts and Exhibits (Joint Stipulation) that recited certain agreed-upon facts and stipulated to the authenticity and admissibility of 62 Joint Exhibits. I approved the Joint Stipulation and received the 62 Joint Exhibits in evidence at the hearing. The Joint Stipulation provides relevant background and a broad overview of the voluntary bargaining that occurred. It states:

1. GFI employed about 5,000 different workers annually in both seasonal and "cultural" (year-round) jobs in 2013.

2. GFI hired about 800 to 1,500 different agricultural employees through farm labor contractors in 2013.

3. GFI and the UFW had 14 bargaining sessions outside of the presence of the mediator from January 2013 to July 2013:

    - January 17
    - January 18
    - February 12
    - February 13
    - February 27
    - February 28
    - March 19
    - March 21
    - March 28
    - April 2
    - June 3
    - July I
    - July 24
    - July 29

4. The parties' bargaining sessions in 2013 took place at La Quinta Inn, in Fresno, California.

5. 2013 bargaining sessions were usually 2-3 hours long from 3:00 p.m. to 6:00 p.m.

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6. In 2013, the following individuals attended bargaining sessions on behalf of GFI: Michael Mallery, Jose Erevia, Jaime Mendoza and Ronald Barsamian, with Mr. Barsamian serving as lead negotiator.

7. In 2013, Armando Elenes served as the UFW's lead negotiator. Jeanette Mosqueda and Tanis Ybarra each attended two negotiation sessions.

8. The UFW employee negotiation committee also attended the bargaining sessions. Employees that were not part of the UFW negotiation committee also attended at least one session.

9. The 2013 bargaining sessions were conducted in English, but Armando Elenes and Jose Erevia translated for the employees.

10. In 2013, the parties exchanged contract proposals via e-mail in Word format.

11. GFI made six non-matrix contract proposals from January 2013 to June 2013:

- January 18
- February 12
- March 19
- March 21
- March 27
- June 3

12. UFW made five non-matrix contract proposals from January 2013 to March 2013:

- January 17
- February 12
- February I 7
- March 21
- March 28

13. Once the MMC procedure started the parties started utilizing matrixes to exchange proposals and provide the mediator with updated positions.

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14. GFI and the UFW participated in the MMC process by participating in 4 MMC sessions (2 of which were on the record) on June 6, 2013, June 11, 2013, August 8, 2013 and August 19, 2013.

15. GFI's proposal incorrectly dated "January 12, 2013" is actually its proposal of February 12, 2013.

16. The Third Amended Complaint is limited to bargaining conduct up to August 31, 2013.

The 62 Joint Exhibits consist of the parties' proposals identified in Items 11 and 12 of the Joint Stipulation, plus email and postal correspondence exchanged at various times, negotiation notes of both sides, and matrices summarizing the parties' positions on various proposals together with tentative agreements reached during the voluntary bargaining period.

4. GIFI'S Problematic Proposals

GFI argues that the evidence overall reflects movement on its part that, together with the tentative agreements reached by the parties, reflect a steady progress toward an agreement that should preclude a finding that it engaged in surface bargaining. The General Counsel and the UFW argue, in effect, that the parties reached tentative agreements on only minor matters and that Gerawan held steadfast to proposals that it knew or should have known the UFW would never accept. The General Counsel and the UFW assert that from start to finish of the voluntary negotiations Gerawan insisted on certain terms that would strip the Union of its representative status in dealing with the Company about issues relating to the employees' wages, hours, and other terms and conditions of employment. Addressed below are the key proposals upon which the General Counsel and the UFW rest their surface bargaining claim.

At the first bargaining session on January 17, the parties initially discussed and agreed on certain ground rules that would apply to the talks about to commence. Thereafter, the UFW's presented its initial proposal covering a comprehensive list of non-economic terms the Union sought in an agreement. Elenes, who has negotiated the vast majority of the UFW's collective-bargaining agreements since 2006, characterized

the UFW's opening proposals with words connoting their ordinary and commonplace acceptance in the agreements the UFW has with other growers. Gauging from the numerous past UFW agreements GFI offered in evidence for another purpose, Elenes characterization appears accurate albeit each of those agreements contains language likely negotiated to fit particular situations.[21] (See R. Exhs. 1-11 & 32-36.) The Union's first proposal contained language addressing 28 separate "Articles," several of which included a number of subsections.[22] The Union proposals that would prove prickly throughout the ensuing voluntary negotiations included union recognition (Art. 1); union security (Art. 2); seniority protection (Art. 4) applicable to hiring (Art. 3), layoffs and recalls (Art. 5), and promotions and transfers (Art. 6); grievance and arbitration (Art. 7); no strike – no lockout (Art. 8); discipline and discharge based on just cause (Art. 9); management rights (Art. 14); limits on the use of farm labor contractors (Art. 16); union access to GFI property (Art. 18); and the agreement's duration (Art. 28). (See Jt. Exh. 6.)

The UFW did not submit an economic proposal until July. Elenes attributed this delay to his claim that GFI did not furnish all of the economic data the UFW began requesting in its initial October 2012 letter until late June. (Tr. I at 121-126; Tr. I at 135-138; And, see General Counsel Exhs. 1-3.) Although GFI now attempts to fault the UFW for failing to provide an economic proposal until July (see discussion in the remedy section below), it rejected the union's economic proposal outright anyway. (See Jt. Exh. 59.)

The UFW's note taker at the January 17 meeting recorded snatches of comments appearing beneath the heading "RB," presumably a reference to Gerawan's lead

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21 In a letter dated December 29, 2012, from Attorney Barsamian to Vice President Elenes, the Barsamian asked Elenes to provide the UFW's "opening proposal as soon as you can." It appears from the UFW's notes taken at the January 17 meeting that the UFW provided the Gerawan side with its opening proposal at least shortly in advance of that meeting.

22 Until they began using matrices, the Union numbered the separate articles in its proposals using Arabic numerals; the Company used Roman numerals. Here, I have retained their numbering protocol in referencing proposals to signify the source.

spokesperson, attorney Ronald Barsamian. One cryptic note under the RB heading states that Gerawan planned to "make proposals that may not be like other employer (sic)."[23] (Jt. Exh. 7:GCD00814.) This note proved prescient.

GFI presented its opening proposal on January 18. It called for a one-year agreement with an automatic renewal clause. (See Jt. Exh. 9, Art. XVIi (sic).) It refused to alter its position on the duration of the agreement throughout the period of voluntary negotiations. Near the end it justified its position for this limited duration on its belief "that the situation giving rise to this mediation, a one-year agreement is the most logical for any relationship between these parties." (Jt. Exh. 59:RespD01359.) It contained 16 other articles addressing, as the Union did, non-economic matters only. Whether these proposals differ materially from those routinely advanced by other growers as the Union's note taker recorded the day before appears very obvious from Respondent's Exhibits 1-11 and 32-36. Elenes, recalling his initial reaction to GFI's proposals, said, "It was just something I had never seen before." A little later he added: "I was taken aback. I had never seen a proposal like this. I mean, it was just, it was bad. I was like - - it was bad." (Tr. I: 76.)

The arguments of the General Counsel and the UFW focus on the following provisions of Gerawan's January 18 contract proposal: Article I (Parties to the Agreement), Article II (Right to Work), Article III (Hiring, Work Assignments and Layoffs), Article IV (Promotions and Transfers), Article V (Economic Action), Article VI (Resolving Employee Concerns), Article IX (Management Rights), Article XII (Farm Labor Contractors), Article XVI (Union Obligations). These proposals, they assert, would strip the Union of any representative role by ceding to GFI the right to maintain "for itself sole and exclusive control over employees' working conditions." (GC Br. 7.)

The summary below provides a sketch of the parties' minimal progress toward composing their significant differences in the eight-month period under review here.

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[23] Handwritten bargaining notes, I have found over the years, nearly always present a challenge. Though this particular note is legible, I encountered considerable difficulty deciphering the intended meaning of some other notes due largely to both the unfamiliar cursive penmanship and the extreme brevity of some notes.

Based on my review of the record, the parties' differences on the following subjects consumed the greatest amount of their time and effort: (1) Union Recognition; (2) Union Security/Checkoff; (3) Seniority; (4) Grievance-Arbitration; (5) No Strike-No Lockout; (6) Just Cause; (7) Management Rights; (8) Use of FLCs; and (9) Indemnification and Insurance. After reviewing the extensive documentary evidence submitted by the parties, I have concluded the reader can best measure the parties' progress (or lack thereof) toward an agreement by comparing their position reflected in their initial proposals advanced on January 17 (UFW) and 18 (GFI) against the parties arguments prepared in late July and early August 2013 for submission to the mediator found in Joint Exhibits 57 (UFW) and 59 (GFI), or a late August matrix reflecting their positions found in Joint Exhibit 62. That comparison is set forth below.

Union Recognition: UFW Article 1 proposed a straightforward recognition statement on the part of GFI that it recognized the UFW as the exclusive representative of its agricultural employees. (Jt. Ex. 6:GCD00853.) The unit description in Article 1, like Gerawan's Article I, included the lengthy language quoting ALRA language for the exclusion of supervisors from the unit. Article 1 contained two other sections of lesser import seeking GFI's commitment, among other matters, that it would not make individual agreements with unit employees, and that it would encourage employees to "supporting and participating in collective bargaining and contract administration functions." According to Elenes' uncontradicted testimony, Barsamian rejected the UFW's unconditional recognition language on January 17 "just to protect their rights" (Tr. I: 76), an apparent reference to the Company's contention that the UFW's lengthy absence from the scene constituted a forfeiture of its status as the certified bargaining representative of GFI's California agricultural employees, a perspective inconsistent with California case law as it presently exists.

Initially, GFI's Article I contained five sections. The first two merely named the parties to the agreement with no reference to recognition of the UFW as its employees' exclusive representative. The third contained the unit description that concluded with language binding the parties to submit future unit placement disputes to the ALRB for

resolution. The final two sections prohibited the assignment of the agreement by either party and prohibited others from becoming successors to the agreement, proposals that proved to be noncontroversial as the bargaining wore on. Neither this proposal by GFI nor any that followed in the ensuing months contained a direct statement that it recognized the UFW as the exclusive representative of its agricultural employees, a legal duty imposed as the result the ALRB's 1992 certification in the absence of any decertification, or disclaimer or defunctness on the part of the UFW. Joint Exhibit 57 shows that the Union continued to seek a straight forward statement of recognition as a part of Article 1. Although Joint Exhibit 59, prepared by GFI, recites the UFW's recognition proposal, it does not address it in any fashion. Instead it merely substitutes in its place a lengthy provision dealing with the definition of an employee under the ALRA and seeks to preserve any disputes about unit issues for resolution by the ALRB rather than an arbitrator. Hence these two exhibits reflect that, even by that time, GFI still declined to include language recognizing the UFW as the exclusive bargaining representative presumably to protect its position concerning abandonment. And although GFI agreed to include language in Article 1 barring individual agreements, its proposal sought to carve out from that prohibition "cultural employees who have traditionally had their wages set based on past practice of individual evaluation of their performance, skills and experience." The parties tentatively agreed on two aspects of the first article, the names of the parties to the agreement and the prohibition against assignability, neither of which are of considerable significance.

Union Shop/Checkoff: On January 17, the UFW's Article 2 proposed in Section 1 the inclusion of language establishing a "union shop," which would require unit employees to become members of the Union or arrange to pay an agency fee to the Union within five days following their employment. (Jt. Exh. 6:GCD00853-854.) The second section would require GFI to terminate employees who did not meet the membership/agency fee obligation, and Sections 3 through 9 contained the Union's proposals for establishing and operating a dues checkoff system that would serve to fund

the Union's activities in representing the employees in this very large unit spread out, as noted above, across 19 square miles.

GFI's Article II provided for an open shop operation. As noted before, it bore the heading "Right to Work," a term that labor organizations universally regard as anathema. The proposal stated simply, "Neither membership in good standing in the Union, nor the payment of Union dues or non-member fees shall be a condition of employment with the Company." GFI never budged on its position rejecting union security or a dues check off system. It even continued insist on the inflammatory "Right to Work" heading. (See Jt. Exh. 59:RespD0l290.) Additionally, GFI continued its outright rejection of all aspects of the UFW's proposed Article 2, including the checkoff proposal.

In its opening statement, GFI's counsel explained that it "had very good reasons" for its "open shop" or "what we call right to work." That reason, he went on to explain was that "after two decades of not being here, it literally should be up to the employees to decide whether they wished to pay money for the jobs they already had." (Tr. I:38-39.) The UFW's reaction to this proposal is summed up in the tone and words used by Elenes in describing his reaction to this proposal:

> Q What, if anything, caught your attention about this article when you reviewed it?
>
> A Well, right off the bat the title, "Right to Work."
>
> Q Why did that --
>
> A That says it all, you know. And I remember I did tell Ron, I said, hey, California is not a right to work state. I said, I don't know where you're coming from on this.
>
> Q Did Ron say anything in response to you?
>
> A Well, it was some form of they believed in freedom of choice, employee free choice, employee free choice, you know.
>
> Q Did Mr. Barsamian explain what he meant by employee free choice?

/ / /

> A Basically, that that was going to be something that we were going to have to do between the employees and us. They just believed in free choice, that the employees had the right to decide whether they want to pay dues or not pay dues, be a member of the UFW or not. They were adamant on that.

(Tr. I: 82-83.) According to Elenes' credible testimony, GFI's position on its' "Right to Work" proposal remained a repeated point of contention throughout. Moreover, attorney Barsamian largely agreed when he later testified that the GFI rejected any form of a union shop because "a large part of it was the company's deeply-held belief that an employee should have a free choice and not have their jobs depend on whether or not they joined a union." (Tr. I: 225.) Eventually, Barsamian, an experienced negotiator under the ALRA, acknowledged that he knew of no UFW contract in California that contained a "right to work" proposal similar to that proposed by GFI. (Tr. I: 228.) GFI rejected the UFW's union security and checkoff proposals in their entirety. Barsamian acknowledged that there had never been a calculation of the potential costs of a checkoff system and seemed to imply at one point while testifying that, if necessary, union agents could "go up and down the hillside" as had been done at other growers in the past to collect dues if any worker chose to join. (Tr. I:226.) Finally, on several occasions during his testimony, Barsamian mischaracterized the UFW's proposal on this subject as a demand for a "closed shop," a term that refers to the requirement that an employee must be a member of the union in order to be employed from the outset, a practice made unlawful under the 1947 amendments to the NLRA.

Additionally, GFI's argument in support of its Right to Work proposal in Joint Exhibit 59 reflects the basis for its rejection of the UFW's union security/check-off proposal. It makes the following statements in support of GFI's rationale:

> Not to belabor the point or make any political statement, but the fact remains that the several thousand employees who work for the Company were (and still are) already being paid the highest wages in the industry before the Union made any effort to represent them, and thus the questionable concept of "fair share" or "free rider" simply does not apply

> here. The employees should not be forced to pay to keep their jobs, nor is there any justification to try to put those costs on the Company in the form of higher rates to cover the dues/fees. The Company already raised its rates for this season by 10% ($1.00 per hour), and is maintaining its position as the highest paying employer in ~ its segments of the agricultural industry by a wide margin. The employees deserve to become acquainted with the Union and be provided with some semblance of service in the form of representation before being asked to pay money to it. As the provisions of the Union's proposal provide, and as has been confirmed by the Union at the bargaining table, the Union ultimately will force the Company to discharge any employee who fails or refuses to pay dues or fees.
>
> * * *
>
> Further, to require the Company to make any deductions, and in fact to do the Union's bidding by furnishing dues check-off authorization forms goes far beyond any concept of fairness nor does it foster any labor peace given the situation. If labor peace is desired, it is just as logical, if not preferable, to have the Union not collect any dues or fees for the one-year period given its failure to fairly represent the employees for so long. It is not illegal to have an open shop under the law, nor is it legally required that an agency shop be included in a collective bargaining agreement.

(Jt. Exh. 59: RespD01290.)

Elenes provided the following rationale for the UFW's union security proposal in this manner:

> A Well, obviously, you know, we have an obligation to represent all employees, so, you know. And again, all our contracts have some type of union security language that indicates that the employees are either going to pay agency fees or going to pay dues, membership dues. And obviously we need that to be able to collect dues, be able to collect agency fees so that we can fund the work that we're going to have to do to administer the contract and continue improving the conditions of other farm workers.

Tr I: 64.

The following testimony by Elenes also reflects the degree of resistance GFI had to any requirement that its employees pay for their representation by the UFW:

> Q Do you recall if you discussed this article in later negotiations?
>
> A Yeah, this was an article that, I remember one time there was a group of employees that came in and they started making this big old show. I remember

Jaime Mendoza, one of the company reps that was there, started making this big old thing about the dues and that's all we were interested in, etcetera, etcetera.

Q When you say etcetera, etcetera, can you elaborate.

A Well, that the UFW just wants the employees' money, that we just want their three percent. And that the employees are already the highest paid workers in the industry and they shouldn't be forced to pay anything. So it was that type of discussion.

Q Do you recall if that type of discussion occurred in other negotiation sessions?

A Oh, it was a repeated point of contention.

Q During the later negotiation sessions what would you say to the company regarding this article?

A I would just say, look, we're negotiating on behalf of all employees. We have the obligation to represent all employees, and so therefore, we believe that all employees should either pay dues or agency fees. And again, that California is not a right to work state and that's something that we needed to address.

Q In later negotiations did the company say anything in response to you?

A No, their position pretty much stayed the same. That they believed in free choice and that the employees should not have to be forced to pay three percent dues. And then they started making a big deal about, well, if they don't pay dues you'll want us to terminate them and you really just want us to fire employees. I said no, that's not what we're trying to do.

Q Do you recall if there was any other conversations regarding this article?

A Well, it was pretty much along the same lines throughout the whole entire process for the most part.

Q And when you say along the same lines.

A Well, again, what I just repeated, that they believed in free choice.

(Tr I:84-86.)

Seniority: The UFW Article 4, proposed on January 17, provided for the establishment of a seniority system that would apply as a factor in hiring, work assignments, layoffs, recalls, promotions, and transfers. Section 1 defined seniority "the length of continuous service of an employee beginning with their date of hire." The remaining six sections identified when an employee began to acquire seniority, provided

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a means for breaking seniority ties, and identified the recordkeeping and information sharing required to administer the seniority system. Articles 5 and 6 applied the seniority principles established under Article 4 to layoffs, recalls, promotions and transfers.

The Company's notes of the January 17 meeting exchanges contain a terse comment that seniority "hurts employees." (Jt. Exh. 8 RespD01001.) GFI's January 18 proposal included Articles III and IV that address hiring, work assignments, layoffs, promotions and transfers. They both propose to codify the Company's "sole and exclusive authority" to determine these matters. GFI's initial proposal contains no reference to seniority. (JT. Exh 9.)

Apart from rejecting the unilateral action feature of these two GFI proposals, Elenes said that he argued repeatedly that the complete failure of these proposals to consider the application of seniority at all would be very problematic for the UFW because of the numerous complaints of management favoritism that workers were voicing to UFW agents. As a result, GFI negotiator Barsamian, who initially rejected the UFW's seniority proposal, later seemed to concede that an employee's "length of service" merited some consideration. This slight concession led Elenes to largely abandoned use of the word "seniority" and to argue instead, largely to no avail, for language that assigned some credit for an employee's length of service when making decisions on the subjects addressed in GFI Articles III and IV. (Tr. I:87-89)

GFI's August 2 mediator argument continues to reflect that GFI continued to reject any limitation on its exclusive control over layoffs, recalls, work assignments, promotions and transfers. A matrix showing the parties' positions at the end of August 2013, reflects that GFI rejected the UFW's "length of service" proposal. (Jt. Exh. 62:RespD01264.) At best that matrix reflects two pending GFI proposals that would lend a definition to the term "length of service" and the events that would break a worker's length of service that differed slightly from the Union proposal. (Jt. Exh. 62:RespD01263.) Apart from that, the GFI only agreed to notify the Union when it anticipated lack of work layoffs but it continued to insist that it would form crews

"as per past practice." In the event of a permanent reduction in force, the Company agreed to notify and meet with the Union if requested. The remaining details of the Company's proposal on layoffs and recalls largely deal with the employees' obligations to stay in touch and describe generally its own discretion for executing the recall process.

In his opening statement, attorney-negotiator Barsamian asserted that the UFW "wanted strict seniority" and that GFI rejected the implementation of such a system because it "would have kept people from working together in crews and prevented them from maintaining the carpooling they had and working with their families." (Tr I:41-42.)

With respect to promotions and transfers, the GFI eventually came to include "length of service" as one of the last factors to be considered when filling a job vacancies. (Jt. Exh. 59:RespD01297.)

Grievance-Arbitration: The UFW proposed a grievance-arbitration system as the "exclusive means" for resolving all disputes concerning the interpretation or application of the agreement. (Jt. Exh. 6:GCD00858.) This proposal provided for a three-step process preceding arbitration intended to allow an opportunity for a negotiated resolution. Failing a negotiated resolution, the proposal provided for arbitration utilizing American Arbitration Association (AAA) procedures.

The following day GFI's initial proposal contained Article VI, entitled "Resolving Employee Concerns." This constituted GFI's counterpart to the UFW's grievance-arbitration proposal. It sought to enshrine the existing procedure for dealing with employee complaints by providing for the continued use of "the Company's internal procedures" to address employee complaints, meaning that the Company would unilaterally determine whether an employee grievance had merit and, if so, the remedial action to be taken, if any. However, if a grievance remained unresolved then the Company and the Union were to "confer on what approach or venue might be utilized to resolve the issue," in effect, bargaining from scratch for an ad hoc grievance or arbitration procedure each time the Company's internal procedures failed to produce an acceptable resolution. Article VI also excluded the Union agents at any meeting between

an employee and the Company during this concern-resolution process except "when requested by the employee, *as provided by law*." [Emphasis mine.]
(Jt. Exh 9:GCD00630.)

By the end of August, the parties had made considerable progress toward establishing a standard grievance-arbitration system. The August matrix reflect tentative agreements of eight separate provisions of a grievance arbitration article and other areas of near agreement. For example, the parties had a tentative agreement on the use of arbitration if efforts through the initial three steps failed to produce a resolution. The only issue that remained for resolution over the provisions dealing with the arbitration section concerned the source of the list of arbitrators. By the end of August, the UFW had switched from the AAA to the Federal Mediation and Conciliation Service (FMCS) but GFI had consistently proposed other services. (Jt. Exh. 62:RespD01267-68.)

No Strike-No Lockout: The UFW proposal on this subject is set forth in Article 8 of its initial proposal. It has three sections. The first stated that "there will be no strikes, boycotts or slowdowns by the Union during the life of this Agreement." The second prohibited the use of unit employees as strike breakers and the third barred lockouts by GFI during the agreement's term. (Jt. Exh. 6:GCD00860.)

GFI set out its initial proposal on this subject in Article V entitled "Economic Action." As initially proposed, it rejected the Union's language in its entirety and proposed that both parties as well as the employees independently be left "free to take whatever lawful economic action they deem necessary" during the life of the Agreement. (Jt. Exh. 9:GCD00630.) The August matrix reflects that both parties remained committed to their original positions. (Jt. Exh 62:RespD01268.)

Just Cause: The UFW's initial proposal concerning discipline and discharge (Article 9) sought to limit the employer's actions in this sphere to situations where the employer had demonstrable just cause. GFI rejected the just cause proposal from start to finish, I think. After listening to GFI's rejection of his proposal, Elenes noticed a just cause limitation in GFI's initial management rights proposal on January 18, but

Barsamian immediately claimed a mistake and revised the proposal to exclude the just cause term. Hence, GFI's January 18, proposal shows on each page that it was revised on "1-20-13." At the hearing, Barsamian professed that GFI never actually closed the door to just cause; it only requested that the Union define the term so it could carefully consider its implications. But as shown in the following colloquy between counsel, any definition of just cause, if a definition is possible at all, would almost certainly have only provided more fodder for quarreling:

> Q But throughout the 7 months of negotiations, you rejected disciplining and discharging employees for just cause; correct?
>
> A We were rejecting -- we didn't reject just cause. We kept asking for a definition of just cause so that that could be put into the contract. We had a problem with using a term. The company, Gerawan, had been at an at-will company, which is part of the law in California, for decades. And this was a new concept to them. They wanted a definition of what just cause meant. So, to say we rejected it, we were trying to understand it as it would be used in this contract.
>
> Q The term "just cause" was not a new term to you; correct?
>
> A No. I'd struggled with it for decades in arbitrations, in administrative proceedings, employment litigation in court. It's one of those terms that comes up and everybody thinks they know what it is and everything else -- it's like three blind men describing an elephant.

(Tr. I: 231-232.)

It is plain that the Union made no attempt to satisfy GFI's demand for a precise definition of just cause, a concept, as Barsamian's characterization suggests, that can be as amorphous as every possible factual pattern.[24]

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[24] Worthy of note is the apparent fact that GFI's negotiators failed to throw their original management rights template away when they revised their management-rights proposal on January 20 as "for cause" crept back into the descriptions of their management-rights proposal in later documents. (See e.g. Jt. Exh. 59:Resp D01309; Jt. Exhibit 62:Resp D01271.) As its proposals that explicitly pertain to discharge and discipline in Joint Exhibits 59 and 62 show no evidence that GFI ever accepted the inclusion of the just cause concept, and as Barsamian's testimony shows that GFI rejected the UFW's just-cause proposals, I have concluded that the inclusion of "for cause" the management rights proposals in those two exhibits is also an error.

Management Rights: Article 14 of the Union's proposal on management rights provided simply that GFI would retain all "rights of management except as expressly and explicitly modified by this Agreement." (Jt. Exh. 6:GCD00864.)

GFI's initial proposal on management rights (Article IX of its January 18 proposal) provides:

> All of the rights, powers, prerogatives, and authorities that the Company has historically exercised are retained except those specifically abridged or modified by this Agreement; including, but not limited to: the right to hire, promote, discharge or discipline, and to maintain discipline and efficiency of employees. The Company maintains the specific right to review the performance and production capabilities of each employee as part of its disciplinary procedure. In addition, the varieties, amount, and extent of acreage of products to be grown, harvested, or sold, the schedules of production, the methods, processes and means of production or harvest are solely and exclusively the responsibility of the Company, including the nature of equipment or machinery used and the rights to change, discontinue, or modify such methods, processes, means, equipment and machinery. Furthermore, it shall be the responsibility of the Company to direct and supervise all employees, to assign and transfer and layoff employees, to make work and safety rules, employee handbooks, and to determine when overtime shall be worked and if required, and to determine the size of crews and hours of work. The Company retains the right to make all decisions that are necessary to the efficient and/or economical operation of its business. The Company's failure to exercise the rights reserved to it, or its exercise of them in a particular way, shall not be deemed a waiver of said rights or of its right to exercise them in some other way, not in conflict with the express terms of this Agreement. It is agreed that these enumerations of management rights and functions shall not be deemed to exclude other proper rights or functions not specifically listed herein.

Joint Exhibit 62, the August 30 matrix, reflects that the UFW had altered its proposal on this subject but only in an insignificant manner and that GFI had not altered one word of its original proposal.

Farm Labor Contractors: The UFW proposal that related to FLC workers reflects a dual objective of limiting the use of FLCs and protecting both direct hires and FLC workers when it became necessary to utilize those workers. Specifically, Article 16, Section 1, in the Union's January 17 proposal sought to protect GFI's direct hires from injury by the employer's use of farm labor contractors. Thus, it provided that the use of FLC workers would not be permitted "if doing so would cause the layoff or loss of

hours" worked by direct hires. Section 2 of that Article provided that when the employer did use FLC workers, they would be provided "equal wages, terms and conditions of employment . . . as those required under this collective bargaining agreement and such employees be part of the bargaining unit." Section 3 sought to completely prohibit the use of FLC's with a history of violating federal and state laws and regulations concerning employment conditions, and employee health and safety by empowering the UFW to demand that GFI terminate an FLC when presented with "reasonable evidence" of the FLC's repeated violations of federal and state laws. In Article XII of GFI's January 18 proposal provided in relevant part that "no provision of this Agreement shall apply to farm labor contractors or to the employees of farm labor contractors."

By the time the August 30 matrix had been prepared, the UFW had dropped Section 3 of its original proposal but retained Sections 1 and 2 largely, if not entirely, intact. GFI also altered its original proposal but the effect would be nearly the same. Thus, by August 30, GFI proposed that the FLCs were to set "the wage rates paid and benefits provided to their respective employees in compliance with federal and state laws." It also provided that the FLCs would use discharge and discipline procedures that conformed to federal and state laws; that grievances pertaining to the employment of FLC workers would be served on both the FLC and GFI; and that GFI would "continue its best efforts to form and employ direct-hire crews before utilizing farm labor contractors" but that promise "shall not be construed as a guarantee" that all direct hires would be "employed before or laid off after" FLC workers. (Jt. Exh. 62:RespD01272-73.)

Union Obligations: On this subject, the UFW had no comparable proposal. On January 18, GFI proposed Article XVI, "Union Obligations," which contains three sections. The first involved a wide-ranging "hold harmless and indemnification" proposal. The second required the UFW to purchase insurance from a provider approved by GFI in unusually high amounts presumably to cover the undertakings in the prior indemnification section. The third required the UFW to cooperate with worker

compensation fraud investigations initiated by GFI or its insurers and to waive any claims of unlawful surveillance as a part of this commitment. The hold harmless and indemnification proposal reads as follows:

> *The Union agrees to indemnify and hold the Company harmless from any and all* claims, losses, damages, costs or expenses whatsoever including reasonable attorneys' fees that it may incur directly or indirectly as a result of the Company performing under this Agreement, or due to the acts or omissions, breach of any provisions of this Agreement or violation of any federal, state, local statute, regulation or ordinance by the Union or its officers, director (sic), employees, agents or volunteers under its control. The Union agrees to protect, defend, indemnify and hold the Company and its employees free and harmless from and against any and all losses, claims, liens, demands and causes of action of every kind and character including the amount of judgment, penalties, interests, court costs and legal fees incurred by the Company in defense of the same, arising in favor of any party including governmental agencies.

Section 2 required these levels of insurance: (1) coverage of fifty million ($50,000,000) for comprehensive general liability coverage; (2) coverage of one hundred million ($100,000,000) for directors and officers' errors and omissions coverage; and (3) one hundred million dollars ($100,000,000) designated as coverage for the indemnification requirements contained in Section 1. Additionally, Section 2 required the UFW to carry Workers Compensation, disability benefit, and other similar insurance "required by law."

By the end of August, Section 1 of this proposal remained unchanged. However, by apparently bargaining with itself,[25] GFI had agreed to lower the limits of all the insurance coverages the Union would be obliged to buy from a GFI approved provider to one million dollars ($1,000,000). (Jt. Exh. 59:RespD01357-58.)

GFI's explanation for its apparent insistence that this proposal be included in the agreement is contained in the argument it made to the mediator as reflected in Jt. Exh. 59: RespD01358:

> **Argument:** The Company's proposal takes into account the government-imposed nature of any agreement resulting from this mediation, which was invoked upon the application made by the Union. The Union's conduct, after a 20-year absence, in attacking the Company without having

[25] There's not a scintilla of evidence to suggest that the UFW ever seriously considered agreeing to any aspect of GFI's "Union Obligations" proposal.

> attempted to gain any experience about its operations or the employees within the bargaining unit, has caused the Company great concern about being held responsible for the Union's conduct. For example, employees constantly complain about Union organizers visiting them at their homes and engaging in threatening and intimidating conduct, for which the employees have already expressed their concern that the Company provided their home addresses to the Union without their consent. Also, the Union's LM-2 indicates a distressing economic situation which has caused the Company to be concerned about the Union's ability not only to continue operations, but further to be able to address any liability which might be imposed upon it or upon the Company for which it may be responsible for. Union representatives will be coming onto Company property, sometimes by vehicle, for which the Company has the right to be informed as to proper liability and Workers' Compensation coverage. The Company seeks to have the Union cooperate with any Workers' Compensation fraud investigations which may occur without invoking provisions of any agreement resulting from this mediation as a shield or protection from investigation and/or prosecution of persons, including employees, for such fraud.

The UFW notes of the March 21 bargaining session reflect that Elenes told Barsamian that GFI's indemnification insurance proposal was "junk." (Jt. Exh. 36:GCD00837.)

5. The March "Interim" Wage Increases

On March 19, GFI proposed to increase the general crew labor rate from $9.00 per hour to $9.50 per hour. (Jt. Exh. 30:GCD 00901-02.) It further proposed to implement the increase during the current pay period for which checks would issue on March 23. Elenes provided the following credible testimony about the UFW's reaction:

> A We counter proposed, actually, on that one. We caucused with the negotiating committee and we counter proposed it. We were open to an interim wage increase while we were continuing to negotiate the contract, but that we counter proposed that it be a dollar wage increase but also that it would apply to not just crew labor, as indicated here, and not just to direct hires, but that it should be a dollar increase to all employees, to include cultural labor, crew labor, whether directly or through FLCs.
>
> Q Did the company say anything in response to your counter proposal?
>
> A No, they rejected it. They said that that's what they were proposing at the time and that was what their proposal was.

The company's bargaining notes for the day contain a single word alluding to "leaflets," a subject apparently raised by Elenes. (Jt. Exh. 32:RespD01019.) An email Barsamian wrote to Elenes late the following morning reflects that there had been a telephone conversation between the two negotiators at some point between the end of the

session on March 19 and the time of the email on the morning of March 20 (before the UFW accepted the wage increase proposal) about the "Company's handout," an apparent reference to the following flyer dated March 20 distributed to employees on Company stationery signed by Ray, Mike and Dan Gerawan that read:

Important News About Your Pay

- Gerawan Fanning proposed a wage increase of $.50 per hour.
- The new base wage for crew labor will be $9.50 per hour.
- Gerawan Fanning has always paid the highest wages.
- We want your raise to go into effect as soon as possible.

Spring has arrived early this year and we are planning for a record season. So, to stay ahead of the competition, we must continue to pay the highest wages, just as we always have.

That's why Gerawan Farming proposed a $.50 per hour wage increase for crew labor to go into effect immediately. We have informed the UFW union of our plan, and we assume they will not cause any unnecessary delay.

Ray, Mike, and Dan Gerawan have made the decision to give crew labor a raise just as they always have.

Thank you for your part in making Gerawan Farming the best place to work. We look forward to another great year of working together.

Elenes said "the employees "told us about (the leaflet) right away." (Tr. I:110.) Regardless, Elenes emailed Barsamian at 5:52 p.m. on March 20 accepting the interim wage increase proposed by GFI the previous day. (Jt. Exh. 33:GCD00708.)

At about 9:30 p.m. on March 27, attorney Barsamian emailed and faxed another wage proposal to the UFW's Elenes. (Jt. Exh. 38.) That proposal provided for increasing the hourly crew rate another fifty cents per hour to $10 per hour. It also proposed to increase the hourly rate paid to cultural employees by $1.00 per hour above whatever rate

the individual employees in that category received at the time. The proposal sought to implement these increases on the checks to be issued on March 30. The proposal and an accompanying letter from Barsamian to Elenes suggested that this increase was also motivated by rates of pay being offered by GFI's competitors. At the end of his letter, Barsamian asked: "Do you agree that Gerawan employees deserve to receive increases to their wage rates on an interim basis beginning with the payroll checks to be issued on Saturday, March 30, 2013, pending a full collective bargaining agreement." (Jt. Exh 38:GCD00722.) Elenes emailed the Union's acceptance of the proposed increases to Barsamian at 11:57 a.m. on March 28. (Jt. Exh. 39:GCD00725.)

As it had done with the earlier increase, GFI provided notices of the proposed increases to its employees at or about the same time as it made its proposals to the UFW. (GC Exh. 4.) The notice distributed to the cultural employees, dated March 28, largely tracked the format of that quoted above concerning the first increase to the crew workers. Its essence stated that GFI proposed to give a $1.00 increase to the cultural workers, that it wanted "your raise to go into effect as soon as possible, and that the Union had been notified of the proposal, "and we assume they will not cause any unnecessary delay." (GC Exh. 4:GCD00424.)

The notices of the second pay increase granted to the crew workers, dated March 29, simply states in bold print that their new rate would be $10.00 per hour. It contains no reference to the Union at all.

6. GFI'S Concurrent Unfair Labor Practices

In the prior case, the ALRB found that Gerawan violated the Act in several respects during the period under examination here.

The Board's decision in the prior case adopted ALJ Soble's findings that soon after the UFW requested to commence negotiations in October 2012, and purportedly while Respondent prepared for and engaged in the voluntary negotiations, it also commenced an extensive propaganda campaign obviously designed to discredit the UFW to its employees. Thus, Judge Soble found that GFI distributed a series of mailers and

flyers to each of some 5,000 employees. Below are excerpts from Judge Soble's findings in 42 ALRB No 1 that I find pertinent to assessing GFI's approach to engaging in collective bargaining with the UFW in 2013:

> . . . In October 2012, the UFW sent a letter to Gerawan seeking negotiations on behalf of the company's agricultural workers. (62 RT 56:18-22, 62 RT 83:25-84:2 and 67 RT 62:21-24) Starting the next month, November 2012, Gerawan began distributing a series of hard-hitting mailers and flyers to workers that described the UFW unfavorably. The materials were typically provided in both Spanish and English.
>
> The first of these mailers was distributed on November 13, 2012 to approximately five thousand employees. (Exhibits J-1, page 1, and GCX-2) This mailer was signed by Ray, Mike and Dan Gerawan, on company letterhead, and stated "As your employer, we did not want [to give your personal information to the UFW,] but we have no control over this."
>
> The next mailer was distributed on November 22, 2012 to approximately five thousand employees. (Exhibits J-1, page 1, and GCX-3) This mailer was on company letterhead and was in a question and answer format. The mailer states that the workers will probably have to give some of their earnings to the UFW as this is generally required by UFW contracts. The mailer states that the UFW may try to mislead workers into thinking that the company will pay the dues, but it is actually the workers who must pay the union. The mailer states that the company does not want this to happen, but that it is not the company's decision to make. The mailer gives multiple telephone numbers if a worker wants to contact the Agricultural Labor Relations Board ("ALRB"), as well as telephone numbers for the local State Assemblyman and State Senator.
>
> The third mailer in November 2012 was distributed on November 30, 2012 to approximately five thousand employees. (Exhibits J-1, page 1, and GCX-4) This mailer was on company letterhead and was in a question and answer format. The mailer states in bold font: "There is no vote planned." Clearly, the company is trying to put the concept of an election in the minds of the recipients. The mailer gives the telephone number for the ALRB, saying "If you want to know why there is no vote planned, you can call the ALRB . . . and have them explain how elections are scheduled and conducted." The mailer states that UFW contracts generally require workers to give some of their money to the UFW in the form of dues or fees. The mailer adds, "The union may tell you that the company will pay the money, but in fact the money is paid by you." The mailer states that Ray, Mike and Dan Gerawan do not want this to happen.
>
> On December 10, 2012, Gerawan distributed a two-page flyer to approximately five thousand employees. (Exhibits J-1, page 2, and GCX-6) This flyer asserts that except for one meeting 20 years ago, the UFW had not contacted the company. The flyer again emphasizes the UFW contracts generally require the workers to give some of their money to the UFW in the form of dues or fees. The flyer notes that "The answer is no, Ray, Mike and Dan do not want this to happen." The flyer talks about the fact that

"there is no vote planned" and that the ALRB is the appropriate agency to contact if you want to know why there is no vote planned.

On December 21, 2012, Gerawan distributed a one-page flyer with the company logo to approximately five thousand employees. (J-1, page 2, and GCX-9) This flyer states that the owners have always been willing to negotiate, but the union went away twenty years ago. The flyer points the workers to the ALRB if they have any questions, and provides the ALRB's telephone number.

On February 22, 2013, Gerawan distributed a one-page flyer with the company logo to approximately five thousand employees. (Exhibits J-1, page 2, and GCX-7) The flyer purportedly attaches a copy of a lawsuit filed by Gerawan against the UFW. The flyer states that the UFW has told workers that money will be taken from their paychecks. The flyer also states that the UFW is trying to limit company communications with workers. Finally, the flyer attacks the employment status and tenure of the worker representatives in attendance. The flyer encourages workers to call the ALRB to see if they can help.

On March 20, 2013, Gerawan distributed a one-page flyer with the company logo to approximately five thousand employees. (Exhibits J-1, page 2, and GCX-5) This flyer states the company is giving a fifty cents hourly pay raise. The flyer states that the pay raise decision was made by Ray, Mike and Dan, just like always, and that they trust that the union will not delay their decision. The flyer is very clearly trying to emphasize that the decision was made solely by the company owners and that the UFW presence and negotiations deserve no credit for the pay raise.

On March 23, 2013, Gerawan distributed a one-page flyer with the company logo to approximately five thousand employees. (J-1, page 2, and GCX-8) This flyer alleges that Gerawan workers make more money than workers at other companies in the industry. The flyer gives Jose Erevia's name, telephone number and email address.

Just eight days after sending the March 20, 2013 mailer, which announced a fifty cents hourly pay raise, the company sent another mailing on March 28, 2013 stating that the pay increase would be for a full dollar, from $9.00 to $10.00 (rather than $9.50 as stated on March 20, 2013). This one-page flyer with the company logo states that it is from Ray, Mike and Dan Gerawan. The mailer was sent to approximately five thousand employees. (Exhibits J-1, page 3, and GCX-10) The flyer gives Jose Erevia's name, telephone number and email address.

The next day, on March 29, 2013, Gerawan sent another mailer, also announcing the one dollar pay raise in a one-page flyer format, with the company logo, and stating that it is from Ray, Mike and Dan Gerawan. (Exhibits J-1, page 3, and GCX-11) The flyer gives Jose Erevia's name, telephone number and email address.

On April 26, 2013, the company distributed a mailer to approximately five thousand employees stating that the "union will require you to pay them 3% of your wages." The mailer also stated that "The union wants us to fire you if you don't give them some of your money for dues."

> This mailer included the company logo, a telephone number for Ray, Mike and Dan Gerawan, and a telephone number and email address for Jose Erevia. (Exhibits J-1, page 3, and GCX-12)

(42 ALRB No. 1:ALJD 10-14.)

In its decision, the Board rejected the UFW's argument that Respondent, by this collection of flyers and mailers, effectively instigated the decertification effort that followed. However, the Board did conclude that once employee Sylvia Lopez, a former employee rehired in June 2013, initiated a decertification effort, GFI provided sufficient support to fatally taint the whole decertification process and so it dismissed Lopez' petition. The Board summarized the extent of GFI's support as follows:

> Although we find that Petitioner Lopez began the decertification campaign on her own initiative, we also find that, over time and in a variety of ways, Gerawan unlawfully inserted itself into the campaign. Gerawan discriminatorily permitted anti-Union signature gathering during worktime while prohibiting pro-Union activity of the same kind, and granted Lopez and other signature gatherers what the ALJ colorfully and properly characterized as a "virtual sabbatical" wholly out of keeping with Gerawan's policy on leaves of absence. Gerawan extended the same immunity from discipline for missing work to other signature gatherers while continuing to enforce such policies among the rest of the crew. It tacitly approved an unlawful work blockage, which, although instigated by the decertification supporters, directly facilitated the gathering of the signatures required for the showing of interest. It colluded with the CFFA to make arrangements for the decertification petition supporters to travel by bus to Sacramento in order to protest the dismissal of the first decertification petition, and thus condoned employees taking time off from work to join the protest. It granted a wage increase during the decertification campaign and unlawfully solicited grievances. In all these ways, Gerawan sent clear signals that it supported the decertification efforts, and in so doing, unlawfully undermined the very principle of free choice it so earnestly argues that the decertification effort represented.

(42 ALRB No. 1:8-9.)

In addition, Board concluded, in agreement with ALJ Soble, that this collection of communications to the Gerawan employees "amounted to an enhanced effort to directly solicit grievances" in violation of Section 1153(e). (42 ALRB No. 1:20, fn. 6; 42 ALRB No 1:63.) The Board further found that this series of flyers and mailers amounted to direct dealing that it found unlawful based on this rationale:

> . . . In *Allied-Signal, Inc*. the NLRB stated that "[i]t is well settled that the Act requires an employer to meet and bargain exclusively with the

> bargaining representative of its employees, and that an employer who deals directly with its unionized employees or with any representative other than the designated bargaining agent regarding terms and conditions of employment violates Section 8(a)(5) and (1). Direct dealing need not take the form of actual bargaining. As the Board made clear in *Modern Merchandising* (1987) 284 NLRB 1377, 1379, the question is whether an employer's direct solicitation of employee sentiment over working conditions is likely to erode 'the Union's position as exclusive representative.'" (*Allied-Signal, Inc*. (1992) 307 NLRB 752, 753.) As the ALJ found, the "gravamen of the message [in the flyers] was that the UFW was worthless and impotent." (ALJ Dec. at p. 182.) Thus, in addition to upholding the ALJ's finding of unlawful solicitation of grievances, we also find that Gerawan engaged in impermissible direct dealing.

(42 ALRB No. 1:62-63.)

D. Argument, Analysis and Conclusions

1. The Surface Bargaining Allegation

Neither the ALRA nor the NLRA, its federal counterpart, employ the term "surface bargaining" but the concept is embedded in numerous decisions by the courts and the administrative agencies responsible for the enforcement of these two labor relations statutes. In the labor law context, surface bargaining simply means going through the motions of bargaining with no intention of ever reaching an agreement.

A little over a decade ago, the NLRB summarized the test applicable in surface bargaining cases in *Regency Service Carts, Inc*. (2005) 345 NLRB 671. It explains the following:

> Under Section 8(d) of the Act, an employer and its employees' representative are mutually required to "meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment . . . but such obligation does not compel either party to agree to a proposal or require the making of a concession . . .." "Both the employer and the union have a duty to negotiate with a 'sincere purpose to find a basis of agreement,'" *Atlanta Hilton & Tower*, 271 NLRB 1600, 1603 (1984) (quoting *NLRB v. Herman Sausage Co.*, 275 F.2d 229, 231 (5th Cir. 1960)), but "the Board cannot force an employer to make a 'concession' on any specific issue or to adopt any particular position." Id. (quoting *NLRB v. Reed & Prince Mfg. Co.*, 205 F.3d 131, 134 (1st Cir. 1953), cert. denied 346 U.S. 887 (1953)). The employer is, nonetheless, "obliged to make *some* reasonable effort in *some* direction to compose his differences with the union, if [Section] 8(a)(5) is to be read as imposing any substantial obligation at all." Ibid. (Emphasis in original.) Therefore, "mere pretense at negotiations with a completely closed mind and without a spirit of cooperation does not satisfy the requirements of the Act." *Mid-Continent Concrete*, 336 NLRB 258, 259 (2001), enfd. sub nom. *NLRB v. Hardesty Co.,* 308 F.3d 859 (8th Cir. 2002) (quoting *NLRB v. Wonder State Mfg. Co.,*

> 344 F.2d 210 (8th Cir. 1965)). A violation may be found where the employer will only reach an agreement on its own terms and none other. Id.; *Pease Co.*, 237 NLRB 1069, 1070 (1978).
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> In determining whether a party has violated its statutory obligation to bargain in good faith, the Board examines the totality of the party's conduct, both at and away from the bargaining table. *Public Service Co. of Oklahoma(PSO)*, 334 NLRB 487 (2001), enfd. 318 F.3d 1173 (10th Cir. 2003); *Overnite Transportation Co.*, 296 NLRB 669, 671 (1989), enfd. 938 F.2d 815 (7th Cir. 1991); *Atlanta Hilton & Tower*, supra, at 1603. From the context of the party's total conduct, the Board must decide whether the party is engaging in hard but lawful bargaining to achieve a contract that it considers desirable or is unlawfully endeavoring to frustrate the possibility of arriving at any agreement. *PSO*, 334 NLRB at 487.
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> The Board considers several factors when evaluating a party's conduct for evidence of surface bargaining. These include delaying tactics, the nature of the bargaining demands, unilateral changes in mandatory subjects of bargaining, efforts to bypass the union, failure to designate an agent with sufficient bargaining authority, withdrawal of already-agreed-upon provisions, and arbitrary scheduling of meetings. *Atlanta Hilton & Tower*, supra, at 1603. It has never been required that a respondent must have engaged in each of those enumerated activities before it can be concluded that bargaining has not been conducted in good faith. *Altorfer Machinery Co.*, 332 NLRB 130, 148 (2000). Indeed, avoidance of the statutory bargaining obligation can be demonstrated without engaging in wholesale and wide-ranging activities in every one of these areas; rather, a respondent will be found to have violated the Act when its conduct in its entirety reflects an intention on its part to avoid reaching an agreement.
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> (See *id.* at 130 fn. 2.)

The *Reed & Prince* case, cited in quoted text above, contains one of labor law's classical phrases often quoted in surface bargaining cases where the party whose conduct is under scrutiny adheres to extreme proposals. The *Reed & Prince* court found that over the course of bargaining that lasted months, the employer rejected all of the union's proposals. It then came forward with a two-page proposal containing a recognition clause limited to paraphrasing a portion of NLRA Section 9(a), and a provision about the hours of work contained in a decade-old prior agreement. The employer's proposal contained no provisions about wages, a grievance procedure, or any of the other major items which the union sought in its proposed contract. Of the employer's proposal, the court said:

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> It is difficult to believe that the Company with a straight face and in good faith could have supposed that this proposal had the slightest chance of acceptance by a self-respecting union, or even that it might advance the negotiations by affording a basis of discussion; rather, it looks more like a stalling tactic by a party bent upon maintaining the pretense of bargaining.

In numerous surface bargaining cases since, the ALRB, NLRB, and the courts, when called upon to assess a party's good faith effort to reach an agreement, often find themselves presented with the task of assessing the probability that various proposals put forward at the bargaining table would likely have of gaining acceptance, or even "advance negotiations by affording a basis of discussion." Yet, when examining a party's bargaining proposals and positions, decisions avoid judging the subjective content of a proposal and focus on whether the proposal, when considered in all of the circumstances, indicates an intention to avoid reaching an agreement. (*Litton Systems,* (1990) *300 NLRB 324, 326-27,* enfd. *(8th Cir. 1991) 949 F.2d 249,* cert. denied *(1992)503 U.S. 985,* citing *Reichhold Chemicals, (1988) 288 NLRB 69,* enfd. in pertinent part *(D.C.Cir. 1990) 906 F.2d 719,* cert. denied *(1991) 498 U.S. 1053.)* Proposals determined to be unduly harsh, vindictive, or otherwise unreasonable may merit the conclusion that they were proffered in bad faith. (*Genstar Stone Products, (1995) 317 NLRB 1293, 1293.)* Likewise, employer proposals seeking to deprive the union of any significant representational role such as the case where an employer insisted upon retaining absolute discretion and control over every important economic term of employment and the right to deal directly with employees, while seeking to exclude almost every matter from arbitration have been found indicative of bad faith. (*Modern Manufacturing, (1988) 292 NLRB 10, 10-11*.)

Based on this summary of relevant precedent, the ultimate question presented for resolution here is whether the General Counsel has established by a preponderance of the evidence that Respondent's conduct, both at the table and away, merits a conclusion that it engaged in bad faith bargaining with no intention of reaching an agreement. For the following reasons, I find the General Counsel succeeded and that Respondent engaged in surface bargaining as alleged.

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Based on the public record, Respondent's history of bargaining conduct from the beginning reflects, at most, a lackadaisical attitude toward its duty to bargain with its employee representative and, at worst, complete hostility toward that legal obligation. Thus, following the outcome of the 1990 runoff election, Judge Wolpman's decision shows that Respondent chose to risk ignoring its duty to bargain with the UFW over the important subject of worker housing. When it finally came to the bargaining table 1993, it appears to have insisted that the UFW first present a proposal it found sufficient to bargain about while it proceeded to the NLRB to litigate over the inclusion of certain packing shed employees in a forum with a vastly different standard than the ALRB in determining the status of those workers as agricultural employees.

Yet later, Respondent itself, based on its barebones claim of unit abandonment by the UFW, unquestionably ignored for more than two decades a very serious duty under the ALRA to notify and provide the UFW with an opportunity to bargain about various changes in the wages, hour, and working conditions that have unquestionably occurred over the years. As the Board noted in the prior GFI case, an employer's bargaining obligation with a union remains in effect "even if the union appears 'dormant.'" In support, it quoted the following from its *Dole Fresh Fruit* case:[26]

> "[Even where a union appears dormant], employers are not free to act as if there is no such representative, as, for example, when implementing unilateral changes in working conditions. An employer who contemplates changes in employees' wages, hours or other terms and conditions of employment, but fails to notify and offer to bargain with the certified representative before implementing such changes risks being charged with having violated the duty to bargain."

(42 ALRB No. 1:63, fn. 27.)

Given the scope and sophistication of the labor law litigation this Respondent chose to engage in over the years, including the directly related labor-camp closure question, I find it impossible to conclude that Respondent could not have clearly understood its statutory bargaining obligation during the period its challenges to the

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[26] *Dole Fresh Fruit Company* (1996) 22 ALRB No. 4.

election were pending. Instead, I find it fair to infer that at some point in the mid-1990s it deliberately chose to ignore its duty to bargain under the ALRA altogether.

From all appearances, GFI welcomed the UFW's lengthy absence from the scene after what must have been a five to seven-year effort by that labor organization just to get to the bargaining table with Respondent in the first place. Had Respondent met its bargaining duty during the period of the UFW's "dormancy," it seems self-evident that one of two things would likely appear in this record but they do not. With the legally required notices concerning proposed interim changes in the wages and conditions of employment and no responses from the UFW, Respondent would have a factual record to support its abandonment argument that would go well beyond its current, self-serving cries of anguish over the UFW's reemergence in 2012. Instead, the abandonment argument is not supported by a single word from Respondent seeking to bargain over numerous interim changes it made over the years.

On the other hand, any legally mandated notices of proposed changes may well have produced productive initial bargaining between the parties that could have led to a more constructive relationship, and perhaps an agreement many years ago. But there is scant evidence from what I have been able to discern from the history between these two parties that Respondent harbored any intention of reaching any kind of agreement with the UFW. The more recent bargaining history strongly supports that conclusion.

Critical delays marked the bargaining process that followed the UFW's reemergence in October 2012. Progressing from the lesser to the greater, I note first that the UFW's request to bargain in October 2012, initially went completely unanswered for nearly three weeks. A response from GFI emerged only after the UFW wrote again at the end of the month threatening to file an unfair labor practice charge in the absence of a prompt response. Respondent's principals finally replied with a letter containing an unctuous tone, not one mention of the requested information, and a lecture about the

UFW's potential intent to invoke the MMC process that it set about in the following months to virtually guarantee.

As for the important information requested by the UFW in both of its October 2012 letters, the evidence shows that Respondent provided some of the information in December – even that being on the borderline of unlawful delay in many reported cases – but delayed furnishing critical economic information until late June or early July 2013, following 12 bargaining sessions, plus two sessions with a mediator.[27] By doing so, the UFW asserts with some justification that it could not formulate a complete economic proposal through most of the voluntary bargaining period.[28] Despite its protracted delays in furnishing information, Respondent now faults the UFW for failing to submit an economic proposal prior to the July 21 bargaining session and claims that this failure inhibited the parties progress toward an agreement. (R. Br. at 56-58.) I reject that claim.

Although Respondent's principals assured the UFW in their November 2012 letter responding to the UFW's renewed bargaining demand that they would "work with you, in good faith, to reach agreement on those matters which concern our employees," Respondent's bargaining conduct establishes no such thing. Instead, it ignored the ALRA's rudimentary bargaining obligations when granting the interim wage increases during the 2013 season.

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27 I strongly suspect the mediator sessions in June served as the impetus for Respondent to finally furnish the remainder of the requested information in at the end of the month or in early July, some eight months after the initial requests. To put this delay in its relevant perspective, that is two-thirds of the way or more into a full season of work for most of Respondent's employees affected by these negotiations.

28 Although Elenes also referred to other information Respondent failed to produce until June or July, he attributed the failure to produce information related to the costs of Respondent's health care program as the cause of the Union's inability to prepare a complete economic package. (Tr. I: 123-128.) Its July 21 economic package appears to have been the only comprehensive economic proposal put forward during the voluntary bargaining. Elenes asserted that Respondent proposed to stick with the economic package it already maintained.

In the prior case, Judge Soble found that Dan Gerawan admitted outright that GFI gave no advance notice to the UFW about the June 2013 dollar an hour increase the hourly rate paid to GFI's FLC workers (42 ALRB No. 1: ALJD 37.) who, as found above, are a part of the wall-to-wall bargaining unit and who had been the subject of a bargaining table dispute since January 18.[29]

Although GFI made a pretense at bargaining over the two-step increase in March, I find GFI presented both fifty-cent increases in such manner as to warrant the conclusion that the UFW got only a notice of a fait accompli. Despite the fact that the March 20 flyer distributed to employees suggested the increase was a proposal, it clearly stated the Gerawans "have made the decision to give crew labor a raise just as they always have." That objective language coupled with the stiff resistance GFI's negotiators took at the bargaining table the previous evening to alternate UFW proposals provides strong evidence that the matter was already decided. Moreover, the concurrent timing of the notices to the UFW and the bargaining unit employees about the first increase left the Union with a Hobson's choice, not an opportunity to bargain. Thus, by its concurrent announcement to employees that the owners had decided to increase wages, the Union had to either agree quickly or face added vilification from GFI for holding up the increase. An employer violates its duty to bargain by, as here, notifying employees about forthcoming changes in their wages and working conditions with language that implies a predetermined decision concurrent with the notice of those changes to their agent that

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[29] Although the Board found the unilateral pay increase implemented for the FLC workers in June 2013 to be "unlawful," as well as Judge Soble's finding that that GFI "committed unfair labor practices by its enhanced efforts to directly solicit grievances and by making another other well-timed, unilateral wage increase" to the grape packers (42 ALRB No. 1: 2.), it ordered no specific remedial action for this conduct. Instead, the Board appears to have treated that conduct solely from the perspective of assessing the validity of the ongoing decertification movement. Hence, the Board's order contains no separate remedy for unlawful unilateral action grounded on Section 1153(e) as might be expected. For this reason, and as the complaints before me do not specifically target the 2013 wage increases as unlawful, I am precluded from providing a separate remedy here for those unilateral actions. However, I find that the precedent requires that I assess Respondent's overall bargaining conduct between January and August 2013, to determine its intent to conclude an agreement at that time.

purportedly provides an opportunity to bargain. (See, e.g., *Champion International Corp.* (2003) 339 NLRB 672, 687-88; *S & I Transportation, Inc.* (1993) 311 NLRB 1388, fn. 1.)

With respect to the second pay increase in late March, I find a high probability based on the cited documentary evidence that the employees may have received notice of GFI's wage increase proposal *before* even their bargaining agent had been given the legally required notice that provided it with an opportunity to "bargain." about the proposal. Worse yet, both of the employee flyers/mailers crudely projected a "good guy – bad guy" message to the employees. That message said, in effect, your employer has decided to grant you an immediate pay increase on the next check you will receive and we hope the UFW will not prevent or delay you from receiving it. In my judgment, Respondent failed to reconcile this kind of conduct with the ALRA's statutory duty to bargain in good faith. I also find this conduct entirely inconsistent with its pledge in its November 3, 2012, letter to bargain in good faith.

Moreover, by late July and August, Respondent began to claim that the March pay proposals, advanced at the time as interim proposals to meet an immediate problem posed by its competitors' wage offers in a tight labor market, were actually its *entire* economic proposal. This claim underscores the duplicitous nature of Respondent's overall bargaining conduct with respect to the March interim wage increases. Accordingly, I find Respondent's conduct with respect to the March wage increases compelling evidence of its extreme bad faith approach to its bargaining efforts in 2013.

Respondent also advanced proposals that it obviously knew the UFW would never accept, another significant indicium of bad faith bargaining. I include in this group its so-called Right to Work proposal, its Economic Action proposal, and its Union Obligation/Insurance proposal. It insisted on the first two of these proposals into the final stages of the MMC process and, save for the lowered insurance demands it negotiated with itself because the Union refused to even consider this proposal from the outset, all three remained unchanged throughout the bargaining process. Respondent's position on

at least the first two of this trilogy if not all three is clearly grounded on its own personal and very self-serving philosophy of freedom of choice. That philosophy ultimately became so extreme that Respondent even proposed to the mediator that the Union satisfy a one-year learning curve with its operations and its employees before it should be entitled to collect money for fulfilling its statutory obligation of fairly representing *all* unit employees. This ludicrous proposition has no support in the ALRA or the history of its interpretation by the ALRB or the courts of California. Indeed, it is reflective of the mentality suggested by some of Respondent's conduct during this bargaining period. These three proposals seek to impose its own special qualifications on the UFW in order to satisfactorily qualify as a proper representative of GFI's employees. Nothing in any labor relations statute authorizes an employer to impose its own qualification standards on the employee representative. Indeed, Section 1153(b) of the ALRA and Section 8(a)(2) of the NLRB prohibit employers from doing just that in order to protect the right of employees to independent representation.

Respondent's rigid adherence to its Right to Work, Economic Action, and Union Obligations proposals constitutes further evidence of its bad faith surface bargaining during the period of voluntary negotiations between the parties. Where, as here, the employer adamantly opposes certain subjects such as union security or a no strike-no lockout proposal on "vague or generalized 'philosophical' grounds or questionable assertions of policy," the inference is warranted that it entered negotiations with a fixed intention not to consider or agree to any form of those significant subjects in violation of its duty to bargain in good faith. (See *Chester County Hospital* (1995) 320 NLRB 604, and the cases cited at 622.)

Additionally, Respondent's Union Obligations proposal as well as its proposals seeking to exclude the FLC employees from coverage under the agreement are not mandatory subjects of bargaining. (*Arlington Asphalt* (1962) 136 NLRB 742 (an indemnification provision is not a mandatory subject of bargaining); *Hess Oil &*

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Chemical Corp. (1967) 167 NLRB 115, enfd. (5th Cir.1969) 415 F.2d 440 (requests to alter the certified bargaining unit are not a mandatory subject of bargaining).)

To be sure, during the course of the voluntary negotiations GFI did agree to include the FLC workers under the grievance/arbitration provisions but that amounts to a hollow concession since it also proposed to leave all of the other terms and conditions of employment for the farm labor contractor to determine. As those contractors are not agricultural employers under the ALRA, they have no duty to bargain with the UFW. Hence, the effect is largely as GFI originally proposed on January 18, i.e., the exclusion of the FLC workers from the terms of any agreement reached. Additionally, it even becomes difficult to perceive of the means by which the Union could acquire definitive, first-hand information about the terms and conditions of employment those workers "enjoyed" or to compel a recalcitrant FLC to arbitrate violations of the terms of employment it established under GFI's arbitration agreement.

Eight months of "No" is enough! By persisting over the entire course of the voluntary negotiations and into the MMC process on proposals seeking the inclusion of its union indemnification proposal and the exclusion of the FLC workers from most or all of the coverage under any the agreement makes clear that Respondent, by insisting that these non-mandatory subjects be resolved, sought to use this device to prevent an agreement. Respondent's defense that the UFW agreed with other employers in the past to exclude the FLC workers, in whole or in part, is not persuasive. A union has no duty to give all employers like deals and this employer's drumbeat of condemnation of this union provided absolutely no incentive for it to accommodate such requests.

Likewise, its argument that it insists on all vendors providing proof of insurance in order to enter its property lacks merit. UFW is the employee representative and not a vendor. All of the UFW's "rights" flow from the legal protection accorded to those agricultural workers who freely selected that labor organization by a majority vote in a lawful election. As the workers cannot be required to buy liability insurance from an

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approved provider in order to enter GFI's premises, it follows that their representative need not do so.

Accordingly, I find Respondent violated its duty to bargain in good faith under Section 1153(e) by its insistence on an indemnification/insurance proposal and on the exclusion of FLC workers from the core benefits of a collective-bargaining agreement. (*Hess Oil & Chemical Corp. v. NLRB* (1969) 415 F.2d 440, 445.) As the General Counsel's evidence sustains the Third Cause of Action alleging that GFI persistently refused to bargain about the wages, hours and terms and conditions of employment of the FLC workers who are a part of the bargaining unit, my recommended remedial order will include that unlawful conduct. But without a separate allegation pertaining to Respondent's insistence on an indemnification/insurance provision, no independent remedial order will be recommended as to that conduct. However, that evidence has been considered as a factor in reaching the conclusion that Respondent engaged in surface bargaining as alleged in the First Cause of Action.

For the foregoing reasons, and as Respondent engaged in a series of serious unfair labor practices away from the bargaining table in an effort to undermine and dislodge the UFW as the bargaining representative of its employees, I find that the record here supports the conclusion that Respondent engaged in the bargaining examined here with no intention of ever reaching an agreement with the Union and by persistently refusing to bargain concerning the employment terms of the FLC workers.

CONCLUSIONS OF LAW

1. Respondent GFI is an agricultural employer within the meaning of Labor Code section 1140.4(c) that employs agricultural employees within the meaning of Labor Code section 1140(b).

2. The UFW is a labor organization within the meaning of Labor Code section 1140(f).

3. On July 8, 1992, following an election and a runoff election conducted pursuant to Labor Code section 1156, et. seq., the ALRB certified the UFW as the

exclusive representative of Respondent's agricultural employees in the following appropriate unit:

> All agricultural employees of Ray and Star Gerawan, a partnership, dba Gerawan Ranches, and of Gerawan Company, Inc., in the State of California for the purposes of collective bargaining, as that term is defined in section 1155.2(a).

4. Since its certification as the exclusive bargaining representative of the Respondent's agricultural employees, the UFW has not been decertified as the representative of the employees in the unit set forth in paragraph 3, above, nor has it become defunct or disclaimed interest in representing the unit employees.

5. Commencing on January 18, 2013, and continuing through August 2013, Respondent violated Labor Code section 1153(a) and (e) by engaging in collective bargaining with the UFW concerning the wages, hours, and other terms and conditions of employment of the agricultural employees in the above unit with no intention of reaching an agreement with the UFW.

6. During the same period, Respondent independently violated Labor Code §1153(a) and (e) by persistently refusing to bargain about the wages, hours, and other terms and conditions of employment of those unit employees who are employed by farm labor contractors.

REMEDY

Having concluded that Respondent violated the Act as alleged in the General Counsel's Third Amended Complaint, it will be ordered to cease and desist from its unlawful conduct and take certain affirmative action to remedy its unlawful conduct.

Respondent will be required to mail signed copies of the attached Notice to Agricultural Employees to all agricultural employees, including the FLC workers it employed during the period from January 2013 through August 2013. Respondent will also be required to grant ALRB agents access to work sites where Gerawan' s agricultural employees are employed at mutually arranged times to provide a reading of the attached Notice to Agricultural Employees (Notice) outside the presence of supervisory personnel.

Following the reading, Respondent's agricultural employees must be provided a reasonable period of time in which to ask questions of ALRB agents about the Notice or about their rights under the Act. The time spent during the reading and the question and answer period shall be compensated by Respondent at the employees' regular hourly rates, or each employee's average hourly rate based on their piece-rate production during the prior pay period. In addition, Respondent must post the Notice at its work sites for a period of 60 days during the period of peak employment; provide access during this period to ALRB agents to ensure compliance with this notice posting requirement; and provide a signed copy of the Notice to each person it hires for work as an agricultural employee during the twelve-month period following the issuance of the ALRB's order in this case.

The General Counsel also proposes that Respondent's supervisory staff be required to attend training session concerning the rights of agricultural workers under the Act. Given the nature of the violations found here and the fact there is scant evidence that, at most, only a few, if any, of Respondents managers and supervisors played any role in the bargaining violations found here, I find this request unnecessary and bordering on a punitive demand. Accordingly, I find this remedial request would not serve the purposes of the Act. Therefore, I deny this remedial request.

Finally, the General Counsel seeks a make-whole remedy commencing on January 18, 2013. She argues that Respondent commenced its unlawful conduct on that date as evidenced by the terms of its proposal that seeks to retain for itself the sole and exclusive authority over the workers' employment conditions, providing, in effect, for the UFW to abdicate its representational role, and seeking to exclude FLC workers from the all or most of the terms of the agreement. Though I concur in those arguments, this remedial request is complicated by the MMC process that started during the period covered by the conclusions I have reached and played out in the litigation before the ALRB but has since been reversed by the Fifth District Court of Appeals and is now pending before the

Supreme Court. And, needless to say, Respondent opposes the make-whole request on grounds that can hardly be characterized as frivolous.

Where the Board finds that an employer refused to bargain, it may require the offending employer to make its employees whole for the loss of pay resulting from its refusal to bargain. (Labor Code section 1160.3.) Established precedent demonstrates that the Board applies the bargaining make-whole remedy in surface bargaining cases that show the bargaining process has been frustrated by the employer's unlawful conduct. (See e.g., *Robert Meyer* (1991) 17 ALRB No. 17; *Mario Saikhon, Inc.* (1987) 13 ALRB No. 8; *O.P. Murphy Produce Co., Inc.* (1981) 5 ALRB No. 63.)

However, the California courts have found the Section 1160.3 bargaining make-whole remedy "appropriate" only after the Board makes particular findings. (See e.g., *J. R. Norton Co.* v. *ALRB (1979) 26 Cal.3d 1 (Norton)*; *William Dal Porto v. ALRB* (1987) 191 Cal.App.3d 1195 (*Dal Porto*) (to award a § 1160.3 make-whole remedy the Board must find that the parties would have reached an agreement calling for a wage increase "but for" the employer's unlawful conduct that caused the negotiations to fail).) *Dal Porto* applies to surface bargaining cases such as this. In adopting the so-called "but for" test, *Dal Porto* analogizes the determination required to that found in "mixed motive" adverse action cases such as *Martori Brothers Distributors v. ALRB* (1987) 29 Cal.3d 721. In *Martori*, the court characterized the NLRB's formulation in *Wright Line* (1980) 251 NLRB 1083 as a "but for" test. Hence, by extension, the *Dal Porto* looked to the burden shifting scheme similar to *Wright Line*. The *Dal Porto* court could not have made that clearer when, after a remarkably relevant and insightful discussion of the nuances often found in collective-bargaining negotiations, it adopted this remedial process:

> Here, the employer must bear the consequence of its illegality by proving it had no effect on the failure to conclude a collective bargaining agreement. Thus, once the Board produces evidence showing the employer unlawfully refused to bargain, the burden of persuasion shifts to the employer to prove no agreement calling for higher pay would have been concluded in the absence of the illegality. (See *Martori Brothers, supra, 29 Cal. 3d at p. 730.*) If the employer fails to carry its burden in this regard, the Board is

> entitled to find an agreement providing for higher pay would have been concluded.

(*Dal Porto* at 1208-09.)

Having concluded the record supports the General Counsel's allegations that Respondent engaged in a lengthy series of negotiation with no intent of reaching an agreement and her assertion that this conduct merits a make-whole remedy, I turn to Respondent's defense against such a remedy.

Respondent begins by arguing that a make-whole remedy is not warranted because of the UFW's so-called abandonment of the unit. It cites the conclusion of the Fifth District Court of Appeal in *Tri-Fanucchi Farms v. ALRB* (2015) 236 Cal.App.4th 1079 finding that the ALRB's make whole remedy inappropriate because of the employer's legitimate public interest in its decision to litigate the abandonment theory, i.e., UFW's long-term absence.

Apart from the fact that the California Supreme Court stayed that court's decision when it granted review, I do not find the situations at all comparable. In *Tri-Fanucchi*, the employer did not engage in a months-long fruitless bargaining, a part of which included an unrelenting effort to discredit the employees' bargaining representative. Rather, *Tri-Fanucchi* just said no to the UFW's demand to bargain after a long absence from the scene and let the law run its course so it could test the abandonment defense in the courts. In contrast, Respondent engaged in a time-consuming bargaining charade while repeatedly suggesting an "election" to its employees. When a group of employees finally took the hint, and acted, Respondent's managers and supervisors jumped in to lend considerable unlawful support to the decertification effort. Meanwhile, Respondent announced pay raises to employees whenever it suited its anti-union campaign without regard to the legally mandated duty to bargain with the employee representative. Indeed, the *fait accompli* notices provided to the Union in connection with the March pay increases come across as Respondent virtually thumbing its nose at the duty to bargain

especially where, as here, it later tried to claim that they constituted its entire economic proposal. I find it simply inconceivable that the term "legitimate public interest" applies to the kind of conduct this Respondent engaged in while supposedly bargaining with the UFW. Accordingly, I reject Respondent's argument that it has acted "reasonably."

The record before me cannot sustain Respondent's second claim that a make whole remedy would be inappropriate because Respondent already pays the highest wage in the industry. On the contrary, as I have previously found in connection with Respondent's wage increases in March 2013, the record support here for Respondent's "highest wages in the industry" claim is limited to nothing more than its own self-serving, unproven assertions. Regardless, Respondent will have an opportunity to prove this claim at the compliance stage of these proceedings.

Respondent's further claim that the UFW's failure to make an economic proposal until July "delayed and impeded" an agreement also lacks merit. At best, this claim appears to be an afterthought. Again, there is almost nothing I have been able to locate in this record suggesting Respondent ever pressured the UFW to submit an economic proposal for the purpose of rescuing the negotiations from the quagmire into which they quickly sank with Respondent's January 18 proposal. In fact, email correspondence in evidence as General Counsel's Exhibits 1 and 2 reflect Respondent had still failed to supply a substantial amount of important information necessary for the Union to prepare its economic proposal as late as June 2013. Accordingly, I also reject this argument and find that Respondent has failed to meet its burden under *Dal Porto* to show that even in the absence of its bad faith bargaining, no agreement calling for higher wages would have been reached. Therefore, I find that the make-whole remedy requested by the General Counsel is appropriate.

Finally, Respondent argues that any make-whole period should only run to March 29, the date on which the UFW filed its petition to commence the MMC process. However, where the MMC process has been invoked, ALRB precedent provides that the

make-whole period commences when the bad faith began and continues to the date of the first session before the mediator. (*Arnaudo Brothers* (2014) 41 ALRB No. 6: ALJD 14.) Here, the parties first session with the mediator occurred on June 6, 2013. Accordingly, I find the appropriate make-whole period should be January 18 to June 6, 2013.

On these findings of fact, conclusions of law and the entire record in this matter I hereby issue the following recommended:

ORDER

Pursuant to Labor Code section 1160.3, Respondent, Gerawan Farming, Inc., its officers, agents, labor contractors, successors and assigns shall:

1. Cease and desist from:

(a) Engaging in collective-bargaining negotiations with the United Farm Workers of America (UFW) with no intention of reaching an agreement covering the wages, hours, and other terms and conditions of employment for the employees in the following bargaining unit:

> All agricultural employees of Ray and Star Gerawan, a partnership, dba Gerawan Ranches, and of Gerawan Company, Inc., in the State of California for the purposes of collective bargaining, as that term is defined in section 1155.2(a).

(b) Persisting in its refusal to bargain with the UFW about the wages, hours, and other terms and conditions of employment those members of the above bargaining unit who are employed by farm labor contractors.

(c) In any like or related manner interfering with, restraining, or coercing its agricultural employees in the exercise of the rights guaranteed by section 1152 of the Agricultural Labor Relations Act (Act).

2. Take the following affirmative actions necessary to effectuate the policies of the Act:

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(a) Make whole its agricultural employees for the losses they suffered as the result its failure to bargain in good faith beginning on January 18, 2013, in accord with the findings and conclusion contained in the Remedy section of this decision.

(b) Preserve and, within fourteen (14) days of a request, make available to the ALRB or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including related electronic records, necessary to analyze the amount of pay due under this Order.

(c) Upon request of the Regional Director, sign the attached Notice to Agricultural Employees (Notice) and, after its translation by a Board agent into all appropriate languages, reproduce sufficient copies in each language for the purposes set forth hereinafter.

(d) Mail signed copies of the attached Notice to the last known address of all agricultural employees it employed, including those employed through farm labor contractors, during the period from January 2013 through August 2013.

(e) Grant ALRB agents access to work sites where the agricultural employees in the above bargaining union work at mutually arranged times in order to read the attached Notice to them and to answer questions employees may have about their rights under the Act outside the presence of supervisory personnel.

(f) Compensate employees for the time spent during the Notice reading and the following question and answer period at the employees' regular hourly rates, or each employee's average hourly rate based on their piece-rate production during the prior pay period.

(g) Post copies of the attached Notice, in all appropriate languages, in conspicuous places on its property, for sixty (60) days, the period(s) and place(s) to be determined by the Regional Director, and exercise due care to replace any Notice which has been altered, defaced, covered or removed.

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(h) Provide access during the notice posting period to ALRB agents to ensure compliance with the notice posting requirements of this ORDER.

(i) Provide a signed copy of the Notice to each person it hires for work as an agricultural employee during the twelve-month period following the issuance of the ALRB's Order in this case.

(j) Notify the Regional Director in writing, within thirty (30) days after the date of issuance of this Order, of the steps Respondent has taken to comply with its terms and, upon request, also notify the Regional Director periodically in writing of further actions taken to comply with the terms of this Order until notified that full compliance has been achieved.

DATED: April 14, 2017

William L. Schmidt
Administrative Law Judge
Agricultural Labor Relations Board

NOTICE TO AGRICULTURAL EMPLOYEES

After a hearing at which all parties had an opportunity to present evidence, the Agricultural Labor Relations Board (ALRB) found that we violated the Agricultural Labor Relations Act (Act) by failing to bargain in good faith with your representative, the United Farm Workers of America (UFW), as alleged in a complaint issued by the ALRB's General Counsel.

The ALRB has told us to post, publish and abide by the terms of this Notice. The Act is a law that gives you and all other farm workers in California the following rights:

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

Because you have these rights, we promise that:

WE WILL NOT engage in collective-bargaining negotiations with the UFW with no intention of reaching a collective-bargaining agreement for the employees in the following unit:

All agricultural employees of Ray and Star Gerawan, a partnership, dba Gerawan Ranches, and of Gerawan Company, Inc., in the State of California for the purposes of collective bargaining, as that term is defined in Section 1155.2(a).

WE WILL NOT persist in refusing to bargain with the UFW about the wages, hours, and terms and conditions of employment those members of the above bargaining unit who are employed by farm labor contractors.

WE WILL NOT in any like or related manner interfere with, restrain or coerce you in the exercise of the rights guaranteed by Section 1152 of the Act.

WE WILL make all members of the above bargaining unit whole for the wages they lost; as a result, of our failure to bargain in good faith with the United Farm Workers of America.

DATED: _____ GERAWAN FARMING INC.

By: _____

(Representative) (Title)

If you have any questions about your rights as farm workers or about this Notice, you may contact any office of the Agricultural Labor Relations Board (ALRB). The nearest ALRB office is located at 1642 W. Walnut Avenue, Visalia, CA 93277, telephone number (559) 627-0995.

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

DO NOT REMOVE OR MUTILATE